Università
Ca'Foscari
Venezia

Corso di Laurea magistrale in
Amministrazione, Finanza e
Controllo

Tesi di Laurea

Riders on the storm: the Riders' case in Italy, France and Spain

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Anno Accademico
2021 / 2022

In primo luogo, desidero ringraziare il Prof. Maurizio Falsone per avermi seguito con pazienza ed encomiabile disponibilità lungo la stesura di questo lavoro.

Un pensiero speciale, inoltre, va a tutte le persone che mi sono state vicine, a vario titolo, durante questo percorso. Senza di voi, oggi non sarei qui. Grazie!

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INTRODUCTION

In the last decades, the birth of novel business models has changed the way of conceiving the industry, and hence the traditional working relationships. The advent of the Internet, right in this sense, has opened the doors to technology disruptions in several sectors, laying the foundations for a more interconnected, just a click away, labor market.

In this context, the emergence of digital platforms has innovated a great variety of tasks - initially carried out without the adit of ICT tools - through a set of ever easier, cheaper, and faster processes, which in turn, have overcome the typical exchange economies' barriers. Nonetheless, it has also posed several unprecedented issues, especially regarding the changes it implies within the organizational aspect.

With specific reference to some industries, platform-based companies are, in fact, progressively raising attention not much about their potential but rather about their practices in reshaping the standard worker's figure[1]. Attended their "costs and risks" minimization strategies[2], mainly focused on the employment of external workforce instead of permanent staff, a lively international debate is questioning – in particular - their implications on the working condition they promote.

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[1] Based on a non-standard employment form (See: JACOBY SANFORD M., CAPPELLI P., Are Career Jobs Headed for Extinction?, in *Wharton Pension Research Council Working Papers*. No. 673, 2001; SUPIOT A., The transformation of work and the future of labour law in Europe: A multidisciplinary perspective, in *International Labour Review*, vol. 138, issue 1, 1999, 31-46) that does "not always fit within the parameters of the employment relationship" (ROSIORU F., The Changing Concept of Subordination, Babeș-Bolyai University, Faculty of Law, 2013, p. 3.) the platform economy, as a whole, has *de facto* nourished the idea that labor is nothing more than "a service, to be bought and traded like any other commodity" (PRASSL J., Humans as a service: the promise and perils of work in the gig economy, Oxford Univeristy Press, 2018. p. 4), thus fostering a "belittled perception" of its real social weight (DE STEFANO V., The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig economy", International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, Geneva: ILO, Conditions of work and employment series, No. 71, 2016, p. 2.). In this sense, while a traditional working relationship means a *do ut des* between worker and employer, wherein the first performs a certain activity, follows the latter's orders, and "enjoys a basic level of stability and economic security in return", working for a platform does not involve any exchange, in a way that "work is rebranded as entrepreneurship and labour sold as a technology" (PRASSL J., *Op. Cit.*, p. 4).

[2] The platform economy fits into the trend of outsourcing (QUINN J. B., HILMER F. G., Strategic outsourcing, in *Sloan Management Review*, Vol. 35, No. 4, 1994, pp. 43-55), which implies two main strategies: cost reduction and risk removal. The cost reduction is applicable in companies wherein salary systems based on the average characteristics of the worker, thus not sufficiently individualized, are higher than the market salary. The risk removal, instead, is for companies that, by facing a – difficult to foresee - volatile demand, seek to find flexibility and remove the risk of retaining an excess of the workforce. See MERINO DE LUCAS F., Externalización y cambio de localización en la actividad productiva, in *Revista de Estudios Empresariales. Segunda Época,* Vol. 1, 2008, p. 8.

Here, the platform's business model presents a trade-off that, even embracing higher flexibility and autonomy, involves a warrant lack – often total - of rules and safeguards.

Usually recognized as mere intermediaries, platforms are generally alien to labor law. At the same time, platform workers tend to be considered self-employed and consequently excluded from the reach of social protection.

In this respect, many countries' institutional proposals aim to prevent workers' exploitation, shifting them into a protected regime. However, cases wherein neither law nor case law cannot avoid the spread of borderline or misleading situations are still noticeable.

From this perspective, almost all the food delivery players feed *ab origine* the issue, keeping moving in the gaps left by the system. In a sort of *uroboro* of bad practices and deregulation, the case of the so-called riders is surely the most emblematic, as witnessed by the high number of judicial proceedings promoted against circumstances often deemed degrading.

In line with this, the present thesis focuses on the question, considering a comparative analysis of three countries more affected by such a phenomenon: Italy, France, and Spain.

In order to reach coherent and relevant considerations, the research is split into three parts.

Chapter I gives a general overview of the platform's work and analyzes its application in the food delivery industry, which, as confirmed by figures, counts as the most spread platform local-based sector in Europe.

Chapter II then reviews the main case law in any of these countries, describing in detail the path followed by the Courts in detecting the misclassification of these workers. Interestingly, the judges face the question from different perspectives, relying on the difference between national laws. In arguing the rulings, however, they proceed *grosso modo* in the same chronological order, sharing what seems to be a common line of thinking.

Chapter III lastly deals with the current scenario, illustrating the state of the art after the recent novel interventions. As advisable, the lawmaker has tried to solve or circumscribe the problem in all the jurisdictions analyzed. Yet, even with different interpretations, it has somehow bypassed many hot points that would have required its action in the first place. In the room left by the law, other actors involved have demonstrated a certain foresight, acting in the sign of virtuosity. The same European Union, on the theme, has eventually made its case, with a proposal potentially able to affect the whole subject.

CHAPTER I

PLATFORM WORK: A GENERAL OVERVIEW

Summary: I. Platform's taxonomy and business model; I.I. Platform work in figures; I.II. Platform work implications;

Platform's taxonomy and business model.

Before giving some insights into the technical issues behind the platform work, it is necessary to look at the context in which it is inserted.

Due to the lack of a formal definition, "platform work"[3] has been chiefly outlined by literature, which has framed the key features that distinguish it from other similar work forms. While theoretically falling within the broader category of "sharing" or "collaborative economy," the paradigm, in particular, leans on the presence of three types of actors: i) the clients; ii) the workers; iii) and the platform itself.

In this context, alongside the wide range of terms internationally accepted - and often used interchangeably - to describe working activities that take place through digital systems[4], platform work finds its *raison d'etre* in the instant matching between the demand and supply of labor[5].

[3] See DE GROEN W. P. et al (2018). Employment and working conditions of selected types of platform work. Luxembourg: Publications Office of the European Union, 2018, p. 9; FLORISON R., MANDL I. (2018), Platform work: Types and implications for work and employment Literature review, Eurofund, 2018, p. 12.

[4] Here the reference is to all those hybrid terms without a specific meaning, such as "on-demand economy", "sharing economy", "gig economy", "1099 economy", "Uber economy" [..] that are used to describe more and more business models within the platform economy.

[5] The business model is roughly summarized as "the "instant" matching of demand and supply of labour, facilitated by digital tools (mostly apps on smartphones and online platforms)". See DE STEFANO V., ALOISI A., European Legal framework for digital labour platforms, European Commission, Luxembourg, 2018, p. 2.

Leveraging the use of the Internet as a connection tool between "two or more distinct but interdependent set of users," the model - in detail – sees the platform acting as a focal manager for job seekers and businesses, enabling their interactions and transactions, and specifically allowing the firsts to apply for a job and the latter to request and pay for its provision[6].

Within this scheme, platforms lend themselves to intermediate the demand and supply of several activities[7], including intellectual as much as physical jobs. As a result, the variety of jobs that can be required and carried out is almost infinite.

Here, a certain degree of heterogeneity exists since many online-channeled services belong to a "virtual environment," and many others require to be performed in the "real and local world." In this regard, literature tends to focus separately right on those types of platforms that involve online rather than offline workers, as "their different places of work (remote versus face-to-face) and relationships with clients (telemediated versus direct) create peculiar patterns of work" with equally "different risk profiles."

For this purpose, two main types of platform work have been identified: *"crowdwork"* and "*work on-demand via app*"[8].

The "crowdwork", in the first place, identifies "an ICT-based form of organizing the outsourcing of tasks to a large pool of workers[9]". The logic behind the model is quite immediate. The platform handles the work requests received by businesses to make them available to an almost infinite set of users, which are free to apply for them and obtain a job. Here, all the traditional phases of the working relationship, from the recruiting to the final compensation, materialize exclusively online in a virtual environment that allows organizations and individuals to get in touch on a global basis[10]. Under a practical profile,

[6] In this sense ARDOLINO M. et Al., A Business Model Framework to Characterize Digital Multisided Platforms, in *Journal of Open Innovation: Technology, Market and Complexity*, Vol. 6., No. 10, 2020, p. 1.
[7] To make an idea of the multitude of specialized platforms, and therefore of the different jobs offered, see CAÑIGUERAL A., El trabajo ya no es lo que era: nuevas formas de trabajar, otras maneras de vivir, Concecta, 2020; it is interesting also the way the author uses to explain such a concept: "Hoy en dia ya existen plataformas para acceder con facilitad a todo tipo de talento destinado a cualquier tipo de trabajo que te pueda pasar por la cabeza".
[8] See DE STEFANO V., The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig economy", International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, Geneva: ILO, Conditions of work and employment series, No. 71, 2016.
[9] PRASSL. J., RISAK. M., Uber, Task Rabbit & Co: platforms as employers? Rethinking the legal analysis of crowdwork, in *Comparative Labour Law & Policy Journal*, Vol. 37*,* 2015, p. 624.
[10] See DE STEFANO V., The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig economy", *Op. Cit.*, p. 2.

the platform receives, analyzes, and subdivides job requests with the scope of turning them into tiny enough tasks to be completed individually[11] - solely on a computer and remotely[12] - from any place equipped with a Wi-Fi connection.

The list of these activities is rather wide and includes various independent duties, whether clerical or creative. Platforms of global renown such as *Crowdflower* and *Amazon Mechanical Turk*, for instance, permit clients to require the performance of low-skill and repetitive "Human intelligence tasks[13]", such as survey feedback, texts reviews, and categorization of data or products; others, such as *Workana* or *Twago* - just to mention some - allow the execution of more professional and structured works, ranging from the creation of marketing campaigns up to the business and legal consulting.

By contrast, the "work on-demand via app" outlines a form of work encompassing services bought and sold through smartphone apps but taking place locally, as in the case of home delivery, transport, ride-hailing, cleaning, and so on. The basic idea behind the model does not change as a whole; the connection between clients and workers, as well as several steps of the working relationship, still occur online. However, the labor performance is delivered in person, thus making necessary direct contact between the parties. Beyond the pioneering cases of Uber and Lyft, this second type counts booming businesses like Deliveroo, Glovo, and Foodora, which today are among the most valuable tech companies in the world.

Keeping the focus on this last paradigm, food delivery, which is at the core of our analysis, represents a successful example of disruption. In this model, the delivery company, through the platform, replaces the classic on-call reservation system usually used by takeaway and fast-food restaurants.

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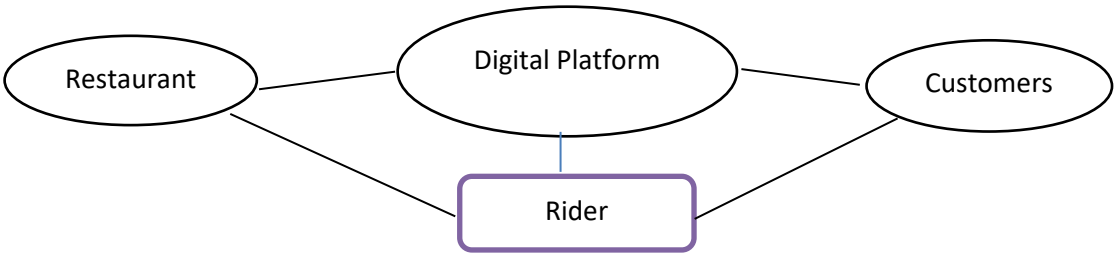
[11] These activities, properly because of their size, are usually named “micro-tasks”, and fall within what has been regarded as “Microtasks Crowdosourcing” or “Microwork” or “task economy”; See: PRASSL. J., RISAK. M., Uber, *Op. Cit.*, in *Comparative Labour Law* & *Policy Journal*, Vol. 37*,* 2015; IRANI L. (2015). The cultural work of microwork, in *New media & society,* Vol. 17, No. 5, 2015; SUNDARARAJAN A.*,* the sharing economy: the end of employment and the rise of the crowd-based capitalism*,* The MIT Press, 2016; WEBSTER J., Microworkers of the Gig Economy, in *New Labor Forum*, Vol. 25, No. 3, 2016.

[12] See DE STEFANO V., ALOISI A., *Op. Cit.*, p. 10.

[13] These activities, also known as HIT (Human intelligence task), can be simply performed by humans, but are still too complicated to be accomplished by computer algorithms.

Besides being an intermediary, the platform – here - is a showcase for partner restaurants and customers. The digital infrastructure, on the one hand, allows the first to be virtually present on a portal where they can load their menus. On the other hand, it enables the seconds to access restaurants nearby through a web page or a smartphone app, allowing them to read menus, prices, and reviews and thus place orders.

Figure 1: Food delivery platform's model



Source: Author's personal elaboration

Within this scheme, the user takes orders by selecting the products from the app menù and paying them through a digitalized payment system. Once an order is taken, the user receives an email or a text message from the app confirming the transaction. At the same time, the restaurant receives the details of the order just made and all the data relating to the delivery, which will be carried out by a "rider".

This rider is often a freelance worker who does cost to the company just the deliveries he can do. Usually, he is free to work whenever he wants. However, once he accepts an order, he has to deliver it within a pre-established time.

The model is flexible. It uses technology to connect the latter with the platform. A rider, on his hand, only needs a smartphone, which allows him to log into the app through which the company makes available the orders he has to deliver. The company, in contrast, controls that the delivery is made correctly, assigning the orders and rating the performance.

Overall, the platform has a double benefit. On the one hand, it takes a commission from the delivery fees and the costs of meals and takeaways sold through them. On the other, it minimizes its "running costs by owning as few assets as possible", outsourcing workers, fixed capital, physical infrastructure, and maintenance[14].

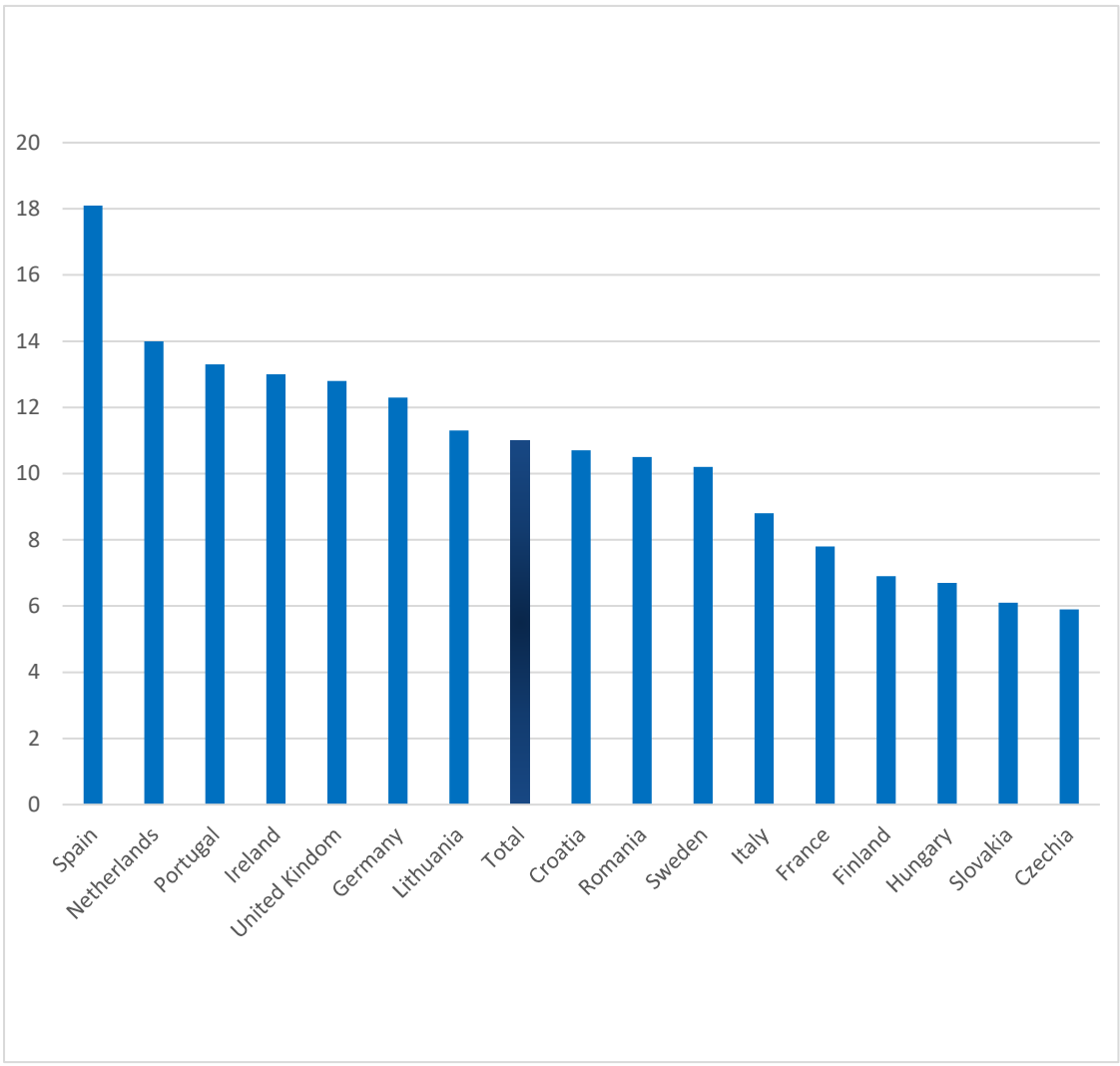
Moreover, such a model has advantages for both restaurants and customers. For restaurants, the main advantage of using a platform is innovating and optimizing the ordering system online, permitting them to be known in the digital arena and thus acquiring new customers. For customers, in the same way, these platforms represent a compendium of all food delivery services in their local area, offering a quick and easy tool to select, pay, and receive a meal at home.

Platform work in figures.

Bearing in mind the framework outlined so far, it is worth investigating the qualitative and quantitative aspects revolving around the platform work. Although still considered by someone as not a new phenomenon[15], the "labor provided through, on, or mediated by[16]" digital intermediaries have assumed considerable dimensions in the last years, involving a growing number of people worldwide and particularly within European economies. In line with evidence from recent surveys[17], 11% of European citizens between 16 and 74 years, namely the working-age population, carry out jobs classifiable as "platform work" at least once a year[18].

[14] LORD C., BATES O., FRIDAY A., Et Al., The Sustainability of the Gig Economy Food Delivery System (Deliveroo, UberEATS and Just-Eat): Histories and Futures of Rebound, Lock-in and Path Dependency, in *International Journal of Sustainable Transportation*, 2022, p. 2.
[15] PETTINGER L., What's wrong with work?, Bristol University Press, 2019, pp. 62-63.
[16] GARBEN S., Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU, European Agency for Safety and Health at Work, Luxembourg: Publications Office of the European Union, 2017, p. 3.
[17] Please note that no harmonized statistics are available on this theme. Up to now, just a few autonomous pieces of research have been carried out, all based on data collected through different methodologies and analysis techniques. Here, our reference is to the European "COLLEEM II" project's data (2018), which, beyond being the more updated, seems to be also the more coherent, gathering mensuration well-justified and referred all to the same period of time.
[18] According to the survey, at least once a year means at least once in 2018.

Figure 2. People providing labor services via platforms in EU 16



Source: Author's personal elaboration based on the COLLEEM II project's data (2018).

Spain has the highest employment rate in this context, with almost one-fifth of the national workforce committed to the sector. At the same time, Czech, Slovakia, Hungary, and Finland show the less relevant situations, with figures well below the average and stable between 6% and 7%. Platforms here impact the labor market differently, depending on the specific weight assumed by the same activities performed in practice.

Research studies of the European Commission, on the point, face the question from a narrowed perspective, distinguishing workers – and hence "relevance and intensity" of the work – depending on the combination of hours worked and income perceived per week, as follows[19]:

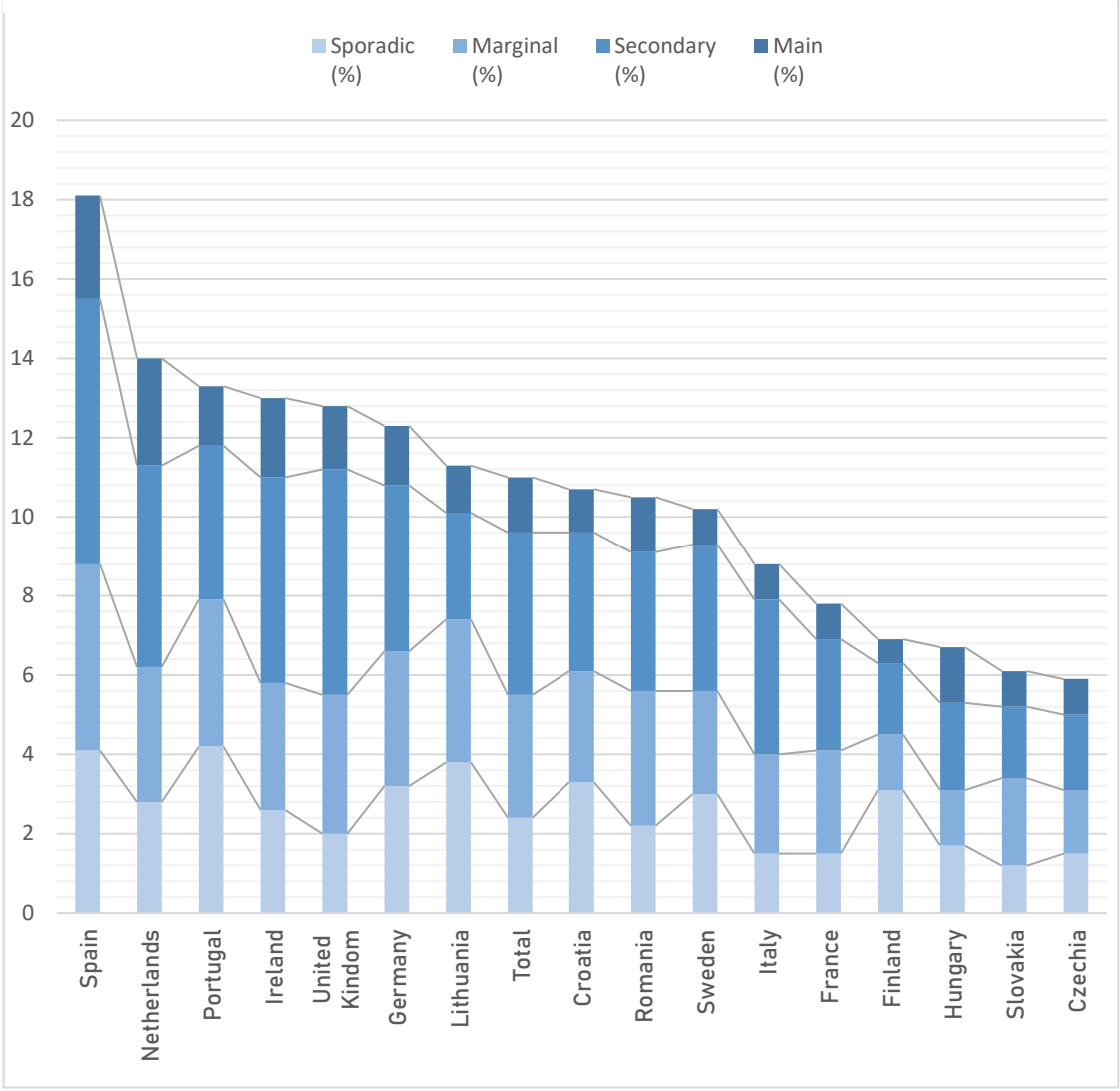
- Those who provide labor services less than once a month form part of "*sporadic platform workers*";
- Those who provide labor services at least monthly but spend less than 10 hours a week and obtain less than 25% of their income via platforms form part of "*marginal platform workers*";
- Those who provide labor services at least monthly, spending between 10 and 19 hours or obtaining between 25% and 50% of their income via platforms, are classified as "*secondary platform workers*[20]*";*
- Finally, those who provide labor services at least monthly, and work on platforms at least 20 hours a week or obtain at least 50% of their income via platforms, are classified as "*main platform workers*";

The chart below – *Figure 2* – illustrates the presence of platform workers in 16 European countries, subdivided into each of these categories.

[19] URZI BRANCATI C., PESOLE A., FERNANDEZ MACIAS, E. New evidence on platform workers in Europe. Results from the second COLLEEM survey, Publications Office of the European Union, Luxembourg, 2020, pp. 15-16.

[20] The survey, in order to minimize possible errors while maximizing the numbers of observations available for being classified, includes in this intermediate category also "those platform workers which provide uneven or contradictory information in terms of income and hours: those who spend more than 20 hours a week doing platform work but say they get less than 25% of their personal income via platforms; and those that say they get more than 50% of their income via platforms but say they spend less than 10 hours a week in platform work".

Figure 3. Intensity and relevance of Platform work in Eu 16



Source: Author's personal elaboration based on the COLLEEM II project's data (2018).

According to the survey, 1.4% of the population between 16 and 74 years perform platform jobs as the main type of employment, while 4.1% carry out these activities as secondary work. Emblematic is the case of Spain, where more than 9% of the population is regularly employed via platforms, closely followed by The Netherlands and Ireland, where the not occasional employment of such work form reaches overall levels between 7% and 8%[21].

[21] Here the reference is to both the categories of main workers and secondary workers, hence of those who work at least 10 hours per month or get in this way at least the 25% of their income, as a relevant form of employment under the platform. Note that these percentages are even higher than those related to all the forms of platform work, in terms of hours or income, present in countries such as Czechia, Slovakia, and Hungary.

The spread of platform work - albeit with a particular dispersion among countries - owes much to its generic flexibility in terms of times and places of work. In this sense, such an employment form tends to fit with those categories of workers searching for additional earnings, resulting suitable for students or those who, more broadly, intend - or need - to match work with other duties or leisure[22].

Among people who provide platform services in Europe, 80% choose to do it as a supplementary occupation, mostly occasionally and voluntarily[23]. Nonetheless, 40% provide more than one type of task, with a significant minority, around 11%, earning more than half of their overall salary right in this way[24].

In this regard, the hourly payment often varies according to the type of activity and the platform rules, with differences more or less pronounced relating to the specific geographic zone and the skills level required[25]. However, considering the significant publications issued by the EU and ILO, the median pay-per-task gap ranges from approximately €7 for micro-tasking to €23 for software development, becoming more emphasized in developing countries[26].

Going further, the socio-demographic features of platform workers highlight some common traits that focus on a predominantly young, male, and high-educated profile. On the point, the last surveys provided by the very same studies – namely the last COLLEEM

[22] See DE STEFANO V., The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig economy", *Op. Cit.*, p. 5, where the author argues that the gig economy (hence the digital labour platforms) "enable workers to benefit from job opportunities that they might not be able to access otherwise and on a flexible-schedule basis, allowing matching work with the performance of other working, family-related, study or leisure activities".

[23] SCHWELLNUS C. et Al., Gig Economy platforms: Boon or Bane? OECD: Economics department working papers, No. 1550, 2019, p. 10.

[24] URZI BRANCATI C., PESOLE A., FERNANDEZ MACIAS, E., *Op. Cit.*, 2020, pp. 17; FORDE Et. Al., The Social Protection of Workers in the Platform Economy, European Parliament, Directorate general for internal policies, policy department A: economic and scientific policy, Brussels, 2018, p. 46; HUWS U. et Al., The Platformisation of Work in Europe. Results from Research in 13 European Countries, FEPS - Foundation for European Progressive Studies, Brussels, 2019, p. 12.

[25] In this regard, a certain heterogeneity partly reflects the differences in task features within and between platforms and the unpaid time. Among the wide variety of tasks that can be performed, the elementary, repetitive, and non-intellectual tasks are often associated with a low wage, while more creative and high-qualified jobs usually correspond to greater salaries.

[26] See BERG J. et Al., Digital labour platforms and the future of work: Towards decent work in the online world International Labour Office – Geneva, ILO, 2018, pp. 49-58.; URZI BRANCATI C., PESOLE A., FERNANDEZ MACIAS E., *Op. Cit.*, 2020, pp. 35-38.

report of the European Commission[27], in line with the evidence collected by the ILO[28] and other previous studies[29], reveal that:

- People regularly employed within digital platforms (at least monthly) tend to be less than 35 and younger than "offline workers." According to the COLLEEM II project's data, the average former's age oscillates between 33 and 35 years, more specifically 34.7 in 2017 and 33.9 in 2018, while the latter ranges between 42 and 44 years, namely 43.1 in 2017 and 42.6 in 2018. In this context, almost one-third of the non-sporadic workers – 29.5% of *marginal platform workers*, 26.7% of *secondary platform workers*, and 23.6% of *main platform workers* – are aged 16-25;

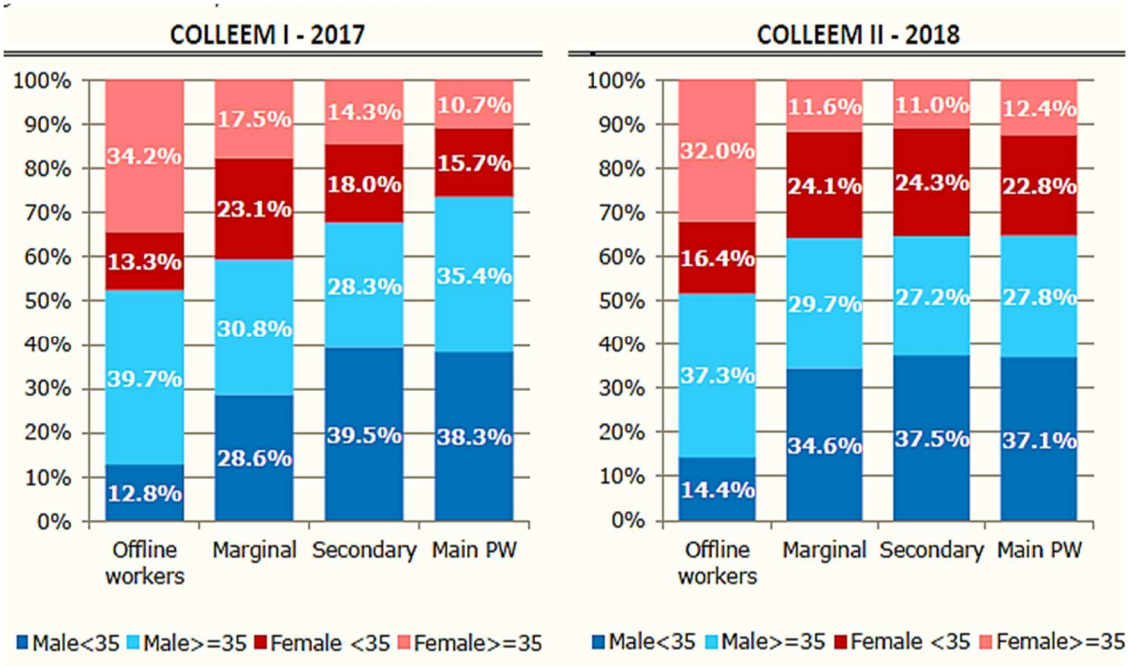
- People regularly employed within platforms (at least monthly) tend to be more educated than the general population since the digital-related skills necessary to perform or apply for a job correspond to an above-average wealth of expertise. Overall, almost half of the workers aged 16-74 have at least a tertiary education, that is to say, a degree corresponding to level 5-8 within the ISCED framework;

- Men than women more frequently perform platform work, and the compared data related to 2017 and 2018 confirms it. However, some changes are predictable. Although the share of younger men and women increases, the growth appears to be faster for women than for men, especially within the secondary or main platform workers categories, where they gain between 6 and 7 percentage points over their male colleagues. While in 2017, women seem to have a first tiny approach towards digital platforms, therefore falling within the *marginal* work category, in 2018, a remarkably high proportion of them try to carry out one or more services with regularity, working for a relevant number of hours or earning a significant income from it.

[27] See PESOLE A. et Al., Platform Workers in Europe, Publications Office of the European Union, Luxembourg, 2018; For further comparison see also: URZI BRANCATI C., PESOLE A., FERNANDEZ MACIAS E., *Op. Cit.*, 2020.
[28] See BERG. J. et Al., *Op. Cit.*, 2018. However, please note that this study - according to the same definition adopted to circumscribe its scope - is focused just on the "Crowdwork" and not on all the types of digital labour platforms (DLP), thus ignoring - the one that for us is - an essential component of the platform economy, especially within Europe.
[29] DE GROEN W. P., MASELLI I., FABO B., The Digital Market for Local Services: A one-night stand for workers? An example from the on-demand economy, CEPS Special Report, Brussels, No. 133, 2016; BOERI et. Al. (2018), 'social protection for independent workers in the digital age', in European Conference of the Fondazione Rodolfo Debenedetti, Pavia, 26 May 2018.

The following chart – Figure 4 – traduces these considerations graphically, combining information on the age and gender of four different worker categories: young men (under 35); young women (under 35); older men (aged 35 or over); and older women (aged 35 or over).

Figure 4. Platform workers by age, gender, and category.



Source. Urzì Brancati, C., Pesole, A., Fernández-Macías, E. New evidence on platform workers in Europe. Results from the second COLLEEM survey, Publications Office of the European Union, Luxembourg, 2020, P. 22.

By observing this situation, it is clear that, even though the platform worker is still mostly a young man, its average profile is next to change. On the one hand, the presence of men under 35 seems to remain overall quite stable; on the other hand, the share of "older men" drops by almost eight percentage points between 2017 ad 2018, leaving room for the employment of an equal number of women[30]".

[30] However, this is not surprising, taking note of the growing impact of "platforms catering for relatively more "feminized" tasks, such as translation or interactive services: URZI BRANCATI C., PESOLE A., FERNANDEZ MACIAS E., *Op. Cit.*, 2020, p. 21.

Besides these general considerations, as briefly anticipated, the platform work has a different impact on the three countries useful for our analysis: Italy, France, and Spain.

Here, the Italian case shows that more than 8 % of people have ever worked under the platform, with around 5 % carrying out activities regularly. Of 2,228,427 people aged between 18 and 74 who declared to earn an income through digital platforms, 25.6% of them can be considered platform workers. This situation translates into more than 570000 workers employed in this way, corresponding to 1.3 % of the general population[31].

In the same line, in France, almost 5% of workers have ever carried out activities for a platform, and around 2.5 % have done it as the main or secondary work. Accordingly, out of the 27 728 000 people working in the country, more than 40000 lend their services to a digital platform.

As for Spain, less than 10% of people carry out platform work activities with a certain frequency. Within this group, 6 % spend at least 10 per week under the platform, earning at least 25% of the total income, while just 2% spend more than 20 hours per week to gain at least 50% of their income. However, in absolute figures, more than 694,000 people earn their main source of income from the platform, which means almost 3.7% of the total employed population within the country[32].

Food delivery occupies a relevant part of this context. From an economic perspective, a recent market analysis indicates that the online food delivery sector accounts for a turnover of 18,496 million Euros and involves 176.8 million European users, around 38% within the platform-to-consumer segment[33]. Furthermore, food delivery platforms show

[31] These data emerge from the 2021 INAPP-PLUS survey. For further insights on this case, see: https://oa.inapp.org/xmlui/bitstream/handle/20.500.12916/3406/INAPP_Lavoro_virtuale_mondo_reale_dati_indagine_inapp_plus_lavoratori_piattaforme_Italia_PB_25_2022.pdf?sequence=1isAllowed=y;

[32] TODOLI SIGNES A., Plataformas digitales y concepto de trabajador: ua propuesta de interpretaciòn finalista, in *Lan Harremanak,* Vol. 41, 2019, p. 21. See where the Author states that*: "*se trata de un número nada desdeñable de afectados por esta nueva forma de trabajar que, además, se espera que aumente exponencialmente en un periodo relativamente corto, considerando que, hace cinco años, esta forma de prestar servicios era prácticamente inexistente en nuestro país".

[33] The online food-delivery services can be split into two categories: "*Restaurant-to-Consumer delivery*, where meals ordered online are delivered directly from the restaurant, whether it is a platform order (e.g., Just Eat, Delivery Hero) or from the restaurant website itself (e.g., Domino's) and all online orders collected from the restaurant; *Platform-to-Consumer Delivery*, where the online order and delivery are made through a platform (e.g., Deliveroo)". See DAZZI D., GIG Economy in Europe, in *Italian Labour Law e-Journal*, Issue 2, Vol. 12, 2019, p. 89.

a double-digit growth path, projected to reach a market value of 8,287 million euros by 2024[34].

Such an expected expansion is consistent with the evidence from ETUI's "The platform work in Europe" report. According to the research, 52.2 % of “internet workers” work in delivery[35]. Moreover, almost half of the total food delivery workers have started to work in the last year, thus leaving room for the potential additional market scalability[36].

Overall, this type of work tends to prevail within the category of non-remote platform work. In Italy and Spain, the delivery % overcome the transport services one, being equal to it just in French[37]. Under the estimates of these countries, the number of delivery men currently working amounts to almost 140000, with 60000 *ciclofattorini*[38], 50000 *livreurs*[39], and 30000 *repartidores*[40].

In this context, the rider’s figure corresponds chiefly to a young man, often an immigrant, who usually does this job as his first occupation in the country or his main remunerated activity.

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[34] See: https://www.statista.com/outlook/374/102/online-food-delivery/europe;
For further insights on the issue, see: DAZZI D., GIG, *Op. Cit.*, 2019, p. 89, “the volume of online food-delivery amounted to approximately $92 billion, of which approximately $17.5 billion related to online distribution through platforms (approximately 18.8% of the total volume). The sector is expected to grow strongly in the coming years (+57% between 2018-2023) with an acceleration in online distribution via platform (+89% between 2018-2023) compared to online distribution via restaurants (+50%). By 2023, the weight of platform distribution is estimated to grow by about 4 percentage points to 22.7% of the total annual value of online food-delivery”.

[35] See PIASNA A. ZWYSEN W, DRAHOKOUPIL J., The platform economy in Europe Results from the second ETUI Internet and Platform Work SurveyEuropean, European Trade Union Institute, Brussels, 2022, p. 19. According to the authors: “this might suggest that labor platforms have penetrated the segments of transport and delivery to a much greater extent than other freelance or informal markets. This can be the result of a much more developed organization of transport and delivery services by various intermediaries connecting own-account workers with clients prior to the emergence of the platform economy”.

[36] See PIASNA A. ZWYSEN W, DRAHOKOUPIL J., *Op. Cit.*,2022, p. 22.

[37] See PIASNA A. ZWYSEN W, DRAHOKOUPIL J., *Op. Cit.*, 2022, p. 21.

[38] As highlighted by the Ministero del Lavoro e Delle Politihe Sociali in the report available at: https://www.ispettorato.gov.it/it-it/notizie/Pagine/ASSICURATE-TUTELE-DEL-LAVORO-SUBORDINATO-PER-60-000-RIDERS-240202021.aspx.

[39] This data emerges from the combined reading of the estimates related to the total number of workers employed under “plateforme numerique” and the proportion of food delivery platform workers within this context. Here, note: PIASNA A. ZWYSEN W, DRAHOKOUPIL J., *Op. Cit.*, 2022, p. 21; Also see the numbers offered jointly by the Ministere De L’Economie et Des Finances and Ministere du Travail, available in the report at: https://www.tresor.economie.gouv.fr/Articles/b81bdc83-d8af-4878-91e3-8420a29fbbc5/files/2cc5304a-f953-49d3-8d1b-f97f5c48531a.

[4040] Coherently with the numbers proposed by Adigital.

Concerning Italy, most riders are men between 18 and 30. More than 85% do not have a higher education, while 30% do not even speak Italian fluently. More than half come from Africa, the Middle East, Asia, and South America and work for a relevant number of hours, which for more the 80% of cases means 30 or more over a week[41].

Similarly, in France, riders are prevalently men, 70% of whom are under 35. Less than 10% of them are French, while the rest are usually Algérienne, Guinéenne, Ivoirienne Marocaine, and Sénégalaise. Most are full-time food delivery men. In contrast, 11% carry out another activity parallel to the platform, of which 60 % work part-time, while another 20 % have a full-time job. Almost 20 % are students, yet 30% of the current workforce have a higher education[42].

Lastly, 64% of riders in Spain come from Latin America, while just 28 % are Spanish natives. A third of those from outside the country work in delivery as the first job when arriving in Spain. In addition, 87% of riders are men, and more than 40% are between 29 and 39 years old. However, contrary to the Italian and French cases, 42% have a degree or higher education[43].

Platform work implications

In light of the considerations made so far, the model involves innovative changes[44] that, in turn, open the door to several questions. As it is known, platform work implies a shift in the business logic from manual to digital work[45], reinventing the worker's role[46]. This situation could certainly fuel progress. However, as highlighted on many fronts, it could also lead to a loss of effectiveness, in line with the multiple downsides such a work form can have on labor organization and workers' well-being.

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[41] FASANO L. M., NATALE P., I riders: una ricerca di carattere cognitivo, 2019. Availavle At: https://www.lavorodirittieuropa.it/images/presentazione_riders_compressed.pdf

[42] DABLANC L., AGUILERA A., KRIER C (et. Al), Étude sur les livreurs des plateformes de livraison instantanée du quart nord-est de Paris, Rapport final, 2021.

[43] Note the survey of Adigital: https://www.foodretail.es/retailers/perfil-repartidor-delivery-adigital_0_1472852715.html

[44] As pointed out by recent surveys, labor markets have experienced radical changes in the aftermath of multiple causes. Among these: digitalization, flexibilization, restructuring, and demographic dynamics. See DE STEFANO V., ALOISI A., *Op. Cit.*, 2018.

[45] See LORENZ M. et Al., Man and Machine in Industry 4.0: How will technology transform the industrial workforce through 2025?, The Boston Consulting Group, 2015.

[46] The reference is to the so-called "Fourth Industrial Revolution" or "Industry 4.0".

For our interest here, the work on-demand via app seems attractive to both companies and those applying for a job. On the one hand, it allows companies to reduce transaction costs[47] and rely on a pool of candidates always available to carry out their workload[48]. On the other, it allows workers to shape their work-life balance, guaranteeing them freedom of choice about places and times of work[49].

Nonetheless, behind these pros., such a model also includes negative aspects. To a closer look, this typical "flexible and autonomous" regime could not be so convenient[50].

First, it *de facto* hides a particular risk-shifting policy. The platforms here usually hire riders through a freelance agreement, with different shades according to the national legislation. As freelancers, riders have no right to a minimum wage, paid holidays, or sick leave, nor do they have any protections in case of dismissal[51]. Likewise, they are often paid depending on how many deliveries they manage to carry out in a given period. As a result, when the demand is low, despite being available for work, they are not paid, thus allowing the company to save structural costs that otherwise it would have to bear[52].

Second, it creates a diabolical system that keeps workers under control, also saving all the HR and management-related costs[53]. Though formally framed as independent, riders are subject to some powers either way. Here, platforms use multiple control strategies to assess the working performance and the related results. Once a rider logs in to the app - in detail – he is affected by an invisible mechanism provided by an algorithm that allocates the working shifts and the orders to deliver, allowing, in turn, clients and customers to

[47] "Platforms seek to make markets more efficient by reducing three main types of transaction costs: (1) search and information costs, incurred in the discovery of relevant goods and services, including availability pricing; (2) bargaining costs, incurred by bringing the two transacting parties to a mutually acceptable agreement; and (3) policing and enforcement costs, which are incurred in ensuring that the parties adhere to the terms of the agreement, and include the costs of taking action to enforce these terms." Note: CHOUDARY S. P. The architecture of digital labour platforms: Policy recommendations on platform design for worker well-being, Ilo future of work research paper series No. 3, International Labour Office – Geneva: ILO, 2018, p. 4.

[48] JÄGER G. ZILIAN L. S., HOFER C., Crowdworking: working with or against the crowd?, in *Journal of Economic Interaction and Coordination*, Vol. 14, No. 1, 2019, p. 763.

[49] *Ibid.*

[50] The model is often resumed with concepts such as "flexibility, independence, and autonomy" or with ironic expressions such as the "friendly and flexible, anytime and anywhere" model. See: EUROFOUND (2016), Foundation Seminar Series 2016: The impact of digitalization on work, Eurofound, Dublin.

[51] TASSINARI A., MACCARONE V., Riders on the Storm: Workplace Solidarity among Gig Economy Couriers in Italy and the UK, in *Work, Employment and Society*, Vol. 34, No. 1, 2020, p. 38.

[52] *Ibid.*

[53] DE STEFANO V., Introduction: Crowdsourcing, gig-economy and the law, in *Comparative Labor Law & Policy Journal,* Vol. 37, No. 3, 2016, p. 4.

give feedback on the job execution. Each working performance is ranked, and so is the worker. This mechanism, relying on the continuous rating review, permits “platforms to exclude – and or – terminate the relationship with – the so-called “poor performers”, namely those who fall below given average ratings[54]. Accordingly, a worker who casually misses a delivery or shift or receives unwanted or unjustified feedback can have limited access to this job.

In line with that, the model can conceal a downside for those workers who desire a stable income since it limits the chances of working - and therefore earning - regularly. If used to further casualize labor by permitting "just-in-time scheduling," the algorithm can adapt work to customer demand in "real-time[55]." “In businesses that are weather-dependent”, as it could be that of riders, ”this could mean that a worker's shift can be “canceled at the last minute, or a worker can be “sent home early because the weather has changed”, with all that entails[56].

From a worker’s perspective, ”such systems have a two-fold impact; first, because they lead to unpredictable schedules, and thus greater insecurity in income; secondly, because they do not consent he to discuss his concerns with a human manager, and thus have them accommodated[57]”.

Within this same context, the positive rhetoric of the "self-employed by choice" inevitably clashes with the other typical traits of platform jobs, such as precariousness and insecurity[58], which, in turn, can feed anxiety and stress.

Precariousness, as a typical pattern of riders, often leads the so-called "on-tap worker" to live with the pressure of having to accept whatever job available whenever it is available, with the risk of running into the paradox of spending so much time in search of opportunities to "invade" its very life-work boundaries[59], theoretically untouchable.

Insecurity, similarly, makes these jobs a pitfall where, in particular situations, they configure the main working activity. As in the case of caregivers, for instance, the

[54] DE STEFANO V., Introduction: Crowdsourcing, gig-economy and the law, *Op. Cit.*, p. 4.
[55] BERG J., Protecting workers in the digital ages: Technology, outsourcing, and the growing precariousness of work. in *Comparative Labor Law & Policy Journal*, Vol. 41, No. 1, p. 81;
[56] BERG J., *Op. Cit.*, p. 81;
[57] BERG J., *Op. Cit.*, p. 81;
[58] YANG LIU C., NAZARENO L., The Changing Quality of Nonstandard Work Arrangements: Does Skill Matter? In *The Russell Sage Foundation Journal of the Social Sciences*, Vol. 5, No. 4, 2019, p. 105.
[59] WEBSTER J., *Op. Cit.*, p. 60.

incompatibility between uncertain working hours and specific care needs can lead to a diabolical trade-off between work and family, wherein earning a living wage is possible only under the condition of minimizing time spent at home[60].

Finally, the model can imply risk profiles linked to the specific labor context and how workers perceive it from a psychological perspective.

Since the work performance usually takes place individually, separated from - and often in competition with - any colleagues, it is not unusual for the worker to deal with states of loneliness and social isolation[61].

In this regard, the lack of a work commonplace eliminates any opportunity for discussion and mutual dialogue. First, this situation induces workers to individualize and internalize problems under stress and abandonment quite difficult to sustain in the long run[62]. Moreover, it inhibits any concrete possibility of confrontation toward collective actions to negotiate better working conditions, keeping them from improving an unstable situation.

[60] In this sense, "arranging, scheduling, and providing childcare when one is an on-call worker makes juggling work and family even more difficult to sustain". See BARZILAY A. R., BEN-DAVID A., Platform Inequality: Gender in the Gig-Economy, in *Seton Hall Law Review,* Vol. 47, 2017, p. 403.
[61] See GARBEN S., *Op. Cit.*, p. 25.
[62] See WEBSTER J., *Op. Cit.*, p. 61, where the author refers to "the abrogation of the traditional workplace".

CHAPTER II.

RIDERS: ARE THEY EMPLOYEES OR INDEPENDENT CONTRACTORS? A MULTI-STATE APPROACH

Summary: Introduction. I. Work classification under European law; II. Work classification under the Italian law; II.I. The Quasi-subordinate work; Relevant case-la: premise; II.II. The Foodora case: the contract; II.III. The decision of the Court of Turin; II.IV. The decision of the Court of Milan; II.V. The decision of the Court of Appeal of Turin; II.VI. The decision of the Supreme Court; II.VII.The decision of the Court of Palermo; III.Work classification under the Spanish Law; III.I. The Trade: trabajo autonomo economicamente dependiente; III.II. Relevant case law: premise; III.III.Deliveroo's contract; III.IV. Deliveroo sentences; III.V. Glovo's contract; III.VI. Glovo sentences: III.VII. The decision of the Supreme Court; IV. Work classification under the French law; IV.I. Relevant case law: premise; IV.II. Relevant case law: Take Eat Easy case;

INTRODUCTION

As seen in Chapter I, platforms pursue strategies to avoid costs and risks associated with the employment of permanent staff, fitting in a context that replaces standard working relationships with autonomous work[63].

Here, the issue of the legal classification of labor starts from the premise that many platform workers, even being fictiously framed as self-employed, show the typical patterns of an employment scheme.

[63] From this perspective, avoiding costs and risks associated with the employment of permanent staff[63] has meant the "balkanization" (TODOLI SIGNES A., El trabajo en la economía colaborativa, Tirant lo Blanch, Valencia, 2016, p. 19) - "fragmentation" (PÁRAMO MONTERO P., Las nuevas formas emergentes de trabajo. Especial referencia a la economía colaborativa, in *Revista del Ministerio de Empleo y Seguridad Social*, No. 128, 2017, p. 197) – "uberitarization" (NERINCKX, S. The 'Uberization' of the labour market: some thoughts from an employment law perspective on the collaborative economy, in *ERA Forum*, Vol. 17, 2016, p. 245) of the labor market, which in turn has favored independent contractors and freelancers to the detriment of the employee's figure, at least as we knew it. On the point: WALTON M. J., The Shifiting Nature of Work and Its Implications, in *Industrial Law Journal,* Vol. 45, No. 2, 2016, p. 111.

Although they have a certain freedom in choosing times and places of work, they are somehow subject to the platform's power, which can control their working performance and allow them to access or not to given delivery shifts.

In this case, the distinction between employment and self-employment is not negligible. On the one hand, it is essential to circumscribe rights and duties to the platform. On the other, it is key to understand if a rider can benefit from national legislation's social protection.

The following Chapter deals with the case law that recently emerged on the theme. As testified by the high number of proceedings, the misclassification of rider's work has seen the judgments of many Courts all around Europe. Alongside the main rules internal to the Italian, French, and Spanish jurisdictions, detailed insights are provided on the most relevant rulings in any of these countries.

I. Work classification under European law

Before entering into detail with the comparative analysis, it may be useful to see how the European lawmaker has intended to address the work legal classification issue.

Within the European Union, roughly speaking, the term "worker" is primarily retraceable to the benefit of free circulation within the common market, as indicated by art. 45 TFEU.

In legal terms, a unanimous definition of worker, as much as we know it, is not given. Nonetheless, a certain commitment to improving the working conditions in the Union legal system has always been tangible.

While the Single States can autonomously regulate the subject[64], the European institutions have already attempted to overcome or mitigate the uncertainty due to the differences between jurisdictions, providing several insights to give "a common meaning" to this concept[65].

[64] As we will see in the following paragraphs, the definitions of employment or self-employment in the different EU countries vary; in some countries it does not exist, while in others it is constructed by jurisprudence, regulations, or both.

[65] See: CJEU, Case C-75/63 *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)*,

Starting from the Lawrie-Blum judgment, the European Court of Justice, in particular, has identified the essential feature of a legal working relationship as "the circumstance that a person provides, for a certain period of time, in favor of another and under the direction of the latter, services in return for which he receives remuneration"[66].

In light of this approach, the same Court has depicted, throughout the years, a set of other clues that may be retraceable to an employment contract. Based on a case-by-case assessment - in detail - the Judges have come to attribute relevance to the combination of three essential criteria: the nature of the work, the remuneration, and the link of subordination[67].

To be gathered under a legal employment relationship, any work must consist of a "genuine and effective" economic, non-marginal or accessory activity[68]. In this setting, the worker has to be remunerated with compensation, which has to be higher than the costs incurred to fulfill the performance[69]. Moreover, he has to carry out his activity under the subordination of an employer, who owns the tools and materials to do the job, bears the primary chance of profit or loss, and has the power to direct, select and dismiss him[70].

ECLI:EU:C:1964:19; on the theme see: See: MENEGATTI E., The evolving concept of "worker" in EU law, in *Italian Labour Law e-Journal*, Issue 1, Vol. 12, 2019, p. 72; AIMO M., Subordinazione e autonomia: che cosa ha da dire l'Unione Europea?, in *Labor. Il lavoro nel diritto*, No. 4, 2021, p.392.

[66] As stated in the CJEU, Case C-66/85 *Deborah Lawrie-Blum v Land Baden- Württemberg* ECLI:EU:C:1986:284: a worker is "any person that for a certain period of time provides services": [a] "for and under the direction of another person"; [b] "in return of which he receives remuneration" engaged in [c] "effective and genuine activities"; See MENEGATTI E., *Op. Cit.*, p. 72.

[67] The judges have carried on to follow the so-called Lawrie-Blum formula, which retraced the presence of a "worker" to the "*existence of a relationship of subordination vis-á-vis the employer, irrespective of the nature of that relationship, the actual provision of services and the payment of remuneration*." (CJEU, Case C-66/85 *Deborah Lawrie-Blum v Land Baden- Württemberg* ECLI:EU:C:1986:284, p. 15); "Under this formula, any person who "is obliged to provide services to another in return for monetary reward and who is subject to the discretion or control of another person as regards the way in which the work is done" (CJEU, Case C-66/85 *Deborah Lawrie-Blum v Land Baden- Württemberg* ECLI:EU:C:1986:284, p. 14) must be regarded as a "worker"". see: LUDERA-RUSZEL A., The concept of "worker" under the principle of free movement of workers and its implications for the protection of workers in the European Union, in *Studies on Labour Law and Social Policy* , Vol. 27, No. 3, 2020, p. 169.

[68] CJEU, Case C-66/85 *Deborah Lawrie-Blum v Land Baden- Württemberg* ECLI:EU:C:1986:284; CJEU, Case C-53/81 *D.M. Levin* v *Staatssecretaris van Justitie*, [1982] ECR 1035; CJEU, Case C-337/97 *C.P.M. Meeusen* v *Hoofddirectie van de Informatie Beheer Groep*, ECLI:EU:C:1982:105.

[69]If the one who provides a service "*does not receive any remuneration or receives merely compensation of costs incurred for his activities*", he could be considered a volunteer rather than a worker. See: Communication from the commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: a European Agenda for the collaborative economy, European Commission, Brussels, 2016, p. 13.

[70] BARNARD C., EU Employment Law, Oxford: Oxford University Press 2012, p. 145.

In this last respect, the concept of subordination has somehow been interpreted extensively.

On the one hand, the CJEU has assessed an employment relationship by comprehending elements out of the ordinary, including the worker's recruiting phase[71], the nature of his assigned duties[72], and the presence of a supervisor[73].

On the other hand, it has been remarked that the worker's status within the EU law is not affected by his qualification under national law, at least as long as he acts under the direction of another party about his freedom to choose times, places and contents of his own work[74]. In this sense, the classification as self-employed under national law does not keep a worker from being legally qualified as an employee within EU law, especially whenever his independence is exclusively notional and not proven in facts[75].

In line with that, jurisprudence has considered to what extent a worker becomes an "employee" under a non-standard working relationship. In *Levin* and *Meeusen*'s following cases, a set of options was assessed.

Attended that those activities performed *"on such a small scale as to be regarded as 'purely marginal and ancillary'*[76]*"* do not shape an employment contract, the Court has

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[71] This is applicable to those who cover managerial role, already featured with a certain degree of autonomy and discretion, such as the members of the Board of Directors of a capital company: See RISAK M., DULLINGER T., The concept of 'worker' in EU law Status quo and potential for change, European Trade Union Intitute, Report No. 140, 2018, p. 36; with reference to: CJEU, Case C-232/09, *Dita Danosa v LKB Līzings SIA*, ECLI:EU:C:2010:674; CJEU, Case C-229/14, *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH*, ECLIEU:C:2015:455.

[72] *Ibid.*

[73] This is what emerges, *inter alia*, from the *Danosa* Case, in which a manager not considered a "worker "under the national legislation at stake (Latvian), was considered as such by the CJEU, which took into consideration *"all the factors and circumstances characterizing the relationship between the parties"*. The Court, in detail, observed that *"even though Ms. Danosa enjoyed a margin of discretion in the performance of her duties, she had to report on her management to the supervisory board and to cooperate with that board. Moreover, under the national law at stake, she could be removed from his or her duties by a decision of the shareholders, in some circumstances following suspension from those duties by the supervisory board, as she actually was. In particular, she was dismissed by a body which, by definition, she did not control and which was able at any time to take decisions contrary to her wishes"*. See: MENEGATTI E., *Op. cit.*, p. 75 with reference to: CJEU, Case C-232/09, *Dita Danosa v LKB Līzings SIA*, ECLI:EU:C:2010:674.

[74] CJEU, Case C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, ECLI:EU:C:2004:18.

[75]This is what emerges from: CJEU, Case C-232/09, *Dita Danosa v LKB Līzings SIA*, ECLI:EU:C:2010:674; paragraphs 51-56; CJEU, Case C-270/13, *Iraklis* Haralambidis v Calogero Casilli, ECLI:EU:C:2014:2185; paragraphs 30-34.

[76]CJEU, Case C-53/81 *D.M. Levin* v *Staatssecretaris van Justitie*, [1982] ECR 1035; CJEU, Case C-337/97 *C.P.M. Meeusen* v *Hoofddirectie van de Informatie Beheer Groep*, ECLI:EU:C:1982:105.

pointed out that temporary or seasonal work[77], part-time work[78], on-call work[79], and professional traineeship[80] are instead worthy of being gathered under the labor law scope.

However, not all the activities configurable in that way are always catalogable as employment. Platform work, indeed, remains outside this consideration, at least in the European arena.

For what is in our interest, here, on April 22, 2020, the CJEU set an interesting precedent on the point. With the *Yodel Delivery* case[81], in particular, the Court reached a discussed ruling about the relationship between the company and one of its riders, giving for the first time a legal opinion on the matter.

In the case *de quo*, the rider and the platform had an agreement wherein the first, under a service contract, carried out a working performance by its own means - as the vehicle and mobile phone - and the latter paid him a fee. In a nutshell, the platform established the generic time slot in which the worker could effectively work. Thus, the rider had the freedom to accept or refuse to make the deliveries in one or more slots, being free to provide his services according to his availability.

Answering the question raised by the Watford Employment Tribunal, the Judges stated that no working relationship is configurable. In detail, the element of the choice of working time and the tasks to be performed are *per se* ascribable to self-employment. Moreover, in line with Directive 2003/88/CE, the Court affirmed that the classification of this relationship, whose independence here is far from being fictitious, is, in any case, a prerogative of the national lawmaker.

As we will see in the following paragraphs, each country has the full power to decide the features of an employment relationship, assessing the nature of the activity itself and interpreting its specific conditions.

[77]CJEU, Case C-428/09 *Union syndicale Solidaires Isère v Premier ministre and Others* ECLI:EU:C:2010:612; CJEU, Case C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, ECLI:EU:C:2003:600.
[78]CJEU, Case C-53/81 *D.M. Levin* v *Staatssecretaris van Justitie*, [1982] ECR 1035.
[79]CJEU, Case C-357/89 *J. M. Raulin v Minister van Onderwijs en Wetenschappen*, ECLI:EU:C:1992:87.
[80]CJEU, Case C-109/04 *Karl Robert Kranemann v Land Nordrhein-Westfalen*, ECLI:EU:C:2005:187.
[81]CJEU, Case C-692/19 *B v Yodel Delivery Network Ltd*, ECLI:EU:C:2020:288.

II. Work classification under the Italian Law.

The Italian workers' classification is traditionally[82] featured by a binary system that opposes the employee's figure to that of the independent contractor[83].

Looking at the structure, the Law identifies two main categories of workers; on the one hand, the subordinate worker (*lavoratore subordinato*), which integrates the scope of the labor law; on the other hand, the autonomous worker (*lavoratore autonomo*), which, by contrast, stands outside its area and regulatory framework.

Article 2094 of the Civil Code defines a *"lavoratore subordinato"* as "*the one who undertakes to collaborate for remuneration in an enterprise by performing intellectual or manual labor under the direction of the entrepreneur*"[84].

[82] Overall, the Italian worker classification finds its roots in classic Roman law and, in particular, in the institute of the *locatio conductio*. In a nutshell, the *locatio conductio* was a contract that regulated the hiring and leasing of work, services, and material things, through the institutes of the "*locatio operis"*, the "*locatio operarum"*, and the "*locatio rei"*, respectively. Here, the *locatio operarum"* and *the locatio operis"* recall the same dichotomy of thought later responsible for the birth of the employment/self-employment binary. On this point, see BARASSI L., Il contratto di lavoro nel diritto positivo italiano, Mario Napoli, V&P Università, 2003, p. 20.

[83] This distinction arises from the distinction between the *locatio operis* and *locatio operarum.*. In this sense, the *Locatio operis* - similarly to a freelance agreement - provided that the conductor, by renting his workforce, had to execute a certain piece of work as a whole, taking under his liability the achievement of a specific result (*opus faciendum*) while the *Locatio operarum,* conversely, just provided that the worker - similarly to an employee - made available his labor, with no reference to a particular single job and no liability for a given outcome. For an in-depth analysis, see CANNATA C. A., Corso di Istituzioni di diritto Romano II, 2, Giappichelli, Torino, 2017, p. 213. On the object of the contract, see BERGER A., Enciclopedic Dictionary of Roman Law, Transactions of The American Philosophical Society, New Series – Volume 43, part. 2, 1953, p. 567, where the Author argues that *locatio conductio operarum* means "hiring another's labor, primarily manual work, since services rendered by intellectual professionals (physicians, lawyers, land surveyors, teachers, architects, etc.), the so-called *operae liberales*, could not in classical law be the object of a *locatio conductio*".; again, see KOUNTOURIS N., The Changing Law of the Employment Relationship: Comparative Analyses in the European Context, Routledge, New York, 2007, p, 22, where the Author claims that the *locator operarum* "could also be the skilled manual or clerical worker even when *produttore di opere della mente*". Finally, note: FREEDLAND M., KOUNTORIS N., The legal construction of personal work relations, Oxford University Press, 2011, p. 117; p. 175; ZIMMERMAN R., *The law of obligations: Romans foundations of the Civilian Tradition*, Oxford UniversityPress, 1996, p. 353.

[84] Under the original wording of Article 2094 of the Civil Code (Regio Decreto 16 marzo 1942, n. 262)*:"È prestatore di lavoro subordinato chi si obbliga mediante retribuzione a collaborare nell'impresa, prestando il proprio lavoro intellettuale o manuale alle dipendenze e sotto la direzione dell'imprenditore".*

Conversely, Article 2222 of the Civil Code outlines a "*lavoratore autonomo"* as *"someone who carries out work or services for remuneration, mainly by means of his own labor and without a relationship of subordination"*[85].

By the combined reading of these norms, a working relationship would exist where a performance - besides being carried out in collaboration and in exchange for remuneration- also:

I) Takes place within an organized hierarchical structure ("*in an enterprise*") with the employer at its head and:

II) It is executed in conformity with the latter's orders ("*under the direction of the entrepreneur*")[86];

Further guidance on the working relationship is then given by Article 2086, which depicts the collaborators as "*hierarchically subordinate to the entrepreneur*"[87], and Article 2104, paragraph 2, of the Civil Code, which sets out the general duty to follow the entrepreneur and the latter's collaborators' instructions[88].

Within this setting, "subordination" is the building block of a labor contract. Nonetheless, the law does not provide a formal definition, limiting itself to depict the concrete conditions through which it verifies.

In this respect, scholars and case law have originally shaped the employee's figure, defining it as a combination of different elements. First, the doctrine has identified the

[85] Under the original wording of Article 2222 of the Civil Code (Regio Decreto 16 marzo 1942, n. 262), better known as "*Contratto d'opera": "Quando una persona si obbliga a compiere verso un corrispettivo un'opera o un servizio, con lavoro prevalentemente proprio e senza vincolo di subordinazione nei confronti del committente, si applicano le norme di questo capo, salvo che il rapporto abbia una disciplina particolare nel libro IV".* In this regard, note that he Article formally does not define the "lavoratore autonomo", but rather the "lavoro autonomo".

[86] CARINCI F., MENEGATTI E., Labour law and industrial relations in Italy: Update to the Jobs Act, IPSOA, Milano, 2015, p. 2.

[87] Article 2086 of the Civil Code of 1942 (Regio Decreto 16 marzo 1942, n. 262) states that: "*L'imprenditore è il capo dell'impresa e da lui dipendono gerarchicamente i suoi collaboratori".*

[88] Article 2104, para. 2, of the Civil Code of 1942 (Regio Decreto 16 marzo 1942, n. 262), with regard to the employee, states that:" *Deve inoltre osservare le disposizioni per l'esecuzione e per la disciplina del lavoro impartite dall'imprenditore e dai collaboratori di questo dai quali gerarchicamente dipende*".

employer's right to exercise managerial and disciplinary powers ("*eterodirezione*") as the hallmark of subordination and the basic principle for qualifying a working relationship[89].

Then, more attention has been paid to other aspects strictly linked to the worker's role within the employment scheme, such as its implication in the employer's productive organization[90] or organizational structure[91], the double non-possession of the productive result and means[92], and even his socio-economic *status* and economic dependence[93].

Despite these perspectives, scholars have also noted that subordination is legally present even when *eterodirezione* manifests itself in more hidden or attenuated ways[94]. With this regard, case law has intervened more times, affirming that a working relationship can be defined as such even when the employer's power of interference and control is mitigated by a certain degree of autonomy and discretion[95], whether the work refers to a specific managerial role or an exceptionally high level of intellectual content[96].

Moreover, the same case law has stressed, over the years, that it is always possible to detect the existence of a working relationship no matter on *nomen Juris* the parties have given to the agreement. Starting from the principle that any financially significant work, whether intellectual or manual, may take the form of either self-employment or

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[89] The reference here is to the father of the labor law, Prof. Lodovico Barassi. See: NAPOLI M., La nascita del contratto di lavoro. ‹‹Il contratto di lavoro›› di Lodovico Barassi cent'anni dopo. Novità, influssi, distanze, V&P Università, Milano, 2003, p. 384. "Secondo Barassi, l'elemento che differenzia la locazione d'opere dall'altra figura consiste non tanto e non solo nell'oggetto dell'obbligazione, ma nel modo con cui il lavoro viene considerato nei rapporti tra le parti e, più in particolare nella circostanza che il creditore delle opere intende sfruttare le energie altrui dirigendole ai risultati che egli intenda ottenere". Seminal to this view is the point that the employer, beside the ordinary managerial and disciplinary powers, would have even the right to modify the content of the contract relationship unilaterally. This power, known as "*Ius Variandi*" is limited by the law and, according to Article 2103 of Civil Code of 1942 (Regio Decreto 16 marzo 1942, n. 262), provides that in some circumstances the employer changes the employee's tasks.

[90] GHERA E., Il lavoro autonomo nella riforma del mercato del lavoro, in *Rivista Italiana di diritto del lav*oro, Vol. 1, 2014, p. 518.

[91] PERSIANI M., Contratto di lavoro e organizzazione, Cedam, Padova, 1966, p. 24.

[92] MENGONI L., Il contratto di lavoro, a cura di Mario Napoli, V&P Università, Milano, 2008, p. 16.

[93] See SCOGNAMIGLIO R., Lezioni di diritto del lavoro, Cacucci, Bari, 1972, p. 10; *Contra* PERULLI A., Il lavoro autonomo, le collaborazioni coordinate e le prestazioni organizzate dal committente, in *WP CSDLE Massimo D'Antona.it*, Centre for the Study of European Labour Law "MASSIMO D'ANTONA", University of Catania, No. 272, 2015, p. 8.

[94] That emerges from a critical reading of: SCOGNAMIGLIO R. (1999), Lavoro subordinato e diritto del lavoro alle soglie del 2000, Scritti in onore di Gino Giugni, Tomo II, Cacucci, Bari, 1999, pp. 1171 ff., where the author claims that the object of the labor contract lies on "the availability of the mental and physical energies of the worker", with no regards to the shades this concept may assume.

[95] See: Cass. Civ. 1885/76; 1064/75.

[96] See: Cass. Civ. 3245/87; 1463/87; 4855/86; 3841/86; 2477/86.

subordinate employment[97], it has been stated that the classification labeled to the contract is relevant, but not to the extent of shaping the Law. As a result, whenever a contract related to the performance of labor services may abstractly constitute an employment contract, the discipline applicable between the parties is always related not that much to what they had in mind when entering into the legal relationship but rather to how they have effectively executed it[98].

In this sense, the parties of an agreement cannot escape the applicable legislation just by addressing it diversely. Therefore, a contract of services cannot be legitimately applied when its concrete execution shows specific clues[99] of an employment contract, including: i) the absence of commercial risk relating to the productive activity defined by the agreement; ii) the technical and functional integration of the worker into the productive and organizational structure of the entrepreneur; iii) the respect for setting working hours; iv) the fact that the work is carried out on-premises made available by another; v) the subjection to managerial and disciplinary powers; vi) the form of payments; vii) the non-possession of the means of production;

Here, these indicators have completed the standard concept of subordination - already based on characteristic features such as collaboration, onerousness, and the synallagma - ex Article 2094. Moreover, they have been fundamental to detecting the subsistence of a subordinate work relation in all those borderline cases where the boundaries between employment/self-employment were somehow blurred[100].

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[97] "*Ogni attività umana, economicamente rilevante, può essere oggetto sia di rapporto di lavoro subordinato che di rapporto di lavoro autonomo, a seconda delle modalità del suo svolgimento[..]".* Cass. Civ.., n. 2622/ 2004; Cass. Civ.., n. 4036, 2000; Cass. Civ.., n. 5710/1998.

[98] The Supreme Court on the theme affirms that: "*ai fini della qualificazione del rapporto di lavoro come subordinato o autonomo, poiché l'iniziale contratto dà vita ad un rapporto che si protrae nel tempo, la volontà che esso esprime ed il "nomen iuris" non costituiscono fattori assorbenti, diventando viceversa il comportamento delle parti posteriore alla conclusione del contratto elemento necessario non solo ai fini della sua interpretazione, ma anche utilizzabile per l'accertamento di una nuova diversa volontà eventualmente intervenuta nel corso dell'attuazione del rapporto e diretta a modificare singole clausole contrattuali e talora la stessa natura del rapporto inizialmente prevista*". See Cass. Civ. n. 14757/2014; with reference to: Cass. Civ. n. 61/1999.

[99] These clues, also defined as "indexes arising from experience" or "subsidiary indicators", are merely indicative and non-binding. See: BLACKHAM A., KULLMANN M., ZBYSZEWSKA A., Theorizing labour law in a changing world: towards inclusive labour law, Hart, Oxford, 2019, p. 62.

[100] In detail, the Courts have used the so-called subsumption method, a general technique useful to reconnect the characteristics of a given concrete relationship to a general and abstract rule.

II.I. The quasi-subordinate work.

By the combined reading of Articles 2094 and 2022 of the Civil Code, it is quite clear that the hallmark of a working relationship is the employee's subjection to the employer's managerial and organizational authority, while the key feature of autonomous work is *de facto* the total absence of any bond or dependence between the worker and the other part.

Yet, the formal definition given by the Civil Code may still be considered extremely vague[101] to lead to a full classification of work as subordinate or self-employment, especially concerning the various possible forms that an employment contract can assume.

Within the employment self-employment binary, for these reasons, Italian Law contemplates a category of working activities somehow located in a "border area" amid autonomy and subordination.

In this sense, the lawmaker's priority is extending the safeguards ensured to the subordinate work to include all those borderline situations that, even excluded from the power of hetero-direction, are somehow subjected to an objective "organizational" dependence of the worker[102].

Tracing a historical excursus, this category of work - usually defined as quasi-subordinate[103] - after a first mention in the Law n. 741 of 1959 (also known as "Legge Vigorelli"), made its entry into the legal system with the Law n. 533 of 1974, in reforming of Art. 409, paragraph 3 of the Code of Civil Procedure.

This Law meant to extend some procedural protections to those autonomous collaboration forms that materialized through «*continuous, coordinated and predominantly personal relationship, although not of a subordinate character*». These collaborations, which did not identify a legal working relationship, were characterized by three elements:

[101] In this way DEL CONTE M., TIRABOSCHI M., *Employment contract: disputes on the definition in the changing Italian labour law,* JILPT, Report. No. 1, 2004, p. 153.
[102] which also translates into a condition of dependence that pervades his economic sphere.
[103] Also known as "*coordinate work*", *or* "*collaborazioni coordinate e continuative*".

i) The prevailing personality of the performance, ascribable to the absence of a business structure of the worker, who could make use of collaborators, but only so far as the contribution of the latter was lower than the personal content of his work[104];

ii) The functional connection between the collaborator's work and the business of the principal[105], wherein the former had to be carried out according to the latter to achieve a specific result[106];

iii) the continuity of the service, namely the reiteration of activities or results[107] linked to the ongoing interest of the principal.

In this regard, while recognizing their particular characters, the norm did not identify a new legal typology of work nor broadened the applicable employment discipline *in toto*[108].

Within this context, not by chance, the recourse to coordinated and continuous collaboration forms was more than attractive for the employer if compared to an ordinary employment contract, attended that, with the same service duration, there were no social security obligations, nor was the worker recognized the guarantees arising from the classification of the relationship in terms of subordinate work[109]. As a result, the wide

[104] As remarked by case law. See Cass. Civ. n. 5698/2002; n. 7785/1997.
[105] Again: Cass. Civ. n. 5698/2002; n. 7785/1997.
[106] Note Cass. Civ. n. 8598/2004.
[107] On this point, Cass. Civ. n. 1553/1999.
[108] See SANTORO-PASSARELLI G., I rapporti di collaborazione organizzati dal committente e le collaborazioni continuative e coordinate ex art. 409, n. 3, c.p.c., in Commento al d.lgs. 15 giugno 2015, n. 81: le tipologie contrattuali e lo jus variandi (art. 2), in *ADAPT Labor Studies*, e-Book series No. 48, ADAPT University Press, 2015, p. 10., where the Author claims: «la categoria dei rapporti di collaborazione coordinata e continuativa [..] non è identificativa di una fattispecie contrattuale unitaria e tipica [..], ma indica le concrete modalità di svolgimento della prestazione di lavoro, comuni ad una serie di rapporti di natura e origine diverse, ai quali continuava ad applicarsi la disciplina sostanziale del tipo cui ineriscono le rispettive prestazioni. L'art. 409, n. 3, c.p.c., in altri termini, non ha introdotto nel nostro ordinamento un nuovo tipo contrattuale, ma si è limitato a descrivere le caratteristiche concrete di una prestazione lavorativa che può essere dedotta sia in schemi contrattuali tipici [..], sia in schemi contrattuali atipici ai sensi dell'art. 1322, secondo comma, c.c.».
[109] As the non-application of the legislation on dismissals ex-Art. 18, Workers' Statute. On this point see FERRANTE V., Il lavoro parasubordinato organizzato dal committente, in *Colloqui giuridici sul lavoro*, Il sole 24 Ore, 2005, p. 35.

diffusion of such contracts soon became unsustainable, up to shaping an actual abuse of the Law[110].

Aware of this, the legislator, with the declared objective of containing the elusive practice, even in consideration of a growing number of rulings related to the work qualification, introduced in the legal system a new type of contract, named "project work contract," governed by Articles 61 to 69 of Legislative Decree n. 276/2003, also known as "Biagi Reform."

Such intervention traced the collaboration relationships at the time to this project-based scheme, within a relationship wherein the collaborator undertook to execute a job as a whole, previously agreeing upon the principal methods, duration, and related remuneration. At the same time, it abrogated the coordinated and continuous collaboration forms, moving all the relationships not centered on the project entirely within the employment field because of a legal presumption[111].

In line with the recalled Art. 61, more in detail, this new contract relied on a fixed-term linked to the achievement of a "final" result which, in turn, had to be reached «*in coordination with the client's organization and regardless of the time taken to perform the work activity*[112]». Under these terms, the project played the central role, mainly to entail an adequate level of protection to those who kept getting driven by stringent organizational constraints despite not being technically subject to hetero-direction.

In this sense, however, over the years, the theme gave rise to many doubts, chiefly regarding the exact formal definition of "project," which, to a closer look, left room for different interpretations, both under a practical and conceptual profile. Therefore, to remedy the then numerous criticalities of this reform, the legislator intervened with Law

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[110] In the accompanying report of the Legilative Decree in question, it is reported that these forms: «*hanno rappresentato un modo con cui la realtà ha individuato nelle pieghe della legge le strade per superare rigidità e insufficienze delle regole del lavoro*».

[111] Article 69, par. 1, Legislative Decree n. 276/2003, affirmed that: *«i rapporti di collaborazione coordinata e continuativa instaurati senza l'individuazione di uno specifico progetto, programma di lavoro o fase di esso ai sensi dell'articolo 61, comma 1, sono considerati rapporti di lavoro subordinato a tempo indeterminato sin dalla data di costituzione del rapporto»*.

[112] More in detail, Article 61, par. 1, Legislative Decree n. 276/2003: *«Ferma restando la disciplina per gli agenti e i rappresentanti di commercio, i rapporti di collaborazione coordinata e continuativa, prevalentemente personale e senza vincolo di subordinazione, di cui all'articolo 409, n. 3, del codice di procedura civile devono essere riconducibili a uno o più progetti specifici o programmi di lavoro o fasi di esso determinati dal committente e gestiti autonomamente dal collaboratore in funzione del risultato, nel rispetto del coordinamento con la organizzazione del committente e indipendentemente dal tempo impiegato per l'esecuzione della attività lavorativa»*.

n. 92 of 2012, the so-called Monti-Fornero Law, reviewing the norms of Articles 61, 62, 63, 67, and 69 of the previous Decree n. 276.

This reform did not aim to revise the category's conceptual framework but somewhat explicitly limited the proliferation of certain practices that had taken hold, once again, to bypass the original scope of the collaboration's contracts[113].

Specifically, in the mind of this provision, presented with Law n. 92 and subsequently refined by Law n. 134/2012 and by Legislative Decree n. 76/2013, the "functional connection" between the project and the final result remained substantially unaltered. Nonetheless, its regulatory framework was slightly modified to avoid that the project could consist of a "mere re-proposal of the principal's corporate purpose," nor could it "involve the performance of merely executive or repetitive tasks."

In this process, overall, the legislative novel, opposing the age-old question that shifted subordination to the collaboration area, actually added even more confusion than before; on the one hand, by identifying the project work as a mere variant of the contract of services ex-Art. 2222 of the Civil Code; on the other, setting out some rules - such as that to guarantee a minimum amount of retribution[114] - incompatible with the autonomy's profile of self-employment and closer to the employee concept[115].

In light of such considerations, the so-called Jobs Act redesigned the whole subject, attempting to overcome the issues related to adopting collaborative hybrid forms.

Here, the Legislative Decree June 15, 2015, n. 81[116], better known as Jobs Act, intervenes – following the delegation contained in the Law 10 December 2014, n. 183 – to reconsider the issue of autonomous collaborations coordinated by the principal.

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[113]The accompanying report of the Legilative Decree illustrates, as its main aming, that of: *«Razionalizzare il lavoro a progetto ed evitarne un utilizzo distorto da parte del datore di lavoro, che celi un vero e proprio rapporto di lavoro di natura subordinata».*

[114] While the norm, in its preceeding wording, obliged the principal to "take into account the compensation normally paid for similar freelance services in the place where the performane takes place", the provision of Law n. 92/2012 anchored the minimum compensation to the wages "applied in the same sector to equal tasks carried out by subordinate workers", coherently with the provision of the relating collective bargaining.

[115] See FERRARO G., Il lavoro parasubordinato organizzato dal committente, in *Colloqui giuridici sul lavoro*, Il sole 24 Ore, 2005, p. 39.

[116] Entitled "Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell'articolo 1, comma 7, della legge 10 dicembre 2014, n. 183".

In terms of quasi-subordination, the Job's Act eliminates the project-based typology, establishing, through Article 2, paragraph 1, the application - as of January 1, 2016 - of the discipline of subordinate work to all those collaborations' forms, continuous, and "exclusively personal[117]", whose performance methods are hetero-organized, that is to say, organized by the client also as for the times and places of work[118].

This reform unveils a tendentially innovative *ratio,* mainly related to the legislator's attempt to reaffirm the centrality of the subordinate work model and stem the persistent – never ceased – abuse[119] of the already mentioned grey area of the labor law[120]. However, not realizing an overcoming – or rather exhuming - the contracts ex-Art. 409 c.p.c., it raises an almost endless debate around its actual extent.

In this regard, it is arguable whether the provision effectively replaces the criteria of hetero-direction with that of hetero-organization[121], thus detecting a new "additive" case of subordinate work[122], or introduces a new type of quasi-subordinate work organized by the client[123], or again does not apport any novel type, by being likewise just an apparent norm[124].

Effectively, on a practical side, the Legislative Decree in question, in the view of a reorganization of contractual types, does not keep a specific intent.

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[117] Here, according to the new wording, the performance must be “exclusively personal”, and not just “prevailing personal”, as required by 409, n. 3, c.p.c.; this means that the collaborator cannot make use of other collaborators, neither if their contribution is lower than the activity effectively performed by him.

[118] On the norm, of particular interest is the explanatory contribution of the Ministry of Labor and Social Affairs, which, with Circular n. 3/2016, clarifies that "whenever the collaborator operates within an employer organization in which he is required to observe certain working hours and pursue his activity at workplaces identified by the principal itself, the conditions set out in art. 2, paragraph 1, are deemed to be fulfilled, provided that the performance is continuous and exclusively personal". In this regard, note PAGANO M., Collaborazioni Organizzate dal committente e stabilizzazione, la circolare ministeriale, in *Guida al Lavoro*, No. 6, Il Sole 24 ore, 2016, pp. 12 - 24.

[119] On this point see SANTORO-PASSARELLI G., *Op. Cit.*, p. 16: «La funzione, infatti, è sempre quella di contrastare il ricorso al “falso” lavoro autonomo come via di fuga dalle rigidità del lavoro subordinato».

[120] See TIRABOSCHI M., Il lavoro etero-organizzato, in Le nuove regole del lavoro dopo il Job’s Act, Giuffrè, Milan, 2016, p. 261.

[121] See TREU T., In tema di Jobs Act. Il riordino dei tipi contrattuali, in *Giornale di diritto del lavoro e di relazioni industriali*, Vol. 146, No. 2, 2015, p. 164.

[122] With this thesis, in the first place: PERULLI A., Il “falso” superamento dei co. co. co. nel Jobs Act, in *Nel Merito*, 9 marzo 2015, p. 2.

[123] ICHINO P., Il lavoro parasubordinato organizzato dal committente, in *Colloqui giuridici sul lavoro,* Il sole 24 ore, 2015, p. 52; PERULLI A., Il lavoro autonomo, le collaborazioni coordinate e le prestazioni organizzate dal committente, *Op. Cit.*, No. 272, 2015, pp. 11-12.

[124] See TOSI P., L’art. 2, comma 1, d.lgs. n. 81/2015. Una norma apparente?, in *Argomenti di diritto del lavoro*, No. 6, 2015, p. 1129.

On the one hand, alongside the employment relationships ex-Art. 2094 c.c.- privileged in the form of an open-ended contract[125], it reinstates the continuous and coordinated collaborations (ex-Art. 409, n. 3, c.p.c) in their version before 2003, eliminating the economics and legal protections associated with the project-based work.

On the other hand, compared to these two types of contracts, Art. 2, paragraph 1, states the applicability of the subordinate work discipline where the collaboration relationship assumes the form of working performance coordinated by the principal also on both times and places of work[126].

In this way, the Law does not introduce a new legal type but rather an absolute presumption of subordination to all that forms whose organization refers even to such specific elements, directly affecting the performance methods. In this sense, the legislator emphasizes the element of the "organization" of the labor performance, as opposed to that of "coordination," to trace the distinction line between the new collaboration's contracts and the classic coordinated collaborations, which, on the other hand, fall within the self-employment category.

The provision seems to reiterate that the work is subordinate whenever the performance is hetero-direct, hence when it is carried out in compliance with the "guidelines for the execution and discipline of work" given by a third subject[127], while it could be not when it is just hetero-organized.

In this case, the presumption of subordination applies only if, or from the moment wherein, the other part organizes the methods of carrying out the service also concerning the space-time profile[128].

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[125] BOLEGO G., Il lavoro parasubordinato organizzato dal committente, in *Colloqui giuridici sul lavoro,* Il sole 24 ore, 2015, p. 11.

[126] Looking at its wording, the norm - for its purpose - requires, beyond the continuity and personality of the service, common to all the collaborations, the concurrency of further factors, in addtion to the determination of both times and places of work. It cannot be read otherwise that the hetero-organization of the performance as for the time and place of work is necessary, but not sufficient for the purposes of the applicability of the regulations on subordinate work. These elements are taken into consideration by the rule as cumulative (*"e"*) and by way of example (*"anche"*), thus making necessary the proof of the hetero-organization of other elements of the performance. Moreover, according to this very approach, the worker who is required to respect a timetable, but free in determining the place or, vice versa, the one who, although having to perform the activity in a certain place is free to determine the time of the performance, cannot be considered as hetero-organized.

[127] As indicated by Art. 2104 of the Civil Code.

[128] BOLEGO G., *Op. Cit.*, p. 12.

Here, art. 2, paragraph 1, does not refer to the insertion of the collaborator in the business organization but rather to the organization of the working performance methods through which the same collaboration materializes, giving relevance - in the wake of recent jurisprudential guidelines[129] - to that organizational power that the employer - or principal - holds - even as for such elements - within the single collaboration's form of exclusively personal nature.

However, as clarified with Article 15 of Law n. 81/2017, the hetero-organization requires a "functional integration" of the collaborator with the principal's activity, juxtaposing a mere "functional connection" with the latter, as required on the contrary by the co.co.co. form[130].

In this regard, the entire novel of the Jobs Act revolves around the conceptual difference between the new notion of hetero-organization and that of subordination ex-art. 2094 c.c. In this sense, the subordination is such only when it is the expression of top-down exercisable power. On the contrary, the coordination does not necessarily configure the unilateral exercise of whatsoever rules, being also developable in a bottom-up direction and in a way that allows the collaborator to determine, independently or in agreement with the counterparty, the methods, place, and times of work.

Under these terms, the discipline of subordinate work applies when the collaborator is hetero-coordinated about both methods and times and workplaces. But, on the contrary, it does not regulate the relationship whenever the collaborator is free to establish the coordination methods, whether for the time or place of work, falling likewise into the regime ex-art. 409, n. 3, of the Civil Procedure Code.

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[129] To a closer look, the Decree n. 81/2015 seems to follow, above all, the indications of international case law, especially of the European Court of Justice. On this point, the Decision 4 December 2014, C-413/13, extending the discipline of subordinate work to the relationships featured by heterorganization, interprets the latter as a condition that excludes the organizational independence of the worker, and, on the contrary, implies his inability to offer services on the market directly, in its own account. By doing so, the Court identifies the area of contractual relationships that need safeguards in those relationships characterized not so much by a mere economic dependence in terms of income, but rather by a certain organizational dependence.
On the theme note: ICHINO P., Sulla questione del lavoro non subordinato ma sostanzialmente nel diritto Europeo e in quello degli stati membri, in *Rivista Italiana di Diritto del Lavoro*, Vol. 2, 2015.

[130] BELLOMO F., FERRARO S., Modern Forms of Work: A European Comparative Study, Sapienza Università Editrice, Roma, 2020, p. 145.

II.II. Relevant case law: premise

After observing the main traits of labor law, it is useful to see how these rules have been applied in the Italian Courtrooms.

The case law has shown *ab initio* an objective difficulty in establishing the exact nature of the rider's employment relationship.

Starting with the Foodora ruling, Courtrooms have fed scholars' doubt with further insights. While the question had already been gone under the lent of case law, with the so-called pony express case, the interpretation of these more modern figures has shown the necessity for new approaches and, also, a delicate opera of adaptation to the actual socio-economic context.

In this regard, it is interesting to note how different judges, including the Supreme Court, have argued the question, first relying on the characteristics of the working performance and then analyzing what the model hides in concrete, including its real work conditions.

II.III. The Foodora case: the contract.

For our interest here, the case law analysis cannot disregard comprehending the company's modus operandi and the main clauses regulating the labor agreement between the parties.

In this respect, Foodora is, first of all, an intermediary that operates between a "crowd-fleet" of cyclists[131] and the customers of the affiliated restaurants, providing food delivery services through the so-called "work on-demand via app" model.

The company's business model is then quite simple. On the one hand, the local restaurants pay a commission for the visibility of an interface made for receiving orders and cover the company's delivery-related costs. On the other, the company uses an algorithm to allocate the single delivery jobs to those riders who have made themselves available by logging in onto an apposite smartphone application.

[131] TASSINARI A., MACCARONE V., The mobilization of gig economy couriers in Italy: some lessons for the trade union movement, in *Transfer: European Review of Labour and Research*, Vol. 23, No. 3, 2017, p. 353.

On the practical side, the working relationship takes place through a multimedia platform, Shyftplan, which is in charge of publishing every week the schedule of the various "slots" - i.e., the work shifts - and the corresponding number of riders required. According to its preference, the worker is free to apply or not apply for each of these slots. Moreover, he is allowed to revoke the availability eventually given earlier up to the beginning of the shift itself and not show up for work, using the "swap" or "no show" functions[132].

Each shift starts at a specific time in one of the meeting points fixed by the platform, and more precisely, when the rider logs in with his credentials and actives the satellite geolocalization system waiting for the first order.

Once the order is received, the performance consists of collecting the food, checking the effective match of the order with the meal, and carrying it to the customer[133]. The time allowed for the delivery is 30 minutes, and a penalty of 15 euros is due in case of delay.

There are no specific restrictions or requirements for the route and bicycle[134]. The only condition established by the company refers to the use of a helmet, a jacket, and a Foodora brand box to keep the food warm during the delivery, which justifies a deposit fee of 50 euros[135].

As established by the contract, the labor performance is carried out in "*full autonomy, without being subject to any subordination, hierarchical or disciplinary power, neither to constraints of presence or time of any kind towards the client, without prejudice to the necessary general coordination with the activity of the latter."* Furthermore, the single

[132] INGLESE M., Regulating the Collaborative Economy in the European Union Digital Single Market, Springer, Switzerland, 2019, p. 115.
[133] A clear explanation of this 'centralyzed' system is given by the lawyer Sergio Bonetto, and is available in: SOMMA A., Lavoro alla spina, welfare à la carte: Lavoro e Stato sociale ai tempi della gig economy, Meltemi, Roma, 2019.
[134] Except for the one related to the compliance with the safety legislation. As stated in the contract, in fact, the deliveryman undertakes to use a bicycle that is *"idonea e dotata di tutti i requisiti richiesti dalla legge per la circolazione".*
[135] As already observed, these conditions, and namely the obligation to wear and exhibit the company brand, are common to all the mayor operating food delivery enterprises. See BIASI M., Dai pony express ai riders di Foodora: l'attualità del binomio subordinazione-autonomia (e del relativo metodo di indagine) quale alternativa all'affannosa ricerca di inedite categorie, in *Bollettino ADAPT*, working paper No. 11, ADAPT University Press, 2017.

delivery does not give - at least in origin[136] - the right to any compensation since the element financially relevant for the rider consists in its availability, paid through an hourly wage of 5.60 euros - gross of tax and social security withholdings.

II.IV. The Decision of the Court of Turin.

The judicial proceedings unfold in three stages, starting from May 7, 2018, with the Decision Court of Turin n. 778.

The case *de quo,* which corresponds to the first instance of judgment, regards the request for ascertaining the subordinate nature of the employment relationship between the parties (with the related claims for payment of the wage differences and verification of the nullity, ineffectiveness, or illegality of the dismissal), in addition to some ancillary questions relating to the violation of the rules on privacy, remote control, and accident prevention.

Prima facie, the sentence would seem to deal with two issues, both abstractly ascribable to the socio-historical context to which "riders" belong[137]. The first question concerns the possibility of classifying a worker as subordinate wherever he is free to choose whether to work in response to the employer's request. The second one is related to the boundary between the "coordination", typical of coordinated and continuous collaborations, and the heterodirection proper of the subordination's forms[138].

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[136] The shift from an hourly wage to piece work compensation is the main cause of the loud protests that took place in the autmun of 2016 and led, on the one hand, Foodora to dismiss them by deactivating the riders account and, on the other hand, the same riders to suit the company. See: TASSINARI A., MACCARONE V., The mobilisation of gig economy couriers in Italy: some lessons for the trade union movement*, Op. Cit.*, p. 354; FLORCZAK I., KENNER J., OTTO M., Precarious Work: The Challenge for Labour Law in Europe, Edward Elgar Publishing, Cheltenham, 2019, p. 193.

[137] As noted by many scholars, this would have been a compelling need in order to rule on this case. Above all, see: MASSA PINTO I., La libertà dei fattorini di non lavorare e il silenzio sulla Costituzione: note in margine alla sentenza Foodora (Tribunale di Torino, sent. n. 778 del 2018), in *Osservatorio Costituzionale*, Vol. 2, 2018; Nonethless, on this point, a contrary opinion is also appreciable. See BIASI M., L'inquadramento giuridico dei riders alla prova della giurisprudenza, in *Lavoro Diritti Europa*, Vol. 2, 2018, p. 4, in particular where the A. observes how: «trasferire nel discorso in oggetto riferimenti alle condizioni socio/economiche generali [..] rischia di offuscare il punto di vista giuridico che deve assitere l'interprete nel procedimento di qualificazione».

[138] See GIARDETTI M., Lavoro autonomo, libertà di inizio e di svolgimento concreto della prestazione", commento a sentenza Tribunale Lavoro di Torino n. 1853/2018, in *il Giuslavorista*, Giuffrè, 2018, p. 1.

However, as pointed out by the same Court, the ruling exclusively concerns what is demanded explicitly by the applicants. Hence it does not consider questions relating to the adequacy of remuneration and the alleged exploitation of workers by the company, nor all the other complex matters of the platform economy[139].

In the first place, the applicants claim their *status* of employees relying on a set of indicators already in themself symptomatic of subordination, like the obligatory character of the performance, the hetero-determination (especially about time and place of work), the control exercised by the platform, and the submission to its disciplinary power. In the alternative, they demand applying those safeguards provided by Article 2 of the Legislative Decree n. 81 of 2015, the regime of hetero-organized collaboration. More in detail, according to their motivations:

- they can apply for a job by picking up a slot, but once the slot is assigned, they cannot refrain from rendering the performance without asking for its reassignment;
- they have to follow specific instructions about the starting points and delivery schedules, also being subject to the platform's control, both through productivity monitoring and through geolocalization techniques;

[139] The Court start its reasoning with the lapidary premise: *«La controversia ha per oggetto esclusivamente la domanda di accertamento della natura subordinata del rapporto di lavoro intercorso tra le parti [..] In questa sentenza non verranno quindi prese in considerazione le questioni relative all'adeguatezza del compenso e al presunto sfruttamento dei lavoratori da parte dell'azienda, né tutte le altre complesse problematiche della c.d. Gig Economy*». According to many, this is the key to the final decision since it is the aspect that most influences the judges in their logical-reconstructive process. See: TULLINI P., Prime riflessioni dopo la sentenza di Torino sul caso Foodora: la qualificazione giuridica dei rapporti di lavoro dei gig-workers: nuove pronunce e vecchi approcci metodologici, in *Lavoro Diritti Europa*, Vol. 1, 2018, p. 1, where the A. states: «si tratta di una precisa scelta metodologica, quasi una sorta di *caveat*, con cui i Giudici dichiarano di non volersi occupare dei presupposti sostanziali del rapporto lavorativo dei riders [..] né della loro condizione materiale". Again, see: MASSA PINTO I., *Op. Cit.*, p. 3, according to whom: "a fronte di questa lapidaria premessa, la prima questione che si pone è se il contesto storico-concreto [..] avrebbe dovuto essere preso in considerazione proprio al fine di attribuire un senso all'oggetto della controversia, ossia alla qualificazione del rapporto di lavoro. È proprio *quel* contesto, infatti, che, se preso in considerazione, avrebbe potuto determinare una decisione diversa: non è forse proprio *quel* contesto che fa dei fattorini dei *giggers*, dei lavoratori che prestano la loro attività in condizioni *sostanziali* di dipendenza socio-economica, cioè in condizioni tali che, se avessero potuto, avrebbero rifiutato (specie sotto il profilo dell'«adeguatezza del compenso» dichiarato espressamente dal Tribunale estraneo all'oggetto della controversia)? L'aver dissimulato [..] le immani catastrofi sociali che le attuali trasformazioni tecnologiche stanno determinando, consente al Tribunale di argomentare *come se* quel contesto [..] non esistesse: [..] *come se* le parti, poste su un piano di parità, fossero state *egualmente* libere di scegliere: i fattorini possono lavorare, ma possono anche scegliere di non lavorare».

- They are subjected to the disciplinary power of the platform, which through the preparation of a rating ranking, may exclude them from the business chat or the work shifts[140].

Having clear such premises, the Court aims to assess the effective subsistence of subordination.

In his logical path, the Judge retraces and evaluates all the conditions underlying the labor contract[141], starting from the considerations that emerged from the investigation and the general methods of carrying out the service.

More in detail, the whole framework revolves around two fundamental concepts: a) the effective right of the service provider to choose whether to work or not; b) the nature of the relationship between the parties once the work is chosen[142].

As for point a), the Court notes that the rider is free to give its availability for one or more slots among those published weekly by the company, but he is not obligated to do so, also being free not to accept the performance even when it has been previously confirmed through a fleet manager. In this sense, the relationship's salient traits lie in the absence of the obligation to make the delivery - once the platform has requested it - and, likewise, the absence of the mutual obligation for the platform to receive the service when offered[143].

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[140] More specifically, the riders argues that Foodora imposed them specific technical directives abouth the whole food delivery process through – as recalled by the ruling: *«la determinazione del luogo e dell'orario di lavoro (punti di partenza e fasce orarie); la verifica della presenza dei riders nei punti di partenza e dell'attivazione del loro profilo sull'applicazione; il richiamo dei lavoratori che tardavano ad accettare l'ordine; la necessità, in caso di impossibilità di svolgere la prestazione lavorativa, di inooltrare ai superiori la richiesta di riassegnazione dell'ordine; l'obbligo di effettuare la consegna dei prodotti in tempi prestabiliti, seguendo il percorso suggerito attraverso il GPS dalla stessa applicazione; lo svolgimento di attività promozionali del brand Foodora; l'esercizio del potere di controllo e di vigilanza, attraverso il monitoraggio della produttività dei singoli lavoratori».*

[141] The Court relies all its considerations on the unrelevance of the *nomen juris* of the labour contract, also quoting a fundamental principle emerged from the preceeding case-law, according to which: «*ai fini della determinazione della natura autonoma o subordinata di un rapporto di lavoro, la formale qualificazione operata dalle parti in sede di conclusione del contratto individuale, seppure rilevante, non è determinante, posto che le parti, pur volendo attuare un rapporto di lavoro subordinato, potrebbero avere simulatamente dichiarato di volere un rapporto autonomo al fine di eludere la disciplina legale in materia (Cass. 19.8.2013 n. 19199; Cass. 8.4.2015 n. 7024; Cass. 1.3.2018 n. 4884)».*

[142] GIARDETTI M., *Op. Cit.*, p. 3.

[143] As remarked by someone, this circumstance would not be just the main argumentation supporting the autonomous nature of the relationship, but it would be the one and only. On the so-called "teoria dell'argomento unico" see the toughts of the lawyer Sergio Bonetto, in SOMMA A., *Op. Cit.*; Also see: TULLINI P., *Op. Cit.*, pp. 3-5.

Along this line, the same Court agrees that the employer cannot demand the service's execution and that he cannot exercise any managerial or organizational power, as required under the bond of subordination. In short, the same freedom to adhere or not to the job offers, which are also addressed indiscriminately to the audience of all the subjects logged into the platform in quality of riders, is by itself in contrast with the primary element that qualifies the employment relationship, that is, the employer's possibility of obliging the employee to perform his work[144].

As for point b), nature's relationship seems not to be identified by the exercisability of the employer's typical powers, which, however, can materialize - within the same terms exposed by the riders - once the work shift begins[145].

Peculiar conditions that feature this relationship, such as the assessment of the rider's presence and account's activation, as well as the reminder calls following a delay or an order refusal, would distinguish an employment contract, except that, in a broader view, they are instrumental to the business activities, as the compliance with the delivery times and customers' needs.

As duly noted, checking the riders and soliciting or asking them for the delivery is the only way for Foodora to know how many of them are available to ensure the proper and timely performance of the service, attended that they are allowed to not show up for work without necessarily having to notify it prior. In this regard, such practices, undoubtedly qualifying elements of the contract, integrate the concept of "coordination" ex-art. 409, n. 3, of Civil Procedure Code, not being, on the other hand, attributable to that "*assiduous activity of supervision and control of the execution of work services*" already deduced by the jurisprudence concerning the element of the hetero-direction[146].

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[144] GIARDETTI M., *Op. Cit.*, p. 4.

[145] The Court argues that: *«il datore di lavoro - pur essendo privo di pretendere dal lavoratore l'esecuzione della prestazione - può in concreto cominciare ad esercitare il potere direttivo e organizzativo dal momento in cui I lavoratori vengono inseriti in un certo turno di lavoro, a seguito della disponibilità da loro manifestata*».

[146] Here, the Court, after citing the numerosity of preceeding sentences about the distinction between employment-self employment, recalls the main criteria used to determine the nature of a labor relationship, pointing out that: *«costituisce requisito fondamentale del rapporto di lavoro subordinato - ai fini della sua distinzione dal rapporto di lavoro autonomo - il vincolo di soggezione del lavoratore al potere direttivo, organizzativo e disciplinare del datore di lavoro, il quale discende dall'emanazione di ordini specifici, oltre che dall'esercizio di una assidua attività di vigilanza e controllo dell'esecuzione delle prestazioni lavorative».* Among the wide variety of rulings on the theme, the same Court indicates as one the most relevant: Cass. Civ. n. 2728/2010.

Coherently, the ruling carries on by supporting the thesis of the non-subordination with two other significant elements.

First, the platform does not unilaterally determine the working hours or the path to follow within the delivery, limiting itself to define, in addition to the departure areas, the shifts - i.e., slots - weekly available. Thus, riders are free to follow the route they prefer, choose their schedules, and not give any availability.

Second, the platform does not exercise disciplinary power. Foodora, *de facto*, seems to have never imposed sanctions, neither through verbal warning nor with the temporary or definitive exclusion from company chat or work shifts. On the theme, the Court deems that any allegation does not correspond with the preliminary findings, from which it appears that the riders revoke their availability even without noticing through the platform's apposite functions. Similarly, it argues how the formation of a rating and rewarding system, on the same line, does not represent a sanctionative measure since, for the Law, a sanction is such only when it deprives a worker of a right and, in this concrete case, riders have no any acquired right of being inserted in a chat group or a specific shift[147]. Accordingly, the conversion of the contract into an employment contract is excluded.

Finally, about the possible application of Art. 2 of Legislative Decree 81/2015, the Judge fully acknowledges the thesis for which the rule in question would be, in reality, just an apparent norm, not being, therefore, *"capable of producing new legal effects in terms of discipline applicable to the different types of employment relationships."*

The emergence of a hetero-organization related only to the times and places of work is not sufficient, again, according to the Judge - "*given that the organization on the part of the client should also pervade other aspects of the employment relationship*" - to

[147] As highlighted by the same Court: "Le sanzioni disciplinari applicate ai lavoratori subordinati - sulla base dell'art. 7 della L. 300/70 e delle disposizioni dei contratti collettivi - hanno come caratteristica comune quella di privare in via temporanea o definitiva i lavoratori dei loro diritti", so that, by the way of example *«la multa priva il lavoratore di un certo numero di ore di retribuzione; la sospensione dal lavoro e dalla retribuzione priva il lavoratore in via temporanea del diritto di effettuare la prestazione lavorativa e di ricevere la retribuzione; il licenziamento priva il lavoratore in via definitiva del diritto di lavorare e di ricevere la retribuzione».*

indulge a *vix espansiva* of the labor law, also representing a scope that is minor to that of the subordinate work ex Article 2094 of the Civil Code [148].

As a result, for the same reasons, the Court rejected the Appeal by denying all the requests advanced by the riders, which also inevitably depended on recognizing a full-fledged work relationship.

II.IV. The Decision of the Court of Milan.

A few months after the sentence of the Court of Turin, even the Labor Court of Milan, with sentence n. 1853, on September 10, 2018, rules for the first time on the classification of the so-called riders.

Just as the abovementioned ruling had stated the autonomous nature of the delivery men of Foodora, the Milanese Court reached a similar conclusion while rejecting the Appeal of one of them who had asked for the verification of the subordinate nature of his working relationship with Foodinho, a food delivery company of Glovo's group.

[148] This interpretation has been largely chriticized by the doctrine. Almost all scholars disagree on this assumption. However, it is interesting to note that, although the interpretation given by the Judge is - legally - rather suspect, the very same nature of Article 2 of Legislative Decree 81/2015 would not allow comprehending the relationship of the riders, as described here, in its field of application. In this regard, concerning both the criticism and the rewiev of the norm, note: ICHINO P., Subordinazione, autonomia e protezione del lavoro nella gigeconomy, in *Rivista Italiana di Diritto del Lavoro*, Vol. 2, 2018, pp. 298 – 299: «Questa lettura della nuova norma [..] non corrisponde all'intendimento del legislatore, che fu sicuramente: a) quello di semplificare il criterio di distinzione tra rapporti assoggettati e non assoggettati al diritto del lavoro, rendendo non più indispensabile nella maggior parte dei casi di confine la prova [..] dell'assoggettamento pieno a eterodirezione; b) quello di ampliare il campo di applicazione del diritto del lavoro in tutti i casi [..] in cui la prestazione, ancorché in ipotesi non ne sia provato l'assoggettamento pieno a eterodirezione, sia però contrattualmente vincolata a svolgersi entro il perimetro aziendale e con un vincolo d'orario. La disposizione infatti si riferisce alla generalità delle collaborazioni autonome continuative coordinate, nelle quali dunque la prestazione è in qualche modo "coordinata", ovvero "organizzata" dal committente anche se non pienamente "etero diretta", per stabilire che quando questo potere di "coordinare" od "organizzare" la prestazione autonoma si spinga fino a determinarne il luogo e il tempo, tanto basta per attrarre il rapporto nell'area di applicazione della protezione forte. In questo contesto [..] l'assoggettamento della prestazione al potere organizzativo del committente, da intendersi qui come sinonimo di "potere di coordinamento", non può essere equiparato all'assoggettamento pieno a eterodirezione. Questa equiparazione, operata invece dal Tribunale [..] priva la disposizione di qualsiasi effetto pratico, così tra l'altro contravvenendo al canone ermeneutico secondo il quale tra due significati possibili della norma deve preferirsi quello che le attribuisca un qualche effetto pratico rispetto a quello che di ogni effetto pratico la privi».

Even in this case, the ruling based the Decision on a precise and timely reconstruction of the working methods, which emerged from an extensive witness investigation. According to the evidence:

- Each delivery man has to install a mobile app on his smartphone, through which he can indicate days and hours wherein he is available to lend his work. The calendar is accessible every three days, and with the same frequency, he can book the time slots of his interest;
- The delivery man is the only one who decides whether to work or not, what days, for how many hours, and in which slots, not having in any case to guarantee a minimum number of hours of daily or weekly work;
- The company, which prepares the calendar wherein delivery man enters their availability, does not have to ensure them a minimum number of working hours;
- Within a certain time frame, the delivery man can freely modify or revoke its availabilities included in the calendar. However, he is not obliged to select and execute a minimum number of deliveries;
- In case of refusal or failure to select delivery orders, request for the reassignment of an order, or failure in logging into the platform during the slots previously selected, the delivery man downgrades within an *ad hoc* rating ranking based on a satisfaction score, which can inhibit its possibility of applying for other slots during a given time.

In the light of such factual elements, the Court excludes the existence of a legal working relationship, deeming the specific features of the performance in question incompatible with both the phases of applying to render the delivery and its effective execution.

As emerged in the first phase, the rider - once taken note of the available slots - is free to decide if and when to work, without constraints in determining *an*, *quid*, and *quantum* of performance[149]. In this regard, the Judge interprets this freedom as the clear expression of organizational autonomy. What is lacking, in the present case, is hence the submission of the applicant to the managerial, organizational, and disciplinary power of the company: in other words, the fact that the rider can decide at his discretion, from week to week, on

[149] See BIASI M, L'inquadramento giuridico dei riders alla prova della giurisprudenza, in *Op. Cit.*, Vol. 2, 2018, p. 2.

which days and on which working hours - and even deciding not to work at all - completely excludes the bond of subordination.

The incompatibility between autonomy of the deliveryman and subordination is not overcome by the specific methods of carrying out the performance set by the platform, as the execution of deliveries in the shortest possible time, and much less by the fact that the refusal of taking orders negatively affects the level of rider satisfaction. Therefore, these circumstances would not qualify the subordination, as they do not translate into the expression of the conforming power on the content and methods of the service[150].

As for the second stage, the control over delivery times cannot represent a form of employer's power, attended that such action is inherent to the nature of the service itself, that is, the home delivery of meals. At the same time, the attribution of scores - as the expression of satisfaction related to the rider's reliability degree - cannot be assimilated into the exercise of disciplinary power since this system does not give rise to the application of sanctions that are afflictive or restrict its rights. According to the Court, indeed, this would be nothing else than a reshaping of the coordination methods in function of the interest of the client to the better management of the activity, which in any case does not question the abovementioned freedom of choice relating to working days and hours, albeit within a more limited range of possibilities[151].

Moreover, to complete his analysis, the Judge argues that the subsistence of an employment relationship cannot always be certified through the so-called "subsidiary indices of subordination." Coherently with this line of thought, the recourse to these indices should be considered valid insofar as they are all – or at least the majority -

[150] In this regard the Judge correctly observes that: «*anche nel rapporto di lavoro autonomo il committente impartisce istruzioni in ordine al contenuto e agli obiettivi dell'incarico affidato e fissa standard quali/quantitativi delle prestazioni concordate, verificandone il rispetto da parte del prestatore. Né il sistema dei punteggi (misura del gradimento e dell'affidabilità del fattorino) può considerarsi assimilabile all'esercizio del potere disciplinare, non dando luogo a sanzioni afflittive o limitative dei diritti del rider, ma a una rimodulazione delle modalità organizzative che non mette in discussione la possibilità di scegliere giorni e orari di lavoro, riducendo semmai la gamma di opzioni possibili*».

[151] The Court specifically states that this scoring system: *«non dà luogo all'applicazione di sanzioni afflittive, limitative dei diritti del prestatore, ma solo ad una rimodulazione delle modalità di coordinamento in funzione dell'interesse del committente ad una più efficiente gestione dell'attività, che non mette comunque in discussione la libertà del prestatore di scegliere giorni e orari di lavoro, sia pure in un ventaglio di possibilità più limitato».*

concurrently present, thus meaningless whenever these elements are considered individually.

On this point, to classify a labor activity as an employment relationship is necessary a global evaluation, which deems them as *"concordant, serious and precise"* in revealing the effective existence of the bond of subordination.

In this case, a significant number of such clues are not recognizable to the point of representing a subordinate employment relationship since the indices present here are essentially the recurring and continuous character of the performance and the use of some working tools provided by the company, such as the smartphone application, the food box, and the portable battery charger. Again, the delivery man is not required to observe a fixed working schedule imposed by the company, nor must he be available to the latter, so he cannot consider himself consistently included in the company organization. Furthermore, he uses his vehicle for the deliveries and, instead of receiving a fixed and predetermined monthly fee, he receives a variable one, depending on the number and type of deliveries made, so that is paid not for the time in which he makes available his work energies, but rather for the results he manages to achieve.

In closing, despite the absence of a specific question, the Judge also excludes applying the discipline of subordinate work under Art. 2, paragraph 1, Legislative Decree June 15, 2015, n. 81 as the methods of execution of the performance, especially about the working hours, cannot be considered as organized by the client, since the fundamental choice about the work and rest times falls within the autonomy of the deliveryman, who exercises it when he expresses his willingness to work on certain days and times and not on others. Coherently with this line of thought, the fact that, in the concrete performance of the activity, the deliveryman, once he has accepted an order, is required to complete it in the shortest possible time does not integrate the abovementioned parameter, as it does not configure an organization of working times.

II.V. The Decision of the Court of Appeal of Turin.

With the sentence on January 11, 2019, n. 26, the Court of Appeal of Turin reforms the prior ruling reached by the Court just a year earlier. The Appeal takes the cue from two main criticisms. The first is that the Decision of the Court of Turin has given excessive importance to the formal qualification of the employment relationship without considering the parties' behavior during the pre-contractual phase or the actual methods for carrying out the performance[152]. The second focuses on evaluating the evidence previously admitted and acquired in the first instance, from which it would seem to emerge the subjection of the riders to the organizational and managerial power of the employer[153].

More in detail, the Appeal relies on the belief that the freedom to work or not within a slot represents just an external element to the classification of the relationship, coherently with a recent ruling of the Court of Cassation in a similar case[154]. In the alternative, the applicants criticize the interpretation of Art. 2, legislative decree n. 81 of 2015, according to which the rule would attribute to subordination a narrower scope than that of Art. 2094 of the Italian Civil Code frustrating the original *intentio* of the legislator to ensure even the autonomous and coordinated working performances the guarantees provided within the subordinate employment relationship.

In light of such requests, the Court retrace the hallmarks of the contract between the parties. Doing this starts from the eventual subsistence of a bond of subordination. Then it considers the possibility of configuring the relationship as a different collaboration form, thus excluding the presence of such a constraint.

According to the Judge, on the one hand, the performance is not mandatory. Unlike an employee, who, except for certain conditions, always has to perform his tasks, the

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[152] This thesis, which is also well illustrated in SOMMA A., *Op. Cit.*, is in sharp contrast with the whole premise with which the Court introduce its consideration in the first instance. In this regard, it is interesting to note the original quote of the Court of Appeal, that says: *«assume allora rilevanza (anche se non decisiva ma comunque rafforzativa circa la valutazione autonoma dei rapporti di lavoro oggetto di causa) il nomen juris concordemente adoperato dalle parti in sede di conclusione dell'accordo, proprio ai fini della qualificazione del rapporto medesimo».*

[153] See MEIFFRET F., L'appello di Torino sul caso dei riders di Foodora: la terza via tra autonomia e subordinazione, nota a: Corte appello Torino, 04 febbraio 2019, n. 26, sez. lav., in *Il giuslavorista*, Giuffrè, 2019.

[154] Specifically, the Court recalls: Cass., February 13, 2018, n. 3457.

deliveryman has no obligations. Moreover, the client could dispose of the performance only following an express candidature for a pre-established time slot. The shift is not imposed but results from a free choice left to the deliveryman.

On the other hand, this form of collaboration could not even be defined as "coordinated and continued." By having predetermined times and places of delivery, the performance provides, in fact, effective functional integration of the rider in the customer's production organization.

Hence, according to the Court, the present case is a clear example of the type identified by Art. 2 of the Decree n. 81/2015, that is to say, that provision was introduced to ensure to some categories of coordinated and autonomous collaborators, so-called hetero-organized, a protection level equivalent to legal employment.

As already discussed, this norm revolves around hetero-organization: the presence of this element - to certain conditions - involves applying the rules of subordinate work to the coordinated and continuous collaboration form. In particular, the rule only applies when the collaboration relationship presents three characteristics: the relationship must have continuous character, the service must have personal nature - without, therefore, the involvement of third subjects - and the worker's performance must be organized by the client.

As recalled by circular no. 3/2016 of the Ministry of work, an example of hetero-organization can occur when a collaborator is required to observe certain working hours decided by the client and is obliged to lend his labor activity at workplaces identified by the same client[155].

However, this norm lends itself to different interpretations. In this regard, the one chosen by the Court of Appeal aims to exclude the automatic link between the organizational insertion of the collaborator and the full application of the norms on the subordinate work and recognizes the right to obtain the economic treatment established by the collective agreement, without however fully equating their relationship to

[155] Circular n. 3/2016, Ministero del Lavoro e delle Politiche Sociali, 01/02/2016: *«Ogniqualvolta il collaboratore operi all 'intemo di una organizzazione datoriale rispetto alia quale sia tenuto ad osservare determinati orari di lavoro e sia tenuto a prestare la propria attivita presso luoghi di lavoro individuati dallo stesso committente, si considerano avverate Ie condizioni di cui all'art, 2, comma I, sempre chc Ie prestazioni risultino continuative ed esclusivamente personali».*

employment. More in detail, the Court's hermeneutic option adheres, in fact, to a thesis already affirmed in doctrine following the approval of the Jobs Act, according to which the legislator would have typed, alongside subordinate work and coordinated and continuous work, a third and intermediate contractual case precisely defined by the abovementioned element[156].

The Court, on this point, takes an unprecedented position, qualifying the type of Art. 2 as a *tertium genus* and, therefore, a stand-alone and distinct category amid the subordinate work regulated by Art. 2094 of the Italian Civil Code and the coordinated and continuous collaboration forms of Art. 409 c.p.c. Consistently with this interpretation, the subsistence of such legal type would not rely on the modality of expression of the contractual will, which remains anchored to self-employment, but rather on peculiarities of the performance.

Here, the key elements in this sense are essentially two, that is to say, a kind of *"effective functional integration of the worker in the client's production organization"* and the *"continuity of the performance,"* understood in terms of "*not randomness*" and *"working activities reiterated over time."*

These two elements, according to the Court, would be recognizable in the *case de quo* since "*the applicants work based on a "shift assignation" established by the appellant*" and "*the client predetermined the departure areas and delivery times."* However, their presence would not affect the qualification of the relationship, which remains technically autonomous but becomes somehow subject to the discipline of subordinate work.

For this purpose, the critical point of the Court's judgment - and the doctrine that supports the typological autonomy of hetero-organized collaborations from the relationship ex-art. 2094 c.c - is that of understanding which safeguards, among those of subordinate work, can be extended[157].

In particular, according to the Court of Appeal, such provisions are applied limitedly to the aspects relating to remuneration, safety and hygiene, time limits, holidays, and social security (with the rejection of claims for compensation related to the illegality of

[156] See FALASCA G., Riders, parasubordinati ma con tutele del lavoro dipendente, in *Guida al Lavoro*, No. 4, Il Sole 24 Ore, 2019.
[157] See DELLE CAVE M., Ai riders spettano maggiori tutele, ma sono lavoratori autonomi, in *Guida al lavoro*, No. 7, Il sole 24 ore, 2019.

the dismissal). On this point, the main legislative reference remains that of Art. 36 of the Constitution, which attaches the concept of "fair salary" to a parametric valuation usually corresponding to contractual data. It is precisely through this norm that the Court recalls the framework and remuneration applicable, thus stating - given the absence of a previous specific collective bargaining - the implementation of the C.C.N.L. of the Freight Transport Logistics sector.

II. VI. The Decision of the Supreme Court.

The third and last stage of the Foodora dispute occurred on January 24, 2020, with the sentence n. 1663, relating to the Appeal proposed by Foodora against the second instance judgment. In this sense, the Appeal to the Supreme Court aimed at refuting the interpretation of Art. 2 of Decree n. 81/2015 given (in its *ratione temporis* version)[158] by the Court of Appeal, reaffirming the previous version about the definition of this rule as merely apparent -. Indeed, with the first of the four reasons proposed, the applicant company reiterates that the legislative provision in question would not introduce a new legal category, being the hetero-organization an element already typical of subordination and then applicable where there is *«a more meaningful interference in the development of the collaboration, in excess hence the hetero-determination».*

Taking note of that, the Court rejects the Appeal. In follow this path, it confirms in the first place the preceptive content of the ruling of the Court of Appeal, which had applied Article 2 of the Legislative Decree 81/2015 to the employment relationship, considering it a collaboration organized by the client, thus falling within the discipline of subordinate work. At the same time, however, it corrects its motivations, excluding that the type pointed out in article 2 can be traced back to a *tertium genus*, intermediate between subordinate and autonomous work and with the characteristics of both categories.

[158] On the text of art. 2 of Legislative Decree n. 81 of 2015 and, more generally, on the rider's work under digital platforms, intervenes the Decree-law 3 September 2019, n. 101, converted, with amendments, into the Law November 2, 2019, n. 128. The amendments to the discipline in question are not retroactive, so the case in question considers the aforementioned Article 2 in its text before such modifications. Its last version, in particular, about the first sentence of the first paragraph of Art. 2, replaces the word "exclusively" with "predominantly" and suppresses the words "also concerning the time and place of work". In addition, the reform adds, after the first sentence, the following text: *«Le disposizioni di cui al presente comma si applicano anche qualora le modalità di esecuzione della prestazione siano organizzate mediante piattaforme anche digitali».*

After retracing – albeit with some different accentuations[159] - the hallmarks of the performance and the "lively doctrinal debate" that accompanied the entry into force of Art. 2, Legislative Decree n. 81/2015[160], the Court's line of reasoning then relies on two interesting observations. On the one hand, according to the Court, the interpreter, in any case, could not label a legislative innovation as an "apparent norm," unable to produce legal effects. On the other hand, the reform approved by such a Decree should be contextualized and interpreted in the light of its specific *ratio legis.*

About the first point, the Court remarks on the principle, well known in doctrine[161], according to which any norm has to be interpreted in the sense that it assumes some practical effect.

As for the second one, according to the same Court, the original *ratio* of the norm is, on the one hand, that of incentivizing new hiring and ensuring the stabilization of temporary and open-ended jobs, and, on the other, that of coping with the deep and rapid transformations known in recent decades in the labor market as a result of technological innovations[162]. Indeed, from an anti-elusive perspective, the so-called Jobs Act introduced some repressive measures against the abuses of the contractual types, especially to deter the masking of employment relationships.[163] Therefore, such a norm should be read

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[159] CARINCI F., L'art. 2 d.lgs. n. 81/2015 ad un primo vaglio della Suprema Corte: Cass. 24 gennaio 2020, n. 1663, in *WP CSDLE Massimo D'Antona.it*, Centre for the Study of European Labour Law "MASSIMO D'ANTONA", University of Catania, No. 414, 2020, p. 2.

[160] Such debate in doctrine is resumed by the ruling's text (pt .11). Nonetheless, this very interpretation does not seem particularly significant. Among the already known position (see *Notes* ...), indeed, the "pendulum" swung between those who intrepret Art. 2, paragraph 1, legislative decree n. 81 of 2015 as substantial reproduction of the notion of subordination, with the consequent devaluation of the term "collaboration relationships" that appears therein, and those who instead recognize a difference between subordinate work and heterorganized work, thus outlining the innovative nature of the provision since the subordinate work regime would been applied also to the autonomous collaboration. Right at this point, the positions furtherly differed on the possible application of the protective statute of subordinate work; according to someone, it should have been applied as a whole, while according to others, it should not have been applied in that part relating to the typical employer powers, amongst which the same social security regulations. With this reconstruction see: MAGNANI M., Al di là dei ciclofattorini: commento a Corte di Cassazione n. 1663/2020, in *Lavoro Diritti Europa*, Vol. 1, 2020. On this point, also note: MAIO V., Il lavoro per le piattaforme digitali tra qualificazione del rapporto e tutele, in *Argomenti di diritto del lavoro*, 2018, Vol. 3, pp. 127 ff.

[161] In this sense, in doctrine, see ICHINO P., Subordinazione, autonomia e protezione del lavoro nella gigeconomy, *Op. Cit.*

[162] See pt. 18 of the ruling's text.

[163] On this point see MARTINO V., La Cassazione colma il solco delle garanzie tra lavoro autonomo e subordinato, in *Guida al Lavoro*, Il sole 24 Ore, No. 6, 2020, p. 43: «la genesi dell'articolo 2 - efficacemente ricostruita in motivazione - porta certamente ad attribuirle evidenti finalità anti-elusive in un contesto, quale quello del Jobs Act, nel quale, in particolare con l'abrogazione del lavoro a progetto, si riesumavano

considering a necessary extension of the discipline of subordinate work to those forms of collaboration, continuous and personal, whose particular features - here identified with "*the functional interference of the organization unilaterally prepared by whom commissions the service*" - make them dangerous because of a marked regime of economic dependence.

In other terms, coordination by itself, known as the mere functional connection with the company's organization for executing the work, is not decisive for access to the protection of subordinate employment. It becomes so only when its modalities are imposed by the client, thus trespassing in hetero-organization.

In light of such premises, the sentence *de quo* deviates substantially from the interpretation offered by the Court of Appeal in both the main questions of the reformed ruling.

More in detail, the Supreme Court, in motivating the scope of Article 2, paragraph 1, embraces "the thesis of the anti-elusive and "remedial" norm, leaning on the fortunate doctrinal prospect of the norm of discipline instead of fact"[164]. As a result, such provision would not be suitable for identifying an intermediate area between the subordinate work under Art. 2094 of the Italian Civil Code and the collaborations according to Art. 409, n. 3 c.p.c., being - on the other hand - just an *escamotage* to extend to those workers - whose concrete modalities of the performance are comparable to those of an employee - an "equivalent protection"[165].

In this sense, it would be even not necessary to channel these types of collaborations - hetero-organized, personal and continuative - to one or the other negotiating scheme, that is, self-employment or employment, since the legal system provides for the case characterized by those elements the full application of the discipline of subordinate work[166].

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le vecchie collaborazioni coordinate e continuative (i cosiddetti co.co.co.), il cui possibile proliferare incontrollato andava in qualche modo arginato e contrastato».

[164] See DEL PUNTA R., Diritto del lavoro, Giuffrè, Milano, 2020, p. 372.

[165] The logical reasoning made by the Court here is well summarized in RAZZOLINI O., Confini tra subordinazione, collaborazioni etero-organizzate e lavoro autonomo coordinato: una rilettura, in *Diritto delle relazioni industriali*, No. 2, 2020, p. 347.

[166] See pt. 26 of the ruling's text.

II.VII. The Decision of the Court of Palermo.

The controversial issue about the subordinate or autonomous nature of the working relationships under a digital platform, in the wake of Foodora's case, includes a last important chapter for the annals of the Italian jurisprudence. After the last ruling of the Supreme Court, which, overturning the judgment of the first instance and reforming partially that of the Court of Appeal, declared the hetero-organization - ex-art. 2 of Legislative Decree no. 81/2015 – of the collaborations carried out by the deliverymen, a Court of Merit reinterprets such relationships, following the requests of a rider – wrongfully dismissed by the platform Foodinho[167].

With the Sentence of November 24, 2020, n. 3570, the Court of Palermo, in fact, after a meticulous performance methods evaluation, states - for the first time - the existence of a full and indeterminate employment relationship between the parties, condemning the platform manager to the reintegration of the rider in the workplace, with a classification on the VI level of the C.C.N.L. of the Tertiary Distribution and Services sector, and the payment of compensation.

Similar to the case solved by the Court of Milan, the working relationship revolves around an algorithm that calculates the demand of users for a specific area and time slot, thus establishing the work shifts for each week. The riders, who have concluded a self-employment contract, ex-art. 2222 c.c., can access these shifts after registering on the online platform and receiving an app to install on the smartphone. The performance is "constantly managed and directed by the platform, from the reception of the order until its withdrawal, delivery, and subsequent money remittance."

Once the number of riders necessary for each work session is met, the possibility of booking for the shifts is staggered over time, depending on a score of excellence, so the most productive ones enter first, while the less productive only later and only to the shifts not yet saturated or residual, thus having "less choice and consequently fewer work opportunities." This score is worth a maximum of 100, and it is calculated by considering various parameters, from the activity carried out under a "high demand" period to the

[167] In practice, the fact would consist in the unilateral disconnection from the platform, which equals to an oral dismissal.

experience, efficiency, and users' and partners' feedback. However, it can downgrade following some undesirable behaviors[168], mainly in a sanctionative view.

Under a mere practical profile, the rights and obligations of the delivery man, as reconstructed here, are essentially the same already observed in the ruling of the Court of Milan[169]. Nonetheless, according to the Judge, a noteworthy different aspect is related to the exact configuration of the platform as an employer instead of a mere intermediary[170].

Starting from this precise premise, in getting to the Decision, the Court's logical process takes the cue, in the first place, from the analysis, from a comparative perspective, of the international case law on the theme.

In this regard, it is primarily taken to reference the Judgment of the Court of Justice of the European Union (C.J.E.U., Grand Section, December 20, 2017, C-434/15), which declared the nature of transport company, ex-Art. 58, par. 1, T.F.E.U., of the Uber platform's "Elite Taxi". Following the motivations of that rulings, according to the Judge *de quo*, it is, in fact, still worthy, given the similarity between the service in both cases[171], the same conclusion, for which a company that acts by leaving no room for negotiations with its workers on essential aspects of the performance, as the cost and organization, could be only an employer[172]. Secondarily, it is considered the case of other rulings of Civil Law countries, among which the whole Foodora saga and the Decisions of the French and Spanish Courts.

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[168] As textually reported by the motivation jointed to the appeal of the riders in the case discussed in front of the Court of Milan.

[169] Decision Court of Milan, September 10, 2018, n. 1853.

[170] With their words, the Judges point out: «*se le piattaforme possono considerarsi imprese, si apre, de facto, la possibilità che I suoi collaboratori lavorino per conto (e non semplicemente in nome) della piattaforma stessa e che, dunque, siano inseriti in una organizzazione imprenditoriale, di mezzi materiali e immateriali, di proprietà e nella disponibilità della piattaforma stessa e così del suo proprietario o utilizzatore*».

[171] It is unrelevant, for this purpose, whether the service concretely refers to the transport of person or the delivery of foods.

[172]The salient treat of the European Court's judgment, in our opinion, is precisely that according to which the platform handles «*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*». See pt. 39 of the Ruling's text, CJEU, Grand Section, December 20, 2017, C-434/15. On this point, note: BARBIERI M., Il luminoso futuro di un concetto antico: la subordinazione nell'esemplare sentenza di Palermo sui riders, in *Labour and Law Issues*, Vol. 6, No. 2, 2020, p. 73.

Bypassing the merits of such a comparison, the Judge reviews the main jurisprudential approaches to resolving the present question. In doing this, it recalls two different orientations.

On the one hand, in line with the Supreme Court n. 1663/2019, it observes how the freedom allowed to the rider on when and whether to work clashes with the employee's definition, at most falling within the hetero-organized collaboration scope. On the other one - coherently with the European Union Court of Justice[173]- it makes clear that a worker who enjoys a certain level of autonomy in determining whether and when to work cannot be subordinate unless this autonomy is fictitious.

Precisely agreeing with the latter, it states that beyond the hetero-organization, also the element of the hetero-direction. In short, the Foodinho's rider is only formally able to decide the *an* and *quantum* of the performance since, although this freedom arises from the contract, this is strongly reduced by the concrete functioning of the algorithm that organizes it.

Specifically, as motivated by the ruling, the worker can choose to book the available shifts by the platform, depending on his rating. Furthermore, in order to perform the service, he must log in to the app previously to the assignment of the delivery, have the cell phone charged to at least 20%, and be in the vicinity of the restaurants where the food has to be picked up, since otherwise, the algorithm, overcoming his decisions on the shift, does not select him.

As a result, in truth, as furtherly argued by the Court, he would not be the one who chooses when to work or not since deliveries are assigned by the platform through the algorithm, with criteria completely unrelated to his preferences and his same general interest[174].

At the same time, he would also be subject to the disciplinary power exercised, via the same algorithm, according to the personal score assigned to punish the situations that do not comply with the instructions. In particular, a decrease in the ranking score would

[173] Court Order of April 22, 2020, C-692/19, with reference to Directive 2003/88 / EC of European Parliament and European Council, November 4, 2003.

[174] In this regard, the Court affirms that: «*il lavoro del ricorrente veniva gestito e organizzato dalla piattaforma (come detto organizzata unicamente da parte datoriale e nel proprio esclusivo interesse), nel senso che solo accedendo alla medesima e sottostando alle sue regole il ricorrente poteva svolgere le prestazioni di lavoro*».

result in an unjustified decrease in job opportunities, thus constituting an atypical sanctionative model.

In this sense, the ruling focuses on the guidelines that have consolidated in interpreting Art. 2094 of the Civil Code under a novel reading key, also in the light of the Directive 2019/1152 on transparent and predictable working conditions the European Union, applicable to the working relationships under the digital platforms.

In this regard, it mentions the indications of the Supreme Court (on the so-called attenuated hetero-direction) useful to detect the subordinate nature of the employment relationship - in the case of highly qualified or merely executive performances. Moreover, it recalls the approach of the Constitutional Court[175] that identifies in the so-called double alienation (of result and organization) the essence of subordination ex Art. 2094, thus attributing relevance not so much to the performance methods as to the functionality of the interest related to the activity itself and the corresponding juridical assets wherein the latter is inserted[176].

III. Work classification under the Spanish law

The preliminary analysis of the riders' legal classification in Spain, as in the Italian case, requires looking at the labor law in general terms.

First, the Spanish labor-related legislation, commonly to the Italian one, relies on as much primary as a not-negligible assumption: protecting the subordinate worker[177]. For this purpose, noting the risks around this figure, the legislator cares about balancing

[175] Constitutional Court, Decision n. 30, February 5, 1996.

[176] The Court, on this point, concludes its motivations by stating that: «*In sostanza, quindi, al di là dell'apparente e dichiarata (in contratto) libertà del rider, e del ricorrente in particolare, di scegliere i tempi di lavoro e se rendere o meno la prestazione, l'organizzazione del lavoro operata in modo esclusivo dalla parte convenuta sulla piattaforma digitale nella propria disponibilità si traduce, oltre che nell'integrazione del presupposto della eteroorganizzazione, anche nella messa a disposizione del datore di lavoro da parte del lavoratore delle proprie energie lavorative per consistenti periodi temporali (peraltro non retribuiti) e nell'esercizio da parte della convenuta di poteri di direzione e controllo, oltre che di natura latamente disciplinare, che costituiscono elementi costitutivi della fattispecie del lavoro subordinato ex art. 2094 c.c*».

[177] CHARRO BAENA C., ESPINOZA ESCOBAR J. H., SILVA DE ROA A. B., El derecho del trabajo y los colectivos vulnerables: un estudio desde las dos orillas, Dykinson, Madrid, 2017, p. 85.

employee and employer interests, strictly regulating the powers ideally exercisable by the latter in organizing, directing, and controlling the working performance.

In this regard, the institutional construction of Spanish labor law starts from a main technical distinction between the category of the "paid or dependent" work (*trabajo asalariado* or *por cuenta ajena)* and that of the "autonomous" work (*trabajo autonomo* or *por cuenta propia),* reserving to the former the protective measures provided on the field. In a nutshell, while one integrates the scope of the legal discipline, being precisely carried out through the employment contract, the other, by contrast, stands outside its area and regulatory framework[178].

As for the *Trabajo asalariado*, the Workers' Statute (*Estatuto de Los Trabajadores*[179]) set out the pillars of the legal working relationship, defining a worker as «*the one who voluntarily provides its paid services on behalf of others and within the scope of the organization and direction of another person, whether physical or legal, called employer or entrepreneur*[180]».

Thus, as formulated, the norm outlines the work as a remunerated activity to perform freely and without constrictions,[181] but still under a third subject's direction, discipline, and control. Such conditions, already defined as subordination, can manifest themselves in various ways and, according to doctrine and case law, mainly through the criteria of *"ajenidad"* and *"dependencia".*

The *ajenidad,* in particular, means the alienation from fruits or utility of the work[182], means of production[183], and market[184].

Depending on the qualification or the type of activity in concrete, this alienation assumes different shades, sometimes referring to situations anchored to specific instructions and other times to more general guidelines. However, it is always indirectly

[178] PALOMEQUE LOPEZ M. C., Trabajo Subordinado y Trabajo autonomo en el ordenamento espanol, in *Revista Gaceta Laboral,* Vol. 10, No. 1, 2004, p. 62.
[179] Ley 8/1980, de 10 de marzo, del Estatuto de los Trabajadores; from now on denominated E.T.
[180] Article 1.1. of the E.T.
[181] DEL REY GUANTER S., Estatuto de los Trabajadores, comentado y con jurisprudencia, Wolters Kluwer, 2007, p. 39.
[182] VICENTE PALACIO A., El contracto de trabajo, Derecho del trabajo*,* Aranzadi, Madrid, 2018, p. 393.
[183] ALBIOL MONTESINOS I., En torno a la polémica ajenidad-dependencia, in *Cuadernos de la Cátedra de derecho de Trabajo*, I, 1971, p. 355.
[184] ALARCÓN CARACUEL M.R., La ajenidad en el mercado: un criterio definitorio del contrato de trabajo, in *Revista espagñola de derecho del trabajo,* XXVIII, 1986, pp. 495 ff.

defined by the employer's actions, who, by organizing the productive factors, remains the only one who appropriates the revenues and assumes the corresponding risks of the business[185].

In this sense, the existence of the *ajenidad* has been tested several times in courts, which, similarly to the Italian case, have identified some indices helpful to recognize it, including the availability, for the latter, of products or services offered by the worker[186], as well as the faculty of adopting market choices like setting tariffs, selecting the customers[187]or the remuneration system[188].

As a consequence of such alienation, the *dependencia* is nothing more than the worker's subjection to the organization and management of the employer, who also directs his working performance by exercising disciplinary powers[189].

This dependence, essentially, regards the worker's alienation from business planning[190]. The latter is the one who adapts his own activity[191] - if not to the whole organization - to the goals and plans of the company[192], working exclusively and personally[193] for the employer, in an established workplace[194], according to a fixed schedule, and with a minimum wage[195].

Concerning the *trabajo autónomo*, in contrast, Article 1 of the L.E.T.A. (*Ley del Estatuto del trabajo autónomo*[196]) refers to the work[197] carried out in «a *habitual, personal, and direct way by a physical person, on his account and outside the scope of the management*

[185] BORRAJO DACRUZ E., Introducción al Derecho Español del Trabajo, Tecnos, Madrid, 1975, p. 22; BAYÓN CHACÓN G., PEREZ BOTIJA E., Manual de Derecho del Trabajo, Cometa, XI ed., I, 1978, p. 15;
[186] STS n. 7973, December, 9, 2004; STS n. 3578, March, 31, 1997;
[187] STS n. 7973, December, 9, 2004; STS n. 3060, April, 11, 1990;
[188] STS n. 7956, July, 22, 2008; STS n. 5640, October 23, 1989;
[189] In this case the subordination is not technical nor juridical *sensu estrictu*, answering instead to the evolution of the labor organization over time.
[190] STS n. 7973, December, 9, 2004;
[191] MARTÍN VALVERDE A., Relaciones de trabajo y derecho del trabajo*, Derecho del Trabajo*, Tecnos, Madrid, XXVIII ed., 2019, p. 43; ALEMÁN PÁEZ F., Trabajadores y empleadores laborales*,* Curso de derecho del trabajo, Tecnos, Madrid, 2015, 358;
[192] BARBERIO M., *Riders on the storm*.: dipendenza tecnica ed economica nel sistema spagnolo, in *Variazioni su Temi di Diritto del Lavoro*, No. 3, 2020 p. 737;
[193] VICENTE PALACIO A., *Op. cit.,* p. 389;
[194] STSJ n.1042, Murcia, December 15, 2000 (Court Order n. 2578/1997);
[195] STSJ n. 54, Valencia, January 10, 2006, (Court Order n. 3391/2005);
[196] Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo; from now on denominated LETA;
[197] Understood as an economic or professional lucrative activity;

and organization of another subject, whether through the employment of other workers or not[198]».

The habitual character, the personality, and the way of carrying out the performance outline the main characteristics of this category, which includes all those not-sporadical activities - developed with a certain frequency or continuity - wherein the worker participation plays an objectively relevant role that does not coincide with that of a mere owner or handler.

Here, autonomy is what defines, more than anything else, the working performance patterns. Contrarily to what regards the *trabajo asalariado*, the worker is indeed not subject to the typical employer's powers, being free to handle his work with no rigid constraints.

A variable autonomy's degree, however, can lie (in some situations) in a sort of partial alienation from the field of management and organization of a third party, who, remaining the performance's recipient - in any case - does not appropriate neither of the fruits nor the utility of the work. In this way, alienation is then possible yet unlikely.

In the performance execution, the Law, diversely from what happens in other jurisdictions, contemplates the possibility of employing other workers, making the autónomo theoretically an employer. In this regard, the distinction between categories - from a contractual perspective - relies upon the exclusive position of the latter, namely the one who receives services from another and not – conversely - the one who directly provides them[199].

[198] Article 1.1. of the LETA specifically refers to those who *«realicen de forma habitual, personal, directa, por cuenta propia y fuera del ámbito de dirección y organización de otra persona, una actividad económica o profesional a título lucrativo, den o no ocupación a trabajadores por cuenta ajena».*
[199] ÁLVAREZ A., CERVILLA M., CRUZ J. et Al., El estatuto del trabajo autónomo, La Ley, Madrid, 2008 p. 67.

III.I. The TRADE: trabajo autonomo economicamente dependiente.

Unlike Italy, Spain has neither recognized nor legislated the quasi-subordination with specific regulations, rather introducing a subtype of the more generic self-employment, featured by criteria that in no case imply organizational direction or alienation[200].

On this point, the Law n. 20/2007 has identified a new legal category in those who, by carrying out «*an economic or professional activity for profit and in a habitual, personal, direct and predominant way for a natural or legal person, called client*», receive from the latter «*at least 75 percent of their overall income for work and economic or professional activities*»[201].

This figure, also known as TRADE, presents *ab initio* clearer traits than those of the "para-subordination", by being, on the one hand, included in the area of self-employment and, on the other, detected by an element of dependence measured in quantitative terms[202].

Here, the Law in question, through various provisions, aims to give greater protection to autonomous collaborations, stopping the abuses of ambiguous or atypical contractual forms[203]. In this sense, the economic aspect, valued well beyond the parameters of a simple self-employed, assumes a specific weight starting when the activity performed for the client becomes almost exclusive, making the worker depend on it for his same subsistence[204].

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[200] CRUZ VILLALÓN J., El trabajo autónomo económicamente dependiente en España. Breve valoración de su impacto tras algunos años de aplicación, in *Documentación laboral*, Vol. 2, No. 98, 2013, pp. 19 ff.
[201] Article 11.1. of the LETA: «*Los trabajadores autónomos económicamente dependientes a los que se refiere el artículo 1.2.d) de la presente Ley son aquéllos que realizan una actividad económica o profesional a título lucrativo y de forma habitual, personal, directa y predominante para una persona física o jurídica, denominada cliente, del que dependen económicamente por percibir de él, al menos, el 75 por ciento de sus ingresos por rendimientos de trabajo y de actividades económicas o profesionales».*
[202] See PENSABENE LIONSANTI G., La parasubordinación en la experiencia europea: hipótesis relevantes en el ordenamiento italiano y aspectos de derecho comparado, in *Trabajo y Derecho*, No. 23, 2016, p. 5.
[203] In Spain this phenomenon is known under the expression: "falsos autonomos".
[204] In this sense, MANGLANO MOLERO C., La configuración legal del autónomo dependiente: problemas y viabilidad (Un estudio del artículo 11 de la Ley 20/2007), in *Actualidad Laboral*, No. 2, January 16, 2008, p. 3, when the Author, referring to the percentage of income reuired by the norm, states: «Se trata de un porcentaje muy elevado, que evidencia un interés del legislador en endurecer el requisito convirtiendo al *trade* en titular de una relación mucho más cercana a la exclusividad que a la simple prestación de servicios predominantes o mayoritarios a favor de un cliente; no contempla un cliente importante sino *el cliente,* del que *depende* la pervivencia profesional del *trade».*

Regarding the formalities required by the Law, the TRADE's category relies on a set of material requirements, which constitute the boundary of separation from subordinate work and, at the same time, the frontier from ordinary self-employment[205]. In this regard, a TRADE stands out from the *trabajo por cuenta ajena* based on different elements, including:

i) The personality of the performance, which implies carrying out the activity differently from those workers who provide services under any other labor contract[206];

ii) The effective ownership of the means of production, and therefore, the execution of the work through infrastructures and materials independent from the principal's labor context[207];

iii) The ownership of an own organizational structure, which translates into the development of the business with its own organizational criteria, thus without detriment to the technical indications that may come from the principal[208];

iv) The personal assumption of business risks, which turn into the right/obligation to receive an economic consideration based on the result of the activity in line with the agreement previously taken with the principal[209];

Analogously, a TRADE keeps distance from self-employment due to the joint subsistence of the following requirements:

i) The absence of employees to his service;

[205] CRUZ VILLALÓN J., *Op. Cit.*, pp. 19 ff.
[206] According to Article 11.2 lett. b) of the LETA, the performance must not be carried out «*de manera indiferenciada con los trabajadores que presten servicios bajo cualquier modalidad de contratación laboral por cuenta del cliente».*
[207] According to Article 11.2 lett. c) of the LETA «*Disponer de infraestructura productiva y material propios, necesarios para el ejercicio de la actividad e independientes de los de su cliente, cuando en dicha actividad sean relevantes económicamente*».
[208] According to Article 11.2 lett. d) of the LETA, Desarrollar su actividad con criterios organizativos propios, sin perjuicio de las indicaciones técnicas que pudiese recibir de su cliente.
[209] According to Article 11.2 lett. e) of the LETA, the TRADE must receive «*una contraprestación económica en función del resultado de su actividad, de acuerdo con lo pactado con el cliente y asumiendo riesgo y ventura de aquélla».*

ii) The gain of at least 75% of the total income from work and economic and professional activities from a unique client company[210];

iii) The total absence of subcontracting of its economic activity, hence not contracting or subcontracting, neither partially, the business with third parties, both concerning the activity contracted with the principal, from which it depends economically and the other activities that he could agree with other clients[211];

iv) The lack of a universal client base, as in the case of owners of commercial or industrial businesses, offices open to the public, and professionals who exercise their profession jointly with other fellows under a corporate regime[212].

In line with this last distinction, a TRADE, except for the particular safeguard regime he is entitled to, shares the same legal ground as an *autonomo*. In this regard, when the economic dependence threshold is lacking, he falls within the common self-employment area, attending that element of juridical dependence, which features the employment area, is either way missing.

[210] On this specific point, to clarify the doubts arises from the original wording of the norm, the Real Law Decree n. 197/2009 has stated that: «*a efectos de la determinación del trabajador autónomo económicamente dependiente a que se refiere el artículo 1.1, se entenderán como ingresos percibidos por el trabajador autónomo del cliente con quien tiene dicha relación, los rendimientos íntegros, de naturaleza dineraria o en especie, que procedan de la actividad económica o profesional realizada por aquél a título lucrativo como trabajador por cuenta propia, para el cálculo del porcentaje del 75 por ciento, los ingresos mencionados en el párrafo anterior se pondrán en relación exclusivamente con los ingresos totales percibidos por el trabajador autónomo por rendimientos de actividades económicas o profesionales como consecuencia del trabajo por cuenta propia realizado para todos los clientes, incluido el que se toma como referencia para determinar la condición de trabajador autónomo económicamente dependiente, así como los rendimientos que pudiera tener como trabajador por cuenta ajena en virtud de contrato de trabajo, bien sea con otros clientes o empresarios o con el propio cliente».* Again, the income from economics activities, according to Article 27.1 of the LETA are those: *«que procediendo del trabajo personal y del capital conjuntamente, o de uno solo de estos factores, suponga por parte del contribuyente la ordenación por cuenta propia de medios de producción y de recursos humanos o de uno de ambos, con la finalidad de intervenir en la producción o distribución de bienes o servicios».*

[211] According to Article 11.2 lett. a) of the LETA, the TRADE must: *«No tener a su cargo trabajadores por cuenta ajena ni contratar o subcontratar parte o toda la actividad con terceros, tanto respecto de la actividad contratada con el cliente del que depende económicamente como de las actividades que pudiera contratar con otros clientes».*

[212] According to Article 11.3 of the LETA: «*Los titulares de establecimientos o locales comerciales e industriales y de oficinas y despachos abiertos al público y los profesionales que ejerzan su profesión conjuntamente con otros en régimen societario o bajo cualquier otra forma jurídica admitida en derecho no tendrán en ningún caso la consideración de trabajadores autónomos económicamente dependientes».*

However, the legal recognition of this figure is essential to guarantee a level of protection that considers the peculiarities of those workers who, albeit formally framed as autonomous, share almost the same features and needs as the subordinate ones.

In this sense, TRADE is guaranteed a set of individual and collective rights typical of a legal employment relationship[213]. Workers who are framed in this category indeed benefit from special safeguards "in the case of termination (*"prestación por cese de actividad"*), maternity and paternity leave, temporary sickness (*"prestación social por incapacidad temporal"*), and beneficial social security programs for special groups (disabled, artisans or young entrepreneurs, *inter alia*)[214]".

Moreover, Articles 12 to 21 of the L.E.T.A. establish, among others[215], the right to receive a remuneration proportioned to the achievement obtained, the right to momentaneously interrupt the activity itself[216], and the right to be previously informed about the interruption and dismissal clauses[217], as well as the right to join a trade union or professional association to defend their professional interests[218] and the basic rights connected to collective bargaining[219].

II.II. Relevant Caselaw: premise.

Within the Spanish context, riders occupy a relevant part of the current debate about the need to protect workers from precariousness. Here, the rulings on the issue have mainly regarded the Deliveroo and Glovo cases, two of the main players in the market.

Even with substantial interpretative differences, the Courts have followed the path of the Italian case law, mostly concluding that they are effectively subordinate. In this context, many judgments refer to the presence of indexes helpful to retrace, or not, their

[213] See ROMAN VACA R., La figura del trabajador autónomo económicamente dependiente y su laboralización en el estatuto del trabajo autónomo, *www.adapt.it.boletin* , p. 5.
[214] CHERRY MIRIAM A., ALOISI A., Dependent Contractors in the Gig Economy: A Comparative Approach, in *Legal Studies Research Paper Series*, Saint Luis University School Of Law, No. 15, 2016, p. 27.
[215] These provisions include: the non-discrimination principle, respect for privacy and dignity, professional training and retraining, protection in matters of safety and health at work, reconciliation of the professional activity with personal and family life, and individual exercise of actions derived from the professional activity.
[216] Article 14 of the LETA.
[217] Articles 15 - 16 of the LETA.
[218] Article 19 of the LETA.
[219] Article 20 of the LETA.

working performance's features to categories different from the *Trabajo Autonomo*. The Supreme Court, with a *sui generis* approach, finally concludes that - given their specific peculiarities - they are once for all employees.

III.III. The Deliveroo's contract.

In Spain, one of the companies more active within the platform economy is Roofods S.l., owner of the digital platform Deliveroo. From a juridical point of view, this case counts several rulings to date, all stating the subsistence of a legal employment relationship[220].

Similar to the other cases, the core business of Roofods S.L. focuses on home delivery of food. For this purpose, it establishes contracts with the riders, who act as distributors. The latter can stipulate alternatively a simple self-employment contract or an economically dependent self-employment contract (TRADE).

In the case of the TRADE, their work falls within the provision of the so-called professional interest agreement (*Acuerdo de Interes Profesional,* or A.I.P.), which, as stated by the L.E.T.A., applies - *ipso iure* – after its express acceptance, following the registration to self-employed workers associations or a signatory union. According to Article 13 of the L.E.T.A., the A.I.P. regulates "the conditions related to modality, time and place of the performance", establishing that the deliveryman carries out the service according to its organizational criteria, freely deciding on times and places of work, with its materials, and assuming the risks and benefits that it entails[221].

Concerning the more practical aspects of the question, the Deliveroo business model works as follows.

First, the consumer places an order through the application and makes the related payment[222]. Second, the restaurant notifies the order acceptance through a tablet owned

[220] More in detail, the reference is to: SJS n. 6, Valencia, June 1, 2018 (Court Order n. 633/2017) which detects a legal employment relationship; SJS n. 5, Valencia, June 10, 2019 (Court Order n. 371/2018) which detects a legal employment relationship; SJS n. 31, Barcelona, June 11, 2019 (Court Order n. 662/2017) which detects a legal employment relationship; STSJ, Madrid, January 17, 2020 (Appeal n. 1323/2019), confirming the Decision SJS n. 19, Madrid, July 22, 2019 (Court Order n. 510/18), in favour of a legal employment relationship; SJS n. 2, Zaragoza, April 22, 2020 (Court Order n. 521/2018) which detects a legal employment relationship.

[221] This agreement somehow attempts to define the same characteristics of TRADE regulated by the LETA. For futher insights, note articles 9, 10, 12 of the AIP.

[222] That includes both the menu price and a further commission.

by the same platform, starting its preparation. Then, the application, handled by an algorithm, selects the best candidate to make the delivery depending on criteria such as the proximity to the collection point and his current reliability score. The rider can accept the delivery or not[223]. Once he accepted it, he would go to the restaurant to pick up the product and take it to its destination.

In order to be hired as riders, it is necessary to have a mobile phone with internet access and a vehicle, whether a bicycle or motorcycle, which the company can also provide in exchange for a deposit fee. Moreover, it is required to register within the self-employed workers' regime and subscribe to civil liability insurance.

The worker's recruiting phase starts via a website and follows with an interview, in which the company provides two explanatory videos and an information brochure on how to perform the performance. After the meeting, riders receive an email containing various indications, ranging from the behavior required by the customer to the uniform to wear, from the regime of absences to the shift system and the acceptance of orders.

To provide the service, the worker has to download an application called Deliveroo to receive the order details and another application, alien to Roofods - Staffomatic - to manage the work shifts. In addition, he has to sign in to a Telegram business chat group, wherein it is possible to communicate with the company in case of need.

If there are more requests for a single shift, Deliveroo solves the discrepancies by assigning it based on the rider's score. Once the company has assigned the corresponding shift, changes are allowed, but only if another rider gives his availability to carry it out with several days of notice. If nobody is available for the substitution, it becomes impossible to cover that shift, and the company can retaliate against the rider with some sanctions.

Digital technology allows the company to be constantly aware of the worker's status, whether or not he is available, if he is working, and the last time he made a delivery. Moreover, it constantly provides his geographical location and the time he takes to place an order so that the company could ask for explanations in case of delay.

[223] The riders may not accept the orders; however, the company encourages them to avoid any refusal because this rejection has negative consequences on their evaluation. Moreover, the company may terminate the relationship due to the repeated use of this option.

III.IV. Deliveroo Sentences.

Starting with the first sentence about Deliveroo, the Spanish jurisprudence takes as a central reference the proceedings relating to the essential features of the employment contract, thus verifying their subsistence well beyond the novelties linked to the performance methods within services made through the digital platform[224].

In this regard, the worker's subordination is apparent, considering the specificity of times and methods of work, the alienation in terms of risks and results, and the subjection to the relevant control power by the company.

More in detail, given the presence of these elements, the jurisprudence relies on the so-called "*indicios de laboradidad*", that is to say, clues proving the existence of a legal working relationship, regardless of the nature of the contract formally binding between the parties. Among these, the Courts focus their rulings precisely on[225]:

- The voluntariness of the performance;

- The remuneration system;

- The alienation;

- The worker's dependency on the counterpart.

As for the voluntariness of the performance[226], it is more than evident, according to the judges, that the rider's autonomy only refers to selecting the time slot in which doing the job. In this sense, the case of Deliveroo's workers is associable with those who voluntarily work under a part-time regime, with a single exception for the freedom the company allows in the choice of the working time frame.

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[224] As pointed out by SJS n. 6, Valencia, June 1, 2018, with sentence n. 244/2018: «*no puede sino concluirse que se dan en el concreto supuesto de hecho las notas de características de la relación laboral de ajenidad y dependencia, ya que la prestación de servicios del demandante a favor de la demandada, presenta rasgos que solo son concebibles en el trabajo dependiente y por cuenta ajena*». See LOPEZ BALAGUER M., Trabajo en plataformas digitales en España: primeras sentencias y primeras discrepancias, in *Labour and Law Issues*, Vol. 4, No. 2, 2018, pp. 53 - 77.

[225] Well known as: "*nota de voluntariedad", "nota de retribución", "nota de ajenidad", "nota de dependencia".*

[226] SJS n. 6, Valencia, June 1, 2018 (Court Order nº 633/2017); SJS n. 5, Valencia, June 10, 2019 (Court Order n. 371/2018); STSJ Madrid, January 17, 2020 (Appeal n. 1323/2019).

This characteristic, which is also quite rare to note within the employment relationship area, could, on the other hand, correspond to that autonomy degree typical of self-employment, thus excluding subordination. However, the simple review of the management of the rider's working time leads to the opposite conclusion, since the company is the subject that determines the working hours and the one that finally decides at what time the worker would perform his duties each week, sometimes also reducing the number of hours requested by the worker just to a part.

Regarding the remuneration system, the Judges note that the payment formula, which is made through invoices of the same company and connected to the number of deliveries, proves a working relationship, being interpretable as a wage[227]. Moreover, the first payment version provided by the contract, which later disappears in favor of a payment composed of two installments per month, not by chance, establishes a fee based on the hour worked[228].

As for the alienation clue, the Courts remark that Deliveroo sets the price of the rider's service and manages the conditions of the service for the affiliated restaurants and clients. In particular, in their reconstruction, the judges seem to consider mainly four aspects:

- The alienation from the benefits of the works, since they belong to the company[229]. The rider does not receive any payment from restaurants and customers, being likewise paid by the company with a fee less than the real economic value of the order.
- The alienation from the risk, since the company is the only subject that assumes the negative consequences of the delivering activity and invests a significant amount of equity capital[230].
- The alienation from the market, since neither the delivery recipient nor the restaurants are clients of the delivery man, being rather company's client, also not

[227] See again SJS n. 6, Valencia, June 1, 2018 (Court Order n. 633/2017); SJS n. 5, Valencia, June 10, 2019 (Court Order n. 371/2018); STSJ Madrid, January 17, 2020 (Appeal n. 1323/2019).
[228] This question is expressly considered in: SJS n. 2, Zaragoza, April 27, 2020 (Court Order n. 521/2018).
[229] SJS n. 31 Barcelona, June 11, 2019 (Court Order n. 662/2017); STSJ Madrid January 17, 2020 (Appeal n. 1323/2019).
[230] STSJ Madrid, January 17, 2020 (Appeal n. 1323/2019).

knowing his identifying data until the same company notifies the acceptance of the order[231].

- The alienation from the means, since the means provided by the same company, especially platform and brand, are far too relevant compared to those acquired by the rider, usually a mobile phone and a vehicle[232].

Finally, about the worker's dependence, the characteristics of the service leave the room with very few doubts about the nature of the relationship.

Among these features, in the first place, there would be a lack of decisional freedom. In short, the rider is free to choose the time slots and not to be continuously available during them. However, in this last case, he is penalized, and the company may inhibit his future possibility of booking for the work shift or even dismiss him following a certain number of order refusals. On the other hand, the freedom allowed to the worker is not as broad as it may seem since the company is the one who fixes the time slots and assigns the schedules, being, in any case, a mere expedient to mask an actual working relationship[233].

Moreover, there would be the worker's subjection to orders and instructions. In this regard, the Courts argue that failure to follow the guidelines established by the company causes a penalization that tries to break with the rider's apparent freedom[234], attended that the platform aims at ensuring the correct execution of the service by sanctioning those workers whose deliveries are poor under a qualitative or quantitative profile. Also, such freedom would be limited by the power of organizing the deliveries, keeping the constant tracking of the rider's geolocation, and imposing the places to start and end a work shift.

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[231] See SJS n. 6, Valencia, June 1, 2018 (Court Order nº 633/2017); STSJ Madrid, January 17, 2020 (Appeal n. 1323/2019); SJS n. 2, Zaragoza, April 27, 2020 (Court Order n. 521/2018).
[232] With a specific emphasis on this point: SJS n. 6, Valencia, June 1, 2018 (Court Order nº 633/2017); Valencia, June 10, 2019 (Court Order n. 371/2018); SJS n. 31, Barcelona, June 11, 2019 (Court Order n. 662/2017); STSJ Madrid, January 17, 2020 (Appeal n. 1323/2019); SJS n. 2, Zaragoza, April 27, 2020 (Court Order n. 521/2018).
[233] SJS n. 6 Valencia, June 1, 2018 (Court Order n. 633/2017); SJS n. 31, Barcelona, June 11, 2019 (Court Order n. 662/2017). SJS n. 21, Barcelona, Septmber 9, 2020 (Appeal n. 737/2017); SJS n. 21, Barcelona, January November 18, 2020 (Ruling n. 259/2020); SJS n. 21, Barcelona, January November 18, 2020 (Ruling n. 259/2020).
[234] With a focus on this point: SJS n. 21, Barcelona, January November 18, 2020 (Ruling n. 259/2020), also recalling the STSJ of Septmber 25, 2020, on Glovo's case.

III.V. Glovo's contract.

Glovo is a Spanish multinational company that offers delivery services for products of various sectors, sold through its online application[235]. In short, when a consumer places an order, the platform facilitates its transport from the store to home through riders called Glovers.

At first glance, the company adopts the same business model as Deliveroo, sharing a similar *modus operandi*.

The hiring process takes place with an information session to explain the operational profiles and the application's functioning to riders. At the same time, the execution phase does not imply the imposition of any specific time slots being available, only requiring that, in case of accepting orders, the delivery occurs within one hour, no matter the itinerary or the vehicle used for this purpose.

More in detail, the deliveryman executes the delivery under the management of an algorithm, the Glovo app. The glover can take charge of one or more orders made available by the company, depending on his physical ubication at a given time. The app works as an automatic allocation system, which follows a cost-benefits logic to seek the best possible order-delivery combination with a minimum cost level.

The glover could reject an order previously accepted, even before its execution, by notifying it via the same app. In this case, the order is reassigned to another rider without penalty. There is no obligation to place a minimum number of orders or be active for a minimum of hours a day or a week. In this sense, the company does not provide any rules, not indicating what deliveries or what shift to perform. If the rider does not activate the 'auto-assignment position on the app, no orders can enter.

The worker decides when to start and end his working day, and the activity carried out, freely selecting the orders he desires to place and rejecting what he does not want to take. In this regard, the remuneration system relies on a single order. Therefore, the higher the number of deliveries, the more attractive the overall compensation.

Each glover is linked to a rating system, which classifies them into three main categories, depending on experience and reliability: beginner, junior and senior. The

[235] The range of products sold by Glovo is quite broad. By the way of example, besides food, the offer includes pharma, beauty care products, and groceries.

highest rate corresponds to preferential access to the available delivery shifts through the app. If a rider works for at least three months without accepting the delivery, he can lose his category. Moreover, he receives a 0.3-point penalty each time he fails to activate his geolocalization or carry out the job in the time slot previously reserved. However, if such a situation is due to a just cause, the company contemplates a specific procedure to communicate the problem and then be justified, avoiding the penalizing effect.

III.VI. Glovo Sentences.

As seen, Glovo, roughly speaking, works like Deliveroo. However, since the first judgments on these companies, some peculiarities have pushed the Spanish Courts to rule differently, sometimes considering glovers as employees and others as self-employed[236].

The chronological path followed by the Judges, in any case, led to the conclusion, now well known, that the patterns between the food delivery digital platforms are too similar to justify a different employee's legal treatment.

Retracing back the argumentations made in this sense, nonetheless, it emerges that all the points that now indicate the subordinate nature of the deliveryman's activity could, under a different interpretation, drive to the opposite statement[237].

In this regard, the rulings in favor of the autonomous nature of the working relationship assume that the company is not an employer but rather a mere intermediary, which acts without assuming any responsibility towards riders and customers.

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[236] The question is rather clear already from the first two judgments on the theme, namely the judgment of the Social Court n. 6 of Valencia of June 1, 2018 (n. 244/2018), on Deliveroo, and the ruling of the Social Court n. 39 of Madrid of September 3, 2018 (n. 284/2018), on Glovo. Both sentences deal with the same issue but reach diametrically opposite conclusions. The first one declares that Deliveroo riders are subordinate workers; the second instead concludes that the so-called glovers are economically dependent self-employed workers (TRADE).

[237] Here, it has precisely been observed that: «las diferencias que en los hechos probados pueden detectarse en relación con las características de la prestación del servicio para la plataforma no son muy significativas, tanto *riders* como *glovers* trabajan en la plataforma; deciden su franja horaria; deciden si admiten o no el pedido; son puntuados o sancionados en función de esta decisión y permanecen geolocalizados durante todo el tiempo de prestación del servicio. En este sentido, es muy interesante analizar cómo a partir de unos supuestos de hecho bastante semejantes, la fundamentación jurídica de las sentencias difiere absolutamente por lo que a la valoración jurídica de los mismos se refiere en punto a la aplicación de la presunción de laboralidad del art. 8.1 ET». LOPEZ BALAGUER M., *Op. Cit.*, Vol. 4, No. 2, 2018, p. 57.

Accordingly, the latter would not imply the worker's submission to its internal organizational structure, being, on the other hand, not more than the one who sets the fee for the service, the place of provision of the same, and the tool to offer the deliveries.

At the same time, by deciding where and when to work, the deliveryman would have complete control of his activity. Here, this freedom - or autonomy – would not be threatened[238] by the generic organization of the shift made available, considered that the glover is still able to choose the hours that are most convenient for him within those offered, also being able not to work at all and even to quit the delivery in the middle of its execution[239].

Again, in the same line of thought, the guidelines provided by the company would not be enough for the existence of a legal working relationship. Within the definition of TRADE, the issuance of specific technical indications is allowed and therefore does not disqualify the worker's organizational autonomy.

Contrarily to these arguments, such elements, according to other Courts, are a clear example of employment. On this point, more rulings agree on the assessment of the already mentioned "indices de laboralidad", detecting with more or less emphasis the presence of the same one related to the Deliveroo case, that is, the voluntariness of the service, remuneration, alienation, and dependence.

As for the voluntariness of the service, the Courts, even if with different argumentations, point out quite the same aspects already noted in the Deliveroo Case, without relevant differences.

Concerning the remuneration aspect, likewise, the rulings in favor of the employment relationship note the existence of payment methods, well structured, established unilaterally by the company, and having the character of a wage[240]. Specifically, the company pays the glovers by issuing an invoice, with a fee linked to the service and a bonus based on other factors, among which the mileage run[241].

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[238] See SJS n. 2, Vigo, 12 November, 2019 (Court Order n. 971/2018);
[239] See SJS n. 1, Salamanca, June 14, 2019 (Appeal n. 133/2019); STSJ Madrid, September 19, 2019 (Appeal n. 195/2019).
[240] STSJ Asturias, July 25, 2019 (Appeal n. 1143/2019); SJS n. 1, Madrid, April 3, 2019 (Court Order n. 944/2018).
[241] SJS n. 1, Madrid, April 3, 2019 (Court Order n. 944/2018); STSJ Asturias, July 25, 2019 (Appeal n. 1143/2019); STSJ Madrid, Novemebr 27, 2019 (Appeal n. 588/2019); STJS Madrid, December 18, 2019

Again, about the alienation, even in this case, essentially the same four aspects are considered.

As for the first one, the alienation from the benefits of the work, the company is the one that sets the service conditions, deals with customers and restaurants, and receives the main fruits of the activity carried out by the glovers[242].

Regarding the alienation of risks, it seems clear the rider has the right to receive a given fee not depending on the company's financial result or the success of the delivery itself, having to communicate, due to the lack of decisional power, any unforeseen event during the execution of the performance[243].

Going further, some Courts affirm the existence of alienation from means since the company is the subject that provides, manages, and controls the most critical tool to carry out the activity, the digital platform. According to this interpretation, the relevance of the means counts, which is quite negligible in the worker's case. On the theme, other judges also value the contribution of the vehicle of the glover, nonetheless assuming that this contribution implies for himself both a possible profit arising from efficiency gains in the orders delivery and a possible risk related to the costs directly sustained[244].

Also, more Judges note the alienation from the market, given that the worker has no connection with customers and restaurants until he takes charge of the orders, thus stating that the company is the only one who can benefit from such a link[245].

In the end, other rulings point out the dependence element, concluding that, by being alien to the organization and productive structure of the work, the glover is certainly

(Appeal n. 714/2019); STSJ Madrid, February 3, 2020 (Appeal n. 749/2019); STSJ Cataluña, February 21, 2020 (Appeal n. 5613/2019).

[242] SJS n. 1, Madrid, Abril 3, 2019 (Court Order n. 944/2018); STSJ Asturias, July 25 2019 (Appeal n. 1143/2019); STSJ Madrid, November 27, 2019 (Appeal n. 588/2019); SJS n. 3, Barcelona, November 18, 2019 (Ruling n. 325/2019); STJS Madrid, December 18, 2019 (Appeal n. 714/2019); STSJ Madrid, February 3, 2020 (Appeal n. 749/2019);

[243]SJS n. 1, Madrid, April 3, 2019 (Court Order n. 944/2018); STSJ Asturias, July 25, 2019 (Appeal n. 1143/2019); SJS n. 3, Barcelona, Novemebr 18, 2019 (Ruling n. 325/2019); STSJ Madrid, Novemebr 27, 2019 (Appeal n. 588/2019); STJS Madrid, December 18, 2019 (Appeal n. 714/2019); STSJ Madrid, February 3, 2020 (Appeal n. 749/2019); STSJ Cataluña, February 21, 2020 (Appeal n. 5613/2019).

[244] On the theme, see: SJS n. 1, Salamanca, June 14, 2019 (Court Order n. 133/2019); STSJ Madrid, September 19, 2019 (Appeal n. 195/2019); SJS n. 2 Vigo, Novemeber 12, 2019 (Court Order n. 971/2018).

[245] SJS n. 1, Madrid, April 3, 2019 (Court Order n. 944/2018); STSJ Asturias, July 25, 2019 (Appeal n. 1143/2019); STSJ Madrid, 18 December, 2019 (Appeal n. 714/2019); STSJ Madrid, November 27, 2019 (Appeal n. 588/2019); STSJ Madrid, February 3, 2020 (Appeal n. 749/2019); STSJ Cataluña, February 21, 2020 (Appeal n. 5613/2019).

dependent, also subject to the organizational, managerial, and decisional power of a third party[246]. In line with such reasoning, dependence derives from some peculiar aspects of the relationship.

First of all, the company is the subject that owns and manages the platform and fixes the worker's remuneration components[247]. According to some Courts[248], the organization is the key to the glover's work as he provides services in line with the guidelines of the digital platform, which uses an algorithm to make delivery shifts available and control their execution. The same company is the one that materially exercises the direction of the riders' performance through the issuance of instructions related to company logos, worker behavior, development of the service[249], and control via a geolocalization system[250].

Secondly, the company acts as an employer when it configures the possible use of the disciplinary powers in the contract, analogously to what would happen in an employment relationship[251].

Last but not least, some judgments state the dependence starting from those elements that, by contrast, exclude it in the first place, as the freedom allowed the worker to choose schedules and orders to accept or even not to accept. In particular, this freedom would be somehow limited, as the working activity is constantly controlled by a mechanism designed by the company and implemented via the platform to measure the efficiency, quantity, and quality of the service provided[252].

[246] STSJ Cataluña, February 21, 2020 (Appeal n. 5613/2019).
[247] STSJ Madrid, Novemeber 27, 2019 (Appeal n. 588/2019); STSJ Madrid, December 18, 2019 (Appeal n. 714/2019); STSJ Madrid, February 3, 2020 (Appeal n. 749/2019).
[248] STSJ Asturias, July 25, 2019 (Appeal n. 1143/2019).
[249] SJS n. 1, Madrid, April 3, 2019 (Court Order n. 944/2018); STSJ Asturias, July 25, 2019 (Appeal n. 1143/2019).
[250] STSJ Asturias, July 25, 2019 (Appeal n. 1143/2019); STSJ Madrid, November 27, 2019 (Appeal n. 588/2019); STSJ Madrid, December 18, 2019 (Appeal n. 714/2019); STSJ Madrid, February 3, 2020 (Appeal n. 749/2019).
[251] STSJ Asturias, July 25, 2019 (Appeal n. 1143/2019).
[252] STSJ Asturias, July 25, 2019 (Appeal n. 1143/2019); SJS n. 3, Barcelona, November 18, 2019 (Ruling n. 325/2019).

III.VII. The Decision of the Supreme Court.

The last act of the Glovo saga occurs with the ruling of the Supreme Court of Madrid, with the Decision on September 25, 2020[253].

The sentence originates from a subpoena presented, first to the Social Courts of Madrid and then to the Superior Court of Justice of Madrid, by a glover to claim his *status* as an employee. These judgments initially favored the self-employed nature of his relationship, thus rejecting the claim.

On this point, the Supreme Court overcomes the previous conclusions, firmly considering his work as subordinate and falling within the employment area. In its reconstruction, after having traced back the conditions of the labor contract, the Judges, similarly to all the other cases mentioned here, focus on the alleged existence of indicators somehow connected with a legal working relationship.

In doing this, the sentence starts from a premise: the classical notion of dependence, as interpreted so far in all the disputes related to the qualification of work, needs to be changed, or better, expanded to comprehend the unprecedented situations arising from the radical change of the productive reality. In particular, according to the Judges, it is necessary to detect further clues of subordination[254] in the light of international case law and a more comprehensive evaluation of the technological impact on the work.

For this purpose, the Spanish Supreme Court has been carrying out, in the last years, an in-depth review of the employee's concept. Indeed, more or less clearly, the Court seems to have abandoned - or least reduced to a minimum - the legal dependence or the "control test" as requirements to identify a legal working relationship[255].

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[253]Supreme Court, September 25, 2020 (Appeal n. 4746/2019).

[254] In detail, the Court observes in the first place that: *«Desde la creación del derecho del trabajo hasta el momento actual hemos asistido a una evolución del requisito de dependencia-subordinación. La sentencia del Tribunal Supremo de 11 de mayo de 1979 ya matizó dicha exigencia, explicando que «la dependencia no implica una subordinación absoluta, sino sólo la inserción en el círculo rector, organizativo y disciplinario de la empresa». En la sociedad postindustrial la nota de dependencia se ha flexibilizado. Las innovaciones tecnológicas han propiciado la instauración de sistemas de control digitalizados de la prestación de servicios. La existencia de una nueva realidad productiva obliga a adaptar las notas de dependencia y ajenidad a la realidad social del tiempo en que deben aplicarse las normas»*.

[255] TODOLI SIGNES A., Comentario a la Sentencia del Tribunal Supremo español que considera a los Riders empleados laborales, In *Labour and Law Issues*, Vol. 6, No. 2, 2020, pp. 10 - 11.

In this sense, on many occasions, the Supreme Court has established that the employment area includes even those cases in which the worker is free to choose their days or hours of work, has the ownership of secondary or non-relevant work means, and assumes a part of the risk related to the working activity. At the same time, it has also been recognized that employment can exist even when the employer gives no instructions or, again, allows refusing the performance of jobs already assigned[256].

However, this ruling marks an epochal innovation, if only because it is the first to consider some peculiar criteria to distinguish the nature of the work under a digital platform. In this regard, the sentence counts some original circumstances among the novel indicators inspired by other jurisdictions.

In the first place, the Court notes four main clues:

- The rider works under a foreign brand, providing services belonging to the core business of its principal[257].
- It would be impossible to provide the service without the digital app owned by the company, attended that the tools - such as the phone and the vehicle - owned by the deliveryman are poorly relevant.
- The digital reputation system is a way to surveil and control the workers and a form of labor organization on the company's part[258].

[256] Without any distinction on the arguments claimed, see: STS July 20, 2010 (Appeal n. 3344/2009), STS january 20, 2015 (Appeal n. 587/2014) on the office cleaner; STS January 22, 2008 (Appeal n. 626/2007) on the transportes with a own vehicle; STS April 30, 2009 (Ruling n. 1701/2008), STS July 16, 2010 (Appeal n. 3391/2009, 2830/2009); STS July 19, 2010 (Appeal n. 1623/2009 y 2233/2009) on the artists; STS May 3, 2005 (Appeal n. 2606/2004) on the lawyers; STS June 21, 2011 (Appeal n. 2355/2010), STS July 14, 2016 (Appeal n. 539/2015) on the assurance agents and sub-agents; STS 16 November, 2017 (Appeal n. 2806/2015) on the translators; STS February 8, 2018 (Appeal n. 3205/2015) on the lift assembler;

[257] At a closer look, this indication is not far from the reasoning adopted on the Uber case with the ABC test by the California Supreme Court - and now incorporated into the AB5 Act. Here, note once again: TODOLI SIGNES, Comentario a la Sentencia del Tribunal Supremo, *Op. Cit.*, p. 8.

[258] On this point, it is interesting to note the arguments of the Court, which affirms: «*En la práctica este sistema de puntuación de cada repartidor condiciona su libertad de elección de horarios porque si no está disponible para prestar servicios en las franjas horarias con más demanda, su puntuación disminuye y con ella la posibilidad de que en el futuro se le encarguen más servicios y conseguir la rentabilidad económica que busca, lo que equivale a perder empleo y retribución. Además, la empresa penaliza a los repartidores, dejando de asignarles pedidos, cuando no estén operativos en las franjas reservadas, salvo causa justificada debidamente comunicada y acreditada. La consecuencia es que los repartidores compiten entre sí por las franjas horarias más productivas, existiendo una inseguridad económica derivada de la retribución a comisión sin garantía alguna de encargos mínimos, que propicia que los repartidores intenten estar disponibles el mayor período de tiempo posible para acceder a más encargos y a una mayor retribución. Se trata de un sistema productivo caracterizado por que no se exige el*

- The company is not a mere intermediary but a delivery business owner[259].

Moreover, the same Court reinforces its conviction through other observations, fully coherent with the path of interpretation assumed on the theme. Specifically, it notes that:

- The company is the one that makes all the commercial decisions of the business.
- Key elements such as the price of the services provided, the form of payment, and the remuneration system are fixed unilaterally by the company.
- The riders do not receive any fee directly from the service customers, receiving the payment from the platform just once Glovo collects the payment of the order and delivery.
- The company appropriates the work of the riders to offer it to their clients.
- The rider is not into the commercial agreements between Glovo and restaurants and much less in the relationship between Glovo and customers.

From these observations, the Supreme Court seems, on a residual basis, to link the presence of a commercial relationship within the platform work to two further essential characteristics on the part of the worker: first, the ownership of an own business structure regarding material or immaterial elements, whose relevance is such to affect, allowing or not, the working performance; second, the organization of elements that are unrelated to the lending of the workforce in the execution of the service, as the ones, more broadly, inherent to the management of the business itself[260].

cumplimiento de un horario rígido impuesto por la empresa porque las microtareas se reparten entre una pluralidad de repartidores que cobran en función de los servicios realizados, lo que garantiza que haya repartidores que acepten ese horario o servicio que deja el repartidor que no quiera trabajar».

[259] To reach its conclusions, the Supreme Court seems to rely on the judgment of the CJEU of December 20, 2017, case C-434/15, about the "Association Elite Professional Taxi", according to which the Uber's brokerage service, hence that subject that, in exchange for remuneration, uses a smartphone app to connect non-professional drivers with people who need an urban displacement, has the nature of a "service in the field of transports".

[260] TODOLI SIGNES A., Comentario a la Sentencia del Tribunal Supremo, *Op. Cit.*, p. 12.

IV. Work classification under the French Law.

As noticed above, the legal notion of subordination constitutes the keystone of the whole labor relations system for many European countries. Therefore, even in the French legal system, the bond between the worker and his principal is what primarily marks a legal working relationship[261].

In the French scenario, the criterion of legal subordination is focused, in particular, on the search for a unilateral power to command[262] or - better said -for the authority of an employer as "the only one able to issue orders and control other people's work"[263].

Given the lack of a specific norm, the notion of subordination has been historically shaped by case law; first, thanks to a set of indexes useful to identify the subsistence of the traditional bond[264]; later, through an explicit and clearer definition.

Thus, the jurisprudential address has initially concerned those relationships wherein the employer determines the contents, execution methods, and purposes of the working performance, including the eventual sanctions in case of breaches[265]. Then, over the years, it has broadened its scope to gather all any relationship where the economic

[261] See Cour de Cassation, Chmbre Sociale, 3 june, 2009: «*le lien de subordination constitue le "critère décisif" du contrat de travail et que dès lors qu'elle est exécutée, non pas à titre d'activité privée mais dans un lien de subordination, pour le compte et dans l'intérêt d'un tiers en vue de la production d'un bien ayant une valeur économique, l'activité, quelle qu'elle soit, peu important qu'elle soit ludique ou exempte de pénibilité, est une prestation de travail soumise au droit du travail*».

[262] ROSA F., Le critère du lien de subordination à l'épreuve du travail de plateforme: quelques éléments d'explication sur le contexte français, in *Labour Law Issues*, Vol. 6, No. 2, 2020, p. 148.

[263] See KESSLER F., The Concept of 'Employee': The Position in France, in *Restatement of Labour Law in Europe: The Concept of Employee*, in B. Waas and G. Heerma Van Voss (Ed.), Hart Publishing, 2017, p. 199.

[264] Such as the presence of a given form of salary or remuneration, the insertion in the productive organization of another, the absence of economic risks, the obligation to comply with given working hours etc..; In this regard, note: DIGENNARO P., Subordination or subjection? A study about the dividing line between subordinate work and self-employment in six European legal systems, in *Labor Law issues*, Vol. 6, No. 1, 2020: "Courts normally investigate whether a worker: must comply with a scheduled working time or can instead arrange it as they wish; receive remuneration on a regular basis; works on company premises and the company provide them with all necessary work equipment and materials; has a portfolio of clients; and whether the company cannot accomplish the same tasks with its own staff".

[265] «*Le lien de subordination est caractérisé par l'exécution d'un travail sous l'autorité de l'employeur qui a le pouvoir de donner des ordres et des directives, d'en contrôler l'exécution et de sanctionner les manquements de son subordonné. Le travail au sein d'un service organisé peut constituer un indice du lien de subordination lorsque l'employeur détermine unilatéralement les conditions d'exécution du travail*» Cour de Cassation, Chambre Sociale, soc., November 13, 1996.

dependence of the worker – well reflexed in his weak position within the same[266] - is equally clear[267].

In this sense, the concept of economically dependent work, among the others, has contributed to filling in the gaps of the domestic Law, which, unlikely other cases analyzed here, does not recognize an intermediate category between employment and self-employment.

With that being said, the French labor law outlines a rigid dichotomy between employee and self-employment wherein the subordinations' element frames the first, while the lack of the same, on the opposite, features - on a residual basis – the second.

In this setting, the existence of an employment contract, as well as already indicated by jurisprudence[268], is characterized by the meeting of three requirements: (i) the performance of a work provision, (ii) the remuneration of the said provision, and (iii) the *lien of subordination*, which is, in turn, characterized by the execution of the work under the authority of the employer.

At the same time, self-employment is retraceable to any occasion in which the one who lends his services defines his working conditions on his own or via "a contract issued in accordance with his client's instructions[269]".

At first glance, this could mean that whenever subordination is lacking, any working activity remains excluded from the employment area. Nonetheless, the Law – even not creating a *tertium genus* - attempts to go over this element, extending the prerogatives typical of a legal working relationship[270] to all those workers deemed, for various reasons, worthy of protection. In doing this, the system lies on two *escamotages*.

[266]Note PERULLI A., Economically dependent/quasi-subordinate (parasubordinate) employment: legal, social and economic aspects, European Union: Committee on Employment and Social Affairs, Brussels, 2003.
[267] See Cour de Cassation, Chambre Sociale, 19 December, 2000, MM Labanne v. Soc. Bastille taxi et. autre, n. 98-40572.
[268] As declared by the French Supreme Court, employment division, n. 94-13187, *Société générale* case.
[269] The self-employed is the one who defines his working conditions on his own or via "a contract issued in accordance with his client's instructions", See: KESSLER F., *Op. Cit.*, p. 199.
[270] As already pointed out, rights relating to a legal working relationship generally include: the right to a minimum wage, the rights related to paid leave, sick leave, and other allowances, the application of specific safety measures within the work environment, the right to form and be associated with a union, the possibility of participating in collective actions.

In the first place, on a presumption-based technique, the system turns *ipso iure* certain types of professions into one or the other category[271]. Accordingly, individuals registered as self-employed service providers are assumed not to be bound to the client by any employment contract for the business activity covered by this registration[272]. In the same way, workers occupying professions with an atypical relationship structure - as in the case of journalists[273], artists[274], models[275], caregivers, employees of buildings, attendants, nursing assistants[276], homeworkers[277], commercial travelers[278], and even some business managers[279] - are presumed to be employees[280].

In the second place, specific legislative provisions are adopted to enlarge the labor law area to particular cases of work organization. In this regard, Art. L 1251-64 of the Labour Code, on the so-called *portage salarial,* allows ensuring adequate protection even to these workers that, by being employed under an "umbrella company" in the quality of independent contractors[281], are free to handle their working performance autonomously, identifying potential clients and negotiating directly with them[282]. Analogously, the Law n. 856 of 2014, relating to the *Coopératives d'activité et d'emploi,* guarantees labor rights to those workers - usually known as *entrepreneurs-salariés* - who handle a project independently by working, finding clients, and delivering services in an equal independent way.

[271] The scheme is based on a *presuntio iuris tantum,* which means that there is no prejudice to the possibility of proving otherwise in court.
[272] Article L. 8221-6 of the Code du travail.
[273] Article L. 7112-1 of the Code du travail.
[274] Article L. 7121-3 of the Code du travail.
[275] Article L. 7123-3 of the Code du travail.
[276] Article L. 7211-2 of the Code du travail.
[277] Articles L. 7411-1 and L. 7412-1 of the Code du travail.
[278] Article L. 7313-1 of the Code du travail.
[279] Article L. 7321-3 of the Code du travail.
[280] On this point: DIGENNARO P., Subordination or subjection?, *Op. Cit.,* p. 28.
[281] French Law defines the *portage salarial* as an "organized group" made up of a company called "wage portage company", a client company and the employee. On the concept of *portage salarial*, see: LOUFRANI, P. Y., Le portage salarial, enfin sécurisé, in *Revue Française de Comptabilité*, No. 488, 2015, pp. 8-9.
[282] Law n. 596/2008.

IV.I. Relevant Caselaw: premise.

Since the emergence of the platform economy, the legal classification of food delivery riders, also in France, has been massively faced by the case law. Nonetheless, well before the advent of the phenomenon, the *Cour de Cassation* had already issued a judgment on the theme, qualifying taxi drivers as employees.

The reasoning of the Court, in particular, makes this Decision still applicable today, posing the legal basis for the qualification of whatever similar relationship. Considering the absence of autonomy within the working performance, riders and drivers seem to fall within the same category.

Although the performance required a car rented from the company, the drivers' working relationship did not allow the exercise of any decisional or organizational power. In the same way, riders, who are free to handle and choose their work time, are subject to the company's unilateral power to geolocalize and disconnect them from the platform.

Recently, the same *Cour de Cassation* has ruled on the TakeEat Easy case, which, alongside other - also controversial – judgments, shapes a pillar within this increasingly debated legal context.

IV.II. Relevant Case law: Take Eat Easy case

With the Decision of November 28, 2018, the French Court of Cassation qualifies as an employee a delivery man of the food delivery platform Take it Easy. The Decision in comment closes two previous rulings, which started with a subpoena proposed by a rider who claimed to recognize his contract under the terms of a legal employment relationship instead of a simple commercial agreement.

Overall, the Take Eat Easy service works as previously analyzed for Deliveroo and Glovo's cases. On the one hand, the rider can choose when to work, yet the platform does not oblige him to any delivery shift. On the other hand, the worker, who is also free not to work, is subject to a rating system based on his performance.

Here, a set of bonuses rewards the "waiting times" at the restaurant (the longer the wait, the higher the bonus) and the average kilometers traveled during the deliveries (calculated on the km run on average by the other fellows). In contrast, a penalty system applies in case of delays, non-use of the helmet, or offensive behavior towards restaurant owners and customers. Penalties make the rider lose the right to any bonuses acquired and, in given cases, can turn into a temporary or permanent exclusion from the platform[283].

With that being said, as introduced in French Law, a legal working relationship generally depends on the subjection to the three typical employer's powers and the requisites mentioned above. Nonetheless, in this case, once the working provision and the correspondent remuneration are verified, the question exclusively regards the *lien of subordination*.

In this regard, the intrinsic features of platform work have historically made the identification of this bond not so clear. On the one hand, the freedom to decide when or if to work has always seemed to be more than a simple clue when identifying to what extent the rider can control his own working performance. On the other, elements such as the absence of unilateral directives, the non-integration into the company's organization, and the ownership of means of work have shaped an image not properly coincident with that of a classic employee.

The French Courts, on the theme, already had shown some doubts, qualifying, in the first place, the relationships between the platforms *Uber* and Deliveroo and their respective workers in the self-employment area[284].

At the same time, the Appeal Court of Paris, by agreeing with Take Eat Easy's argument, had previously sustained the absence of a *lien de subordination*, noting that the worker

[283] https://www.eclavoro.it/wp-content/uploads/pdf/2020-05-20_piattaforme-digitali-cassazione-francese-tassisti-uber-riders-lavoratori-subordinati.pdf

[284] See: Conseil de Prud'Hommes de Paris, n. F16/11460, *Menard v. Sas Uber France*, January 29, 2018; Cour d'Appeal de Paris, n. S16/12875, November 22, 2017, with note of: A. DONINI, La libertà del lavoro sulle piattaforme digitali, con riguardo ai riders di Deliveroo, in *Rivista italiana di diritto del lavoro,* Vol. 2, No. 1, 2018, p. 63;

was not linked to the digital platform by any exclusivity or non-competition clause and was free to select, weekly and by himself, the time slots wherein to work or not.

However, in reforming the Court of Appeal's ruling, the Supreme Court has embraced a different point of view, judging prevalent, for qualifying purposes, not that much the will of the parties but rather the effective ways in which they give execution to it.

In detail, the Court states the subordination under Art. L. 8221-6 of the Code du Travail, overcoming the presumption of autonomy. In doing this, it relies - far beyond the mere juridical definitions[285] - on the platform habits of "giving orders and directives, controlling their execution and sanctioning breaches".

The ruling, for this purpose - also in line with a certain doctrine[286] - points out that while, on the one side, the platform has a system of bonuses, incentives, and penalties taught to be applied to the worker – thus exercising disciplinary power - on the other side, it uses an app with a geolocation system that tracks the real-time worker's movements, reflecting the exercise of a power assimilable to the control.

In line with this, the Court, reviewing the same arguments claimed in the Appeal, deems as irrelevant the higher or less freedom allowed to the counterpart in order to the working times or the possibility of working or not itself. According to the judges, once it is proven that the digital platform can act following one of these powers, *de facto*, such characteristics are enough to include the relationship within the employment area, regardless of the service provider's peculiarities.

In this sense, the notion of subordination does not escape from the classical indices already used to identify an employment relationship. Nonetheless, it is subject to a certain reinterpretation.

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[285] Here, the Court seems not to proceed by seeking the perfect correspondence between the characteristics of the working performance object of investigation and those elements -linked to the subordination concept - obtainable from the *Société générale* ruling, showing an opening towards an innovative interpretation of the subordination's indicators. See COURCOL-BOUCHARD C., Le livreur, la plateforme et la qualification du contrat, in *Revue de droit du travail*, No. 12, 2018, p. 812 ff.

[286] It was already noted that: «le livreur est certes libre de choisir les créneaux pendant lesquels il entend travailler, mais, dés lors qu'il se connecte, ilperd toute liberté piusqu'il lui faut alors accepter les courses prescrites, sauf à risquer la mise en œuvre à ses dépens de la clause résolutoire prévue au contract [..] comment ne pas y voir un pouvoir dedirection qui, s'ajoutant au pouvoir de sanction prévue par le contract, caractérise l'existence d'un état de subordination du travailleur?» See FABBRE A., Plateformes numériques: gare au tropisme "travailliste"!, in *Revue de droit du travail*, 2017, No. 3, p. 170.

Observing the case *de quo*, the judges do not consider assessing the triad of the classical definition of *lien de subordination*, deeming it more useful to dwell on the empirical and factual elements of the performance, such as the geolocalization and disconnection, to derive its presence[287].

Within this innovative approach, which formally could also be criticized, the case law reveals the will to adapt the concept of subordination to the single case and its socio-economic context, bypassing the standard assessment test to include new forms of work within the employment area[288].

[287] BARBIERI M., Della suboridnazione dei ciclofattorini, in *Labor & Law Issues*, Vol. 5, No. 2, 2019, p. 28
[288] In this sense, please note: PERULLI A., Oltre la subordinazione, la nuova tendenza espansiva del diritto del lavoro, Giappichelli, Torino, p. 56, 2021.

CHAPTER III

BETWEEN REGULATORY PROPOSALS AND VIRTUOSITY: WHAT IS NEXT?

Summary: I. The Italian Framework: Riders Decree; I.I. The Italian Scenario; II. The Spanish framework: Ley Rider; II.I. The Spanish Scenario; III. The French Framework: Loi Travail and Loi D'orientation Des Mobilités; III.I. The French scenario; IV. The EU Directive Proposal;

INTRODUCTION

Alongside the work's classification issues, already analyzed in chapter II, the platform economy has provoked the explosion of a conflict - between riders and the same food delivery digital companies - that has gone well beyond the courtrooms. Such a conflict has not initially taken shape through the traditional trade unions, which show difficulty in intercepting these types of workers. On the contrary, it has gained attention thanks to the help of a diverse system of informal unions organized on a city basis, which is currently proliferating across Europe.

Despite the relevant differences between the experiences of various countries involved, informal unions declare unanimously the difficulty of acting in a context where the platforms' business model impedes access to the traditional representation procedures. This condition, on the one hand, complicates trade union action itself. Nonetheless, on the other, it ends up soliciting innovations both in the collective practices and the work organization.

Within this scenario, the actions proposed by the same workers have been way more important than any external aggregative forms. Thanks to these, new paradigms have sprung up, opening the door to a set of new realities and inspiring other actors involved.

Cooperative forms, here, have allowed before anything else to shape a new path within the market, ensuring rights and legal contracts to all those who join them. Moreover, start-ups and virtuous enterprises have followed this positive example, showing that it is possible to overcome the limitations of a business model that does not consider the human aspect.

Even the lawmaker, on the theme, has demonstrated a certain vision. Although in different ways, in all the countries considered - including at the European level - the law has tried to dictate - or at least outline - new rules to navigate the *mare magnum* of uncertainty.

In light of this, section III aims to present the current scenario in Italy, France, and Spain. For this purpose, a brief but deep analysis depicts the respective experiences under the novel framework. Then, further insights on the new EU proposal are given.

I. The Italian framework: Riders Decree

Starting from the Italian Scenario, the lawmaker has legally tried to define the Rider's figure. In this regard, the Decree-Law September 3, 2019, n. 101 - came into force on September 5, 2019, and converted with modifications into Law n. 128/2019 - has significantly changed the Legislative Decree n. 81/2015.

On the one hand, it has rewritten the first paragraph of Art. 2, extending the scope of the hetero-organized collaborations. On the other, it has introduced minimum levels of protection for self-employed workers who deliver goods on behalf of others within urban areas via cycles or mopeds, even through digital platforms.

At a closer look, both interventions have a relevant impact on the labor regulation of the platform economy, stepping in to present, for the first time, a provision expressly referred to "ensure economic protection and legislation to specific categories of workers deemed as particularly weak[289]".

[289] This is what emerges from the premise of the Decree-Law 3 Septmeber 2019, n. 101, which identifies its aiming as that of: *«assicurare protezione economica e normativa ad alcune categorie di lavoratori particolarmente deboli, quali i lavoratori impiegati nella consegna di beni per conto altrui[..]».*

The discipline in question, translating the indications formulated by the Jurisprudence of merit on the theme, aims to expressly extend the discipline of the subordinate work to the platform workers' case[290]. In doing so, in the first place, it adopts a measure that moves all those collaborators that met given legal requirements to the field of hetero-organization.

Article 1 of the present Decree-Law - also called Riders Decree - states that the rule on the collaborations organized by the client, as discussed above, also applies to the collaboration forms through digital platforms. Moreover, the subsequent letter c) of the same Article introduces a new chapter, made of seven articles, to clarify the legal framework of the platform. In particular, according to the new Art 47-bis, a digital platform is an I.T. program or a company's procedure that, "regardless of the establishment, organize activities of goods delivery, fixing the price and determining the modalities of execution of the service"[291].

As for the first of the two novels, such Decree, from its original version - correspondent to its entry into force - to the final wording, on the occasion of its effective conversion, apports radical shifts in the same scope of Article 2 Decree 181/2015.

Indeed, it replaces the requirement of *"exclusive personality"* of the performance with that of the *"prevailing personality"* of the same, thereby extending the sphere of hetero-organization also to those collaborations wherein the collaborator, in turn, makes use - in executing the service - of the labor activity of other subjects. For the same purpose, moreover, it eliminates the reference to *"times and place of work"* contained in the previous draft of the Article, which, in the *intentio* of the 2015 legislator, would have been helpful to detect the subsistence of the then recently introduced "hetero-organization," so that to distinguish it from the mere coordination.

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[290] However, on this point, it has been noted that it is not clear whether the legislator, with the change in question, wanted to introduce an absolute presumption of hetero-organization for those collaborations that make use of digital platforms or if, more simply, limited himself to defining one of the possible one's modalities through which the hetero-organization can materialize, being, on the other hand, the judge the one who assesses the existence or not in the specific case of the requirements referred to in the first part of the first paragraph of Article 2 of Legislative Decree 81/2015. See ZAMBELLI A., Gig economy tra etero organizzazione e autonomia, in *Guida al Lavoro*, Il Sole 24 Ore, No. 46, 2019, p. 11.

[291] The Article 47-*bis*, par. 2, states that *«ai fini del presente decreto (n.d.r. D. Lgs. n. 81/2015) si considerano piattaforme digitali i programmi e le procedure informatiche delle imprese che, indipendentemente dal luogo di stabilimento, organizzano le attività di consegna di beni, fissandone il prezzo e determinando le modalità di esecuzione della prestazione».*

However, as formulated now, the norm does not regulate to what extent the preferential discipline could be effectively applied to such collaborations, thus leaving room for a certain discretion in the Court proceedings. In this sense, the broad scope of such wording seems to make the distinction between the collaborations ex-Article 1 and those ex Article 409 c.p.c. somehow more complex and less evident, complicating the interpreter's work instead of facilitating it[292].

Concerning the second significant intervention, the Decree in question, with the introduction of the recalled Chapter V-*bis* on Decree 81/2015, lays down a minimum standard of legal safeguards for the so-called riders.

Within the broader discipline related to the platform workers, in detail, the articles 47-*bis*, 47-*ter,* 47-*quarter*, 47-*quinques*, 47-*sexies*, and 47-*septies*, regulate specific protective mechanisms for those who, albeit working in the home delivery industry, remain outside the scope of Art. 2.

Art. 47-*bis*, consistently with Art. 2 of the above-cited Decree, identifies in the first place such subjects, defining them as *"self-employed workers who carry out goods delivery activities on behalf of others, in urban areas and with the help of cycles or motor vehicles through platforms also digital*[293]*"*.

To a closer look, the norm *de quo* refers to those collaborators who, by moving in urban areas by bicycle or by vehicles with two or three wheels -including limited power light quadricycles - carry out deliveries of goods. As a result, it does not apply to workers who execute another type of activity or perform deliveries through the platform by using engine-powered vehicles other than a scooter.

Specifically looking at the measures, the subsequent articles focus on formal requirements on the appropriate contractual form, minimum fees, social security contribution and compensation in case of injury, the extension of the anti-discrimination regulation, and other related rights.

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[292] In this sense: ZAMBELLI A, *Op. Cit.*, p. 12.

[293] The original wording of Art. 47, par. 1, states: *«Al fine di promuovere un'occupazione sicura e dignitosa e nella prospettiva di accrescere e riordinare i livelli di tutela per i prestatori occupati con rapporti di lavoro non subordinato, le disposizioni del presente Capo stabiliscono livelli minimi di tutela per i lavoratori impiegati nelle attività di consegna di beni per conto altrui, in ambito urbano e con l'ausilio di velocipedi o veicoli a motore di cui all'art. 47, comma 2 lettera a), del decreto legislativo 30 aprile 1992, n. 285 attraverso piattaforme anche digitali».*

In this regard, Art. 47- *ter* prescribes precise that the employment contract must have the written form *ad probationem*, providing a pecuniary sanction for the platform manager - in case of violation of this provision - determined judicially on an equitable basis and equal to at most one annuity of remuneration due to the worker.

As for the riders' fees, Article 47-*quater,* reforming a previous wording[294], entirely leaves their discipline to collective bargaining, which can, therefore, fully regulate any aspects. However, the norm establishes, in the lack of an express provision in that sense, the right of the worker to receive both a minimum hourly wage - parameterized to the minimum thresholds of the collective contracts of similar or equivalent sectors subscribed by the trade unions comparatively most representative on national territory - and an allowance not less than 10% of the remuneration for the work shifts carried out at night, during holidays or in unfavorable weather conditions, according to what determined by a special decree of the Minister of Labor and Social Policies.

Articles 47-*quinques* and 47-*sexies* extend the application of the discipline on discrimination and protection of freedom and dignity of the worker, typical of a subordinate work regime, and that on the protection of personal data, according to E.U. Regulation 2016/679 (GDPR) and Legislative Decree n. 196/2003. In particular, paragraph 2 of Art. 47 *quinquies* prohibits the "exclusion from the platform and reductions in job opportunities attributable to non-acceptance of the service".

Lastly, Article 47-*septies* introduces mandatory insurance coverage against accidents at work and occupational diseases and the obligation for the principal to respect, also regarding the latter, the laws on health and safety in the workplace under the Legislative Decree 81/2008.

[294] Initially, this norm established two rules, one on single deliveries and one on the hourly rate, leaving to the parties' autonomy and the collective bargaining eventual details. In particular, it provided that, on the one hand, the deliveries could be one of the parameters involved in determining the wage, but they can be neither the only one nor the prevailing one. On the other hand, it recognized a fee-per-hour, to the condition that the worker did at least one shift delivery during that time.

I.II The Italian Scenario

As formulated, the so-called Riders Decree does not solve the issues related to the legal nature of the employment relationship. Besides establishing a set of safeguards, indeed, it remits to the "national collective agreements stipulated by comparatively more representative trade unions" the classification of the *ciclofattorini*. As a result, they can still fall within the quasi-subordinate as much as the autonomous work.

On the one hand, the legislative opera is remarkable as it poses the legal ground to face the problem from another perspective: protecting these workers by admitting them into the well-known category of hetero-organized collaboration. On the other hand, however, it leaves a dangerous room for collective bargaining, which, by having the right to label the relationship, can also derogate the law *in peius*.

In this sense, the norm was originally bourne right to involve the social parties to negotiate the best working conditions, and in particular, to allow them to substitute the law by fixing a given remuneration package. Nonetheless, it has produced a questionable impact.

At first, the novel has opened the door to a kind of "contractualized exploitation". Here, the first National Collective Agreement for the delivery activities, signed in November 2020 between Assodelivery (the food delivery national organization)[295] and UGL Rider (a rider's trade union), represented at its best the dark side of the law. While providing workers with unprecedented rights[296], *de facto*, it took advantage by explicitly framing the contract as one of the forms ex. Article 2222 or Art. 409, 3 c.p.c., thus excluding *a priori* the subordinate nature of the working performance. As a result, it showed a clear as much as diabolical logic as it seemed to have the sole purpose of

[295] Assodelivery represents almost all the companies in the sector, including Deliveroo, Glovo, Just Eat, Socialfood, and Uber Eats, which alone account for 95% of the market.

[296] The CCNL, in detail, stated a set of conditions. Overall, it mentioned the obligation to stipulate the labor contract in written form, with explicit content, and the commitment to implement anti-discrimination regulations. Then, it affirmed the right to disconnection and the faculty to withdraw unilaterally from the contract at any time. Furthermore, it promoted the health and safety of the worker, ensuring further mandatory training, the supply of devices to be replaced periodically, and insurance coverage against damages to people or things that may occur in the working activity.

precisely evading the application of more favorable regulatory constraints, both about hetero-organized collaborations and those specific to Title V of the same reform[297].

Subsequently, jurisprudence and trade unions have contributed to filling the gaps of the Decree, interpreting the new provisions according to their *ratio*. Case law has intervened after just a few months, with two similar but different sentences. In the first place, the Court of Bologna observed that UGL, as a union, did not meet the requirements for entering into a collective agreement under articles 2 and 47 quater of Legislative Decree 81/2015, thus detecting a *contra legem* abuse of the collective bargaining[298]. Secondly, after a previous ruling in the opposite direction, the Court of Florence detected the anti-union conduct of Assodelivery, ordering the platform to terminate the contract's application[299].

In the same way, the more traditional, hence representative, trade unions have fought to raise awareness about the importance of playing straight. CGIL has been a pioneer in signing collective agreements that overcome the UGL contract's model. In doing this, it has tried to involve several players within the industry, reaching even Just Eat, the first enterprise to withdraw from Assodelivery[300].

On March 23, 2021, Nidil CGIL of Pisa, Florence, and Livorno signed the first contract for the category with Tadan - a Tuscan digital food delivery platform. The agreement qualifies riders as quasi-subordinate workers and guarantees them an hourly wage of 9 euros, delivery bonus, additional compensation for bad weather, night work, and holidays, a mileage reimbursements system, and social security protection in case of illness, accident, maternity, and unemployment. Furthermore, the contract ensures a fairer distribution of the shifts, with a guaranteed minimum number of hours, transparent

[297] This logic is well-evocated by the term *"contratto capestro"*, which has been used by scholars to describe an agreement "attraverso il quale le aziende hanno tagliato letteralmente i compensi di tutti i lavoratori fino al 50% su una singola consegna, e hanno derogato alla legge 128, che individuava i rider in riferimento alla sentenza della Corte di Cassazione come lavoratori etero-organizzati ai quali applicare la disciplina della subordinazione in tutti quei casi in cui si accerti il regime di continuità nel rapporto di lavoro"; See AVELLI A. J., Diritti per i riders, in *Lavoro Diritti Europa*, No. 1, 2021, p. 7.

[298] Tribunale di Bologna, Decree 30 giugno 2021; with note of FAVA G., Tribunale di Bologna e CCNL Riders: un'analisi al di là di apodittiche prese di posizione, in *Lavoro Diritti Europa*, No. 3, 2021.

[299] Tribunale di Firenze, n. 781/2021, with note of PELLACANI G,, Il Tribunale di Firenze, la Cgil, i riders e altre vicende L'ordinamento "intersindacale" è arrivato al capolinea?, in *ADAPT' Univeristy Press*, Working Paper No. 14, 2021.

[300]See:www.ilfattoquotidiano.it/2020/11/11/dopo-lannuncio-che-assumera-i-rider-just-eat-esce-da-assodelivery-e-ammette-il-ccnl-firmato-con-ugl-prevede- pagamento-a-cottimo/5999263/.

access to the algorithm, health and safety protections, and the exercise of fundamental trade union rights[301].

Likewise, on March 29, 2021, CGIL and Just Eat agreed, for the first time, to legally qualify riders as subordinate workers, fixing a set of conditions that, on the one hand, align with those of the logistic sector and on the other hand even extend the scope of such typical safeguards. These provisions assign riders the right to a minimum salary of 8.50 euros, increased with an exceptional contribution of 0.6 euros per hour, plus allowances for nights, holidays, and overtime work. Moreover, they guarantee a mileage reimbursement in case riders use their own transport means for the delivery, as well as a general bonus connected to the productivity and the quality of the job[302].

In light of this, riders are treated formally or informally as subordinate workers. However, for this same reason, they can remain *a la mercè* of unfair practices that aim to minimize the cost of labor regardless of anything.

Besides the new framework, in this sense, the combination of trade unions and courts has turned out to be fundamental well beyond the law's reference, with the Italian authorities covering a crucial role in stopping the increasing phenomenon of abuses and exploitation.

In this setting, the prosecutor's office of Milan has notified a sanction of 733 million euros for Deliveroo, Glovo, Just Eat, and Uber Eats, obligating them to frame riders as coordinated and continuative collaborators, regularizing their social and fiscal contributions and, more importantly, ensuring adequate safety and protection levels at work[303]. Moreover, it started an investigation on Uber Eats and its intermediary companies, unveiling a system based on the so-called "caporalato", a particular type of felony disciplined by Italian criminal law[304].

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[301] See: https://www.pisatoday.it/cronaca/accordo-sindacale-riders-tadan-toscana-pisa.html.
[302] See https://www.nidil.cgil.it/rider-accordo-tra-cgil-cisl-uil-e-just-eat/.
[303] The decision takes the cue from the specific circumstances wherein the working perfomance fit into. As stated by the Procura Della Repubblica "E' emerso infatti in maniera inequivoca che il rider non è affatto un lavoratore occasionale che svolge una prestazione in autonomia ed a titolo accessorio. Al contrario è a pieno titolo inserito nell'organizzazione d'impresa, operando all'interno del ciclo produttivo del committente che coordina la sua attività lavorativa a distanza, attraverso un'applicazione digitale preinstallata su smartphone and tablet".
[304] According to Article 603 bis. of 1), caporalato occurs whenever anyone "*recluta manodopera allo scopo di destinarla al lavoro presso terzi in condizioni di sfruttamento, approfittando dello stato di bisogno dei lavoratori; 2) utilizza, assume o impiega manodopera, anche mediante l'attivita' di intermediazione di cui*

Within this framework, the evidence has shown a fraudulent scheme wherein the company used to offer jobs mainly to immigrants to exploit their work in such a way as to jeopardize their fundamental rights.

Uber workers have turned to be recruited through a collaboration form and forced to accept an agreement that did not provide the fulfillment of the legal obligations related to allowances and social contributions. Riders were paid just 3 euros net, or even less, per order. They did not receive any tips the customers gave them through the app, nor could they have back a copy of the contract. Furthermore, under a threat of a penalty or a daily wage deduction, they were obliged to carry out as many deliveries as possible, no matter what, even in cases of illness or unavailability[305].

To tackle this, ensuring respect for reasonable working conditions, the prosecutor's office imposed a controlled administration regime, assuming the executive powers of the company[306]. Then, the Court of Milan convicted Uber and its managers to pay the damages to the whole fleet of riders. In this respect, between October 2021 and February 2022, the Judges stated first a 440000 euros compensation to 44 workers unfairly exploited and then a 500000 euros settlement to 100 riders who had brought suit as a civil party.

Within the same context, the question has been lately faced with a given foresight by the trade unions. From this perspective, the contract signed in April of 2021 between CGIL, CISL, UIL, and the Tuscany region's labor council has served as a sparring partner of case law and has opened the door to other virtuous practices in the industry.

On the one hand, the protocol, beyond the employee *status*, has granted the delivery service's quality and sustainability through three main provisions. First, it has introduced

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al numero 1), sottoponendo i lavoratori a condizioni di sfruttamento ed approfittando del loro stato di bisogno".

[305] As a result, they could not decide even their working slots, thus doing the maximum number of deliveries. To have a better comprehension of the conditions under riders used to work see: FERRI P., CARRÀ S., Il caporalato dei riders: la nuova frontiera della fattispecie interpositoria?, in *Guida al lavoro*, Sole 24 ore, No. 25, June 12, 2020, p. 81: "[..] tra gli altri: il pagamento "a cottimo", con trattamento retributivo particolarmente degradante (3 euro a consegna [..]); il reclutamento di lavoratori in stato di bisogno, reclutati proprio in ragione della provenienza da Paesi territorio di conflitti civili e razziali, richiedenti asilo politico e talvolta dimoranti presso centri di accoglienza temporanei; la richiesta di un numero di prestazioni non compatibili con la tutela minima delle condizioni fisiche del lavoratore; [..] l'applicazione di trattamenti di *malus* e punitivi[..]; la reiterata prospettazione di disattivare l'*account* [..]; la non retrocessione delle mance corrisposte dal cliente; in taluni casi perfino l'omesso versamento delle ritenute previdenziali".

[306] The sanction was lately eliminated when, in 2021, the company decided to follow a renovation path and cut the bridge with the past.

an innovative labor and welfare system with parental leave allowances, training, and workplace safety tools. Second, it has stated the right to disconnect from the platform and the right to privacy, posing a ban on using reputational ranking mechanisms to handle the working relationship. Finally, it has provided the duty to institute certified special registers for companies and employment centers to avoid illegal hiring and promote a better mindset.

On the other hand, it has driven the virtuosity of other experiences and inspired the spontaneous application of *in-melius* labor agreements, which, even not being obliged by the law nor by jurisprudence, mark the beginning of a new era for the whole sector.

Here, Just Eat Italy, right a few days after the signature of this contract, has been the first company to announce its commitment to hire as subordinate workers the more than 4000 riders that lend their services to the company[307]. In this direction, it is also noticeable the effort of other start-up and emerging companies, such as Alfonsino and So.De, which have started to adopt, without prior negotiations or attempts of collective bargaining, a legal framework that considers the needs of their fleet.

Alfonsino, in particular, is the first food delivery south-based company to have an expansion plan that counts on hiring several thousands of riders, with all the *sui generis* benefits[308]. Similarly, So.De (Social delivery) is the pioneer crowdfunding-based platform to put "his and her riders at the center, guaranteeing fair contracts, all the necessary equipment, and adequate training to cross the city safely and become reference points for the neighborhoods in which they operate[309]."

In line with that, the impact that can derive from applying a contract that encompasses social security safeguards, plus a set of benefits assimilable to the collective reference agreements, looks to change much more than simple local reality. In this sense, an

[307] See the news on: https://www.ilfattoquotidiano.it/2021/04/02/riders-ecco-perche-laccordo-con-just-eat-e-solo-il-primo-passo-nel-riconoscimento-dei-diritti/6153556/.

[308]For a complete overview of the case of Alfonsino and the figures behind its business plan, see: https://www.linkiesta.it/blog/2022/01/delivery-alfonsino-assume-2500-nuovi-rider/.

[309] According to the statement of the company on its website, So.De. is “il primo delivery etico della città di Milano. In sella alle nostre bici e cargo bike consegniamo spese a domicilio, vestiti, libri, documenti, mobili, sogni e desideri”, which aims to “rappresentare un'alternativa sostenibile al modello di delivery attuale, creando posti di lavoro dignitosi e tutelati, alimentando un circuito virtuoso di consumo consapevole e minimizzando l'impatto sull'ambiente”; See: https://so-de.it/.

increasing number of companies are embracing ethical and sustainable innovation all over the country.

Following these examples, it is logical to expect even more operators to do the same, especially under the umbrella of new trends. Here, topics like social responsibility and shared value need to be interpreted not just from a business perspective but also in respect of workers, if nothing else, to reshape the company image and thus gain a further and significant market share.

II. The Spanish Framework: Ley Rider

While Italy has circumvented the Rider's issue by drawing norms that attribute additional social rights to platform workers still considered self-employed, Spain has become the first European country to force delivery platforms to qualify their workers as employees.

After six years of conflicts, 18,000 *"falsos autonomos"* cases, and almost 50 convictions for working abuses[310], the lawmaker has approached the question from a double perspective; on the one side, by applying a legal presumption that gathers all the delivery men in the employment area; on the other side, by recognizing the right to information about the algorithmic mechanism that handles the whole working performance.

In this context, the law n 9/2021[311], after months of negotiations among the Ministry of Labor, the unions "UGT", "CCOO," and the CEOE and CEPYME companies' organizations, implied a debated reform of the Workers' Statute.

Roughly speaking, the law established an epochal change. As for the legal classification of the riders, in the light of the Supreme Court ruling[312], it stated, once and for all, that

[310] See: https://www.eldiario.es/economia/seis-anos-18-000-despues-falsos-autonomos
[311] Real Law-Decree n. 9/2021, May 11, 2021, better known as "Ley Riders".
[312] The new provision reproduces the criteria and parameters established by the Supreme Court in Decision n. 805/2020, through the principle of the prevalence of the reality over the form, also based on previous judgments such as those of February 26, 1986, or January 20, 2015, where it is highlighted the need to adapt the dependency and alienation requirements to the current context. The Premise to the present Law recalls what has been stated with that ruling, namely: «*Desde la creación del derecho del trabajo hasta el momento actual hemos asistido a una evolución del requisito de dependencia-subordinación. La sentencia del TS de 11 de mayo de 1979 ya matizó dicha exigencia, explicando que «la*

they become, under certain conditions, *ipso iure* subordinate workers. Moreover, it gave birth to an unprecedented transparency regime for the digital tools used to organize labor performance, obligating the same companies to share the technical rules that govern algorithms and artificial intelligence systems with the trade unions.

Within this setting, the provision counts one Article, which modifies Article 23 of the E.T. and introduces, in this same regulatory framework, the letter d) of Article 64, paragraph 4.

First, through an additional norm at Art. 23, the reform extends - or better reinforces - the employment presumption of the delivery men that operate under digital platforms. According to its wording, anyone *"which provides paid services consisting of the distribution of any consumer product or merchandise, for employers who exercise the powers organization, management and control directly, indirectly or implicitly, through the algorithmic management of the service handled by a digital platform"* is presumed included in the scope of Article 8.1. of E.T[313].

In short, via a four-condition assessment test, a rider is now legally considered an employee when:

- The activity is provided by a person;
- The activity consists of the distribution or delivery of any consumer product or commodity;
- The employer exercises the business powers of organization, direction, and control, whether directly, indirectly, or implicitly;
- The employer exercises such powers through an algorithm.

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dependencia no implica una subordinación absoluta, sino sólo la inserción en el círculo rector, organizativo y disciplinario de la empresa». En la sociedad postindustrial la nota de dependencia se ha flexibilizado. Las innovaciones tecnológicas han propiciado la instauración de sistemas de control digitalizados de la prestación de servicios. La existencia de una nueva realidad productiva obliga a adaptar las notas de dependencia y ajenidad a la realidad social del tiempo en que deben aplicarse las normas».

[313] Article 23 of the Ley Riders: «*Por aplicación de lo establecido en el artículo 8.1, se presume incluida en el ámbito de esta ley la actividad de las personas que presten servicios retribuidos consistentes en el reparto o distribución de cualquier producto de consumo o mercancía, por parte de empleadoras que ejercen las facultades empresariales de organización, dirección y control de forma directa, indirecta o implícita, mediante la gestión algorítmica del servicio o de las condiciones de trabajo, a través de una plataforma digital*».

As discussed above, the Supreme Court and several Merit Courts had already established the clues necessary to affirm the existence of a legal working relationship[314]. Nevertheless, the same volatility of judgments and conclusions observed here - alongside the need to standardize the sector's juridical background - has driven the legislator to intervene, even in a somewhat cryptic way.

The norm, at first glance, underlies a legal presumption that requires more elements than those required by the law to frame a relationship under the subordination area. Article 8.1 of E.T connects the "subordinate work" only to the compensation given in exchange for the performance, implying the reversal of the burden of proof whenever a service contract is remunerated[315]. However, Article 23, for this purpose, adds proof of the said four elements, somehow complicating the identification of a legal working relationship.

According to the doctrine, the norm here is the product of a composition of competing interests. On the one side, the concept of "presumption" desired by the employer slows down the rule's effectiveness, limiting its effects within the mere procedural sphere. On the other side, the formulation wanted by the unions implies the automatic inclusion of all the subjects that meet a set of requirements in the Workers' Statute[316]. As a result, Article 23 incorporates both interpretations: it constitutes a form of presumption, but in such a way that the meeting of some elements retraces materially, and not only procedurally, the worker within the employment area[317].

Then, it is arguable if such notes concur automatically because of the specific features of the activity management, that is to say, the use of an algorithm or a digital platform. On this point, the Rider Law's explanatory memorandum, which indicates the aim of

[314] On this point, the relationship between the platform and the worker had already gone under the lent of the jurisprudence. As sought in Chapter II, several Courts have noted how the powers of management, organization, and control - and consequently, the notes of dependency and alienation - could transform into reality in different ways from the classic one wherein the employer assumes the risks of the activity and is the beneficiary of its fruits. Moreover, a major case law interpretation has observed that exercising the coordination, organization, or control of the activity or holding the sanctioning power could also occur through an algorithm or information technology.

[315] Under Article 8.1 of the E.T: «*El contrato de trabajo* [..] *se presumirá existente entre todo el que presta un servicio por cuenta y dentro del ámbito de organización y dirección de otro y el que lo recibe a cambio de una retribución a aquel*».

[316] See: www.adriantodoli.com/nueva-ley-rider;

[317] A more complete comment is available in: www.adriantodoli.com/nueva-ley-rider;

reducing instability and litigiousness[318], highlights a scheme's analysis case-by-case based[319], according to which, whenever the powers of organization, direction, and control exist, the relationship's real nature depends to what extent the situation fits into the novel presumption. Accordingly, the platforms can continue to articulate their services in commercial relationships. Nonetheless, whenever the worker has a different opinion about his legal classification and wants to prove it in Court, he enjoys the support of this new argument to strengthen his position.

Secondly, with the introduction of letter d) of Article 64, paragraph 4, the reform institutes the right to know the rules and mechanisms that govern the platform. More in detail, article 64 states that *"the presence, the parameters, the rules, and the operating instructions of algorithms and artificial intelligence systems that influence the working conditions, the access or maintenance of the employment*" have to be shared with the works council[320].

The approach adopted by the law starts from the growing importance of digitalization on working and employment conditions. According to the law premise, "the changes that affect the management of business deserve particular attention" in light of the alterations they are causing to the *"traditional scheme of participation of workers in the company"*.

One of the most outstanding issues that can arise within the platform world, not by chance, is ignoring the existence and functioning of the invisible hands that head the performance. On the one hand, the technical component behind the algorithms makes

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[318] The premise of the present law, in particular, affirms: «*A la hora de justificar la concurrencia de la extraordinaria y urgente necesidad, debemos referirnos a la litigiosidad comentada en esta exposición de motivos y la doctrina contenida en la STS 805/2020, de 25 de septiembre de 2020, que impone, de lege ferenda, la adopción de una solución legislativa que procure un panorama necesario de normalización y seguridad jurídica para personas trabajadoras y empresas*».

[319] It cannot fail to take into account the part where it is declared: «*La eficacia de la nueva disposición adicional vigesimotercera, basada, como se ha expuesto, en la valoración de la naturaleza real del vínculo, va a depender en gran medida de la información verificable que se tenga acerca del desarrollo de la actividad a través de plataformas, que debe permitir discernir si las condiciones de prestación de servicios manifestadas en una relación concreta encajan en la situación descrita por dicha disposición, siempre desde el mayor respeto a los secretos industrial y comercial de las empresas conforme a la normativa, que no se ven cuestionados por esta información sobre las derivadas laborales de los algoritmos u otras operaciones matemáticas al servicio de la organización empresarial*».

[320] Article 64, par. 4, let. *d)*, according to its orginal version, states the right for the work council (*comitè de empresa*) to: «*ser informado por la empresa de los parámetros, reglas e instrucciones en los que se basan los algoritmos o sistemas de inteligencia artificial que afectan a la toma de decisiones que pueden incidir en las condiciones de trabajo, el acceso y mantenimiento del empleo, incluida la elaboración de perfiles*».

their comprehension difficult. But, on the other hand, their intangibility sometimes makes their recognition itself almost impossible[321].

In this setting, the norm aims to make workers' representatives aware of what can affect the working performance, even not being tangible. Article 64, paragraph 4, for this purpose, states that information must be provided *"at a time, in a way and with an appropriate content"*. Furthermore, it establishes that the workers' representatives must be able to "*proceed to its proper examination and prepare, where appropriate, consultation and report".*

According to this wording, the provision constitutes a right to the information. However, it does not enforce any consultation. In this sense, Article 64 fits into an obligation to satisfy a mere passive interest, with no intention to engage a higher level of participation between the social parties nor initiate a negotiation process.

As formulated, the norm refers to a subject alien to the workers, namely their representatives, and does not express any particular requisite about the communication content. As a result, it cannot be applicable if the digital platform does not have a legal representation of workers. Moreover, even if it did, this duty can always be met through a simple remission of the algorithmic rules, with no need to produce a report to facilitate or clarify their content.

Lastly, the norm includes all types of companies, not only platform-based ones[322]. Yet, its application only materializes where there is a validly constituted works council, or at least the presence of staff delegates, which usually is not a widespread reality within the platform companies[323].

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[321] It is then more than relevant a provision that explicitly sets out the obligation to give this information to their representatives, in addition to the workers themselves The Workers already have the right to be aware of that since the entry into force of Article 22 of the General Data Protection Regulation, which, through the combined reading of paragraph 1 and paragraph 2, letter c), declares that someone can "be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her" only in the case in which he or she gives his or her "explicit consense". See: www.adriantodoli.com/nueva-ley-rider;

[322] It is worth noting that the norm of Article 23 is specifically referred to the food delivery riders, whereas that of Article 64 includes under its umbrella all the platforms, even when not operating within the food delivery sector.

[323] See: www.adriantodoli.com/nueva-ley-rider; Also, note: BAYLOS GRAU A., Una breve nota sobre la ley española de la laboralidad de los riders, in *Labor & Law Issues*, Vol. 7, No. 1, 2021, p. 9;

Overall, both articles, as for their wording, can give rise to some doubts. Nonetheless, the new ley Rider seems to produce a simple as much as a relevant effect on the qualification of these workers. It includes them, once and for all, in the employment area.

II.I. The Spanish Scenario

The intention of the Spanish legislator, diversely from that of other countries, has been to trace riders into a primary legal category, not leaving their safeguards to a particular discipline provided for the "quasi-subordinate" or autonomous work.

However, beyond representing an absolute novelty, the Ley Rider has not been immune to criticism, specifically regarding the presumption of employment.

On the one hand, CCOO and UGT have argued that the law scope is not so effective as "it only applies to workers in the delivery sector" and "could have included other types of platforms work as well[324]".

On the other hand, Adigital (*Asociacion española de la economia digital*) has stressed that CEOE did not adequately represent the interests of platforms during the negotiations of the law text, not only from their perspective but also from that of the workers involved. On this point, as remarked by *Asociación Autónoma de Riders* (a riders' collective), the new provisions would undermine the same rider's wishes, who would rather embrace the flexibility typical of the self-employment regime[325].

According to the Professional Association of Self-Employed Riders (APRA), at least 10,000 delivery men out of 30000 have lost their jobs during the first months after the law's approval[326]. In addition, leading players such as Deliveroo and growing start-ups like Gorillas and Rocket have terminated their activity in the country[327].

Many platforms have adopted various formulas to avoid this regulation, meaning that only a few have improved their rider's conditions. According to the figures provided by

[324]On the theme, also RidersXDerechos (an informal rider's trade union) highlights that "the issue of bogus self-employment goes far beyond this sector";
See:https://osha.europa.eu/en/publications/spain-riders-law-new-regulation-digital-platform-work; "Spain: the 'riders' law', a new regulation on digital platform work, European Agency for Safety and Health at work, 2022, p. 5.
[325]See:https://www.politico.eu/wp-content/uploads/Letter-to-EU.pdf;
[326] See:https://asociacionautonomaderiders.es/el-pinchazo-de-la-ley-rider/;
[327]See:https://www.elperiodico.com/es/economia/;

UGT, at least 15,000 riders - three out of four of the current 20,000 - continue to work with the self-employed model[328]. As a result, those who have managed to keep their jobs are still chiefly self-employed, with just a minimal percentage of workers formally hired.

Within this context, labor authorities and unions keep the big players in the market in the spotlight for maintaining unaltered their operating model rather than applying the new norms. On the one hand, someone seems to have created a new model that, far from improving the working conditions, has focused on trying to erase any presumption of employment[329]. On the other hand, companies like Amazon have preferred to terminate any further labor contract *a priori*, thus concentrating the workloads on only previously hired employees.

As pointed out by Uber Eats in a letter to the Spanish minister of Labor, from the Rider Law's entry into force, those who have complied with the new regulation are nothing more than an exception to the rule. On its side, the company declares to have opted for outsourcing, employing workers through couriers and logistics partners. Nonetheless, it accuses other competitors of having decided to keep most of their fleet under the same legal framework.

In this regard, Uber indicates that while the rest of the platforms looked for alternatives to comply with the law, Glovo decided to continue undaunted by acting behind a new operating scheme that would jeopardize the competition. This model, which has no preceding in Spain, would work by simply avoiding falling within the employment test. In practice, by allowing a "free connection" regime, Glovo would allow riders: to decide for themselves the day and time of connection to the platform; to set their own prices; to outsource the deliveries; and to have the possibility of accepting or not a shift, without having to face any sanction[330].

Besides these practices, the Minister of Labor argues that Rider's law still shows a concrete way to protect riders' rights with the necessary flexibility that platforms need. Its assessment, on its part, is optimistic for two main reasons; on the one side, for the international echo it has obtained, which could be decisive in inspiring similar initiatives

[328]See:https://www.ugt.es/ugt-exige-la-inspeccion-de-trabajo-el-cumplimiento-de-la-sentencia-sobre-los-repartidores-de-glovo;
[329]See:https://www.bankinter.com/blog/empresas/ley-rider;
[330]See:https://www.newtral.es/ley-rider-plataformas;

in other countries; on the other side, for having enhanced the idea of - and the need for - effective collective bargaining within the sector[331].

In that respect, JustEats have been the first to welcome the novel framework, claiming it "builds the necessary legal security to operate according to two fundamental principles: to guarantee the rights of delivery workers and to ensure all operators in the sector carry out their activity under the same rules[332]." In December 2021, the company signed with the UGT and CCOO unions the first collective Agreement for a food delivery platform in the country, recognizing a compendium of minimum rights for its workers. The contract, in detail, applies a set of basic improvements, ranging from the right to a minimum salary per hour of 8.5 euros and a nine-hour working cup per day, to a 30 days holiday package a year and a two-month extra pay, from a special allowance in case of holidays or night work to the right to receive all the necessary means of protection[333].

In the same line, companies like Stuart and Getir, which recently landed in the national market, have embraced the new regulations by investing in substantial expansion plans, demonstrating that it is possible to work in food delivery even with a fleet of "employees". In doing so, they have guaranteed not just a set of fair working conditions but also the "best existing working conditions". As for Stuart, for example, the company ensured all its workers a full-time indefinite working contract, with all that entails. Furthermore, Getir, in addition to that formula, got to provide electric vehicles and extra equipment, all under the sign of sustainability.

Here, it is worth noting that such a "yes we can" model is still applicable today as much as it was in the past, well before the entering into force of the Ley Rider. Indeed, as in the Italian case, some virtuous examples within the sector were already present. First among them is the case of Mensakas, a food cycle cooperative based in Barcelona.

Taking the cue from an autonomous riders trade union, Mensakas seems the most considerable ethical alternative in the sector. Born under the International Federation of Ecomessaging Cooperatives CoopCycle, the company aims to face the traditional players

[331]See:https://www.larazon.es/economia; See:https://www.lavanguardia//ley-rider;
[332]See:https://www.businessinsider.es/glovo-deliveroo-uber-eats-ley-riders;
[333]See:https://www.eleconomista.es/empresas-finanzas/JustEat; Just Eat emphasizes that this agreement demonstrates the "strong commitment" of the company coherently to the law and the need for protection riders have been asking for years. According to the company: "This agreement makes it possible to reconcile innovation and social protection in a very dynamic environment in which technology plays an essential role";

within food delivery by changing the way of working and thinking of work. From the beginning, it proposes a simple but incredibly effective innovation, assuming a two-way responsibility: it offers a quality service to the clients and, at the same time, it ensures decent employment.

With the "riders" at the center of its project, as partners and not just employees, Mensakas encourages local trade and respect for its fleet[334]. Accordingly, it leads to a real piece of sustainable change, which means overcoming the traditional algorithmic-based model and allowing a fairer and more human way of work. With no pressure on the delivery times nor the number of deliveries, such a model permits riders to self-manage all the work organization and thus to feel part of something bigger than a company, blurring the work-life border in an unprecedented positive way.

In this direction, the effort of other companies who, in line with Mensakas, have pursued a socially friendly innovative path is equally appreciable. La Pájara, Zámpate, Botxo, and Rodant, are just a few names on the list, which today counts dozens of start-ups or cooperatives all over the country. By acting locally, whether in one form or another, they are all driven by a model wherein there is no trade-off between labor costs and market share. As the demand proliferates, a new way of work seems, in this sense, realizable[335].

In this context, the siege around multinationals is tightening. Whether through workers' demands or Labor Inspectorate's initiatives, all the exploitation forms, including the misleading classification of workers, seem to be bound to collapse. Some companies threaten to leave the country. Others plan to review their commitment to the law. As a result, sooner or later, such a legal and business factors combination could reduce the number of players within the industry, finally breaking through the *status quo*[336].

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[334]See: https://www.mensakas.com;

[335] See: https://elpais.com/espana/madrid/2021-08-29/la-pajara-la-cooperativa-que-planta-cara-a-las-plataformas-de-reparto-de-comida.html; see:https://www.elconfidencial.com/alma-corazon-vida/2020-11-30/rodant-bicimissatgeria-la-alternativa-valenciana-comida-a-domicilio_2853812/.https://www.heraldo.es/noticias/aragon/zaragoza/2020/10/28/comida-domicilio-no-solo-de-grandes-plataformas-vive-el-delivery-tres-empresas-zaragozanas-piden-paso-1402294.html;see:https://www.naiz.eus/eu/hemeroteca/gara/editions/2021-06-27/hemeroteca_articles/botxo-riders-la-cooperativa-que-compite-contra-empresas-como-glovo;

[336] This is what seems to emerge also from the latest news, which constantly reportes new and higher sanctions for players like Glovo; see: https://elpais.com/economia/2022-09-21/inspeccion-de-trabajo-multa-con-79-millones-a-glovo-por-mantener-a-falsos-autonomos.html;

III. The French framework: Loi Travail and Loi D'orientation Des Mobilités

In France, similarly to what happened in Italy and Spain, the legislator intervened to try to regulate the platforms sector, aiming to guarantee a certain level of protection to all who work under them. The *Loi Travail* n.2016-1088 and, more recently, the *Loi D'Orientation Des Mobilités* n. 2019-1428 has outlined some relevant provisions.

The *Loi Travail* n. 2016-1088 was the first legislation in Europe to provide a compendium of minimum rights specifically addressed to the self-employed platform workers, thus overcoming the issue of their legal classification.

Roughly speaking, the law reforms the labor code, aiming to impact the workers' lives with various rules. In detail, it makes it easier for companies to dismiss workers and eliminate or reduce extra payments and other sums that workers receive in case of termination. Moreover, it allows workers to benefit from additional support for training or obtaining professional qualifications.

First of all, coherently with the labor code, the *Loi Travail* re-states the 35-hour workweek[337], with further working hours to be considered overtime. Nonetheless, it allows the company to negotiate an internal agreement with trade unions to anchor the remuneration package and modify the weekly schedule.

As for the wage, the company-level agreement can now provide an extra overtime payment up to 10% of the standard hourly rate, thus eliminating the 25% or 50% increase previously fixed by the labor code. In the same line, it can also fix a 44 or 46-hour-working week - with a possible 60 hours peak under exceptional circumstances - and a daily legal limit of 10 hours, instead of 8, to be increased - when agreed - up to 12 hours[338].

Secondly, the law changes the dismissal rules for the company. On the one hand, it allows a company to proceed with a massive layoff just in case of generic "economic

https://www.elperiodico.com/es/economia/20220926/yolanda-diaz-denunciara-glovo-fiscalia-desafio-ley-rider-75906843 ;

[337]On the theme see: https://www.eurofound.europa.eu/publications/article/1998/35-hour-working-week-law-adopted;

[338]To have a clear overwiev of the law, it is worthy to see: https://www.loc.gov/item/global-legal-monitor/2016-10-14/france-controversial-labor-law-reform-adopted/; For a brief resume see also: https://www.eurofound.europa.eu/publications/article/2017/france-new-rules-on-working-time-enter-into-force;

difficulties", as in the case of four consecutive trimesters of reduced turnover or two consecutive trimesters of operating loss. On the other, it reduces the uncertainty for the employer in case of indemnity for unfair layoff, indicating to the judge the maximum payment the employee should theoretically receive.

However, for our interest here, the also-called El Khomri law introduces several reforms in the social security and labor field, providing *"workers who, in the course of their professional activities, use digital platforms"* with measures under an individual and collective dimension[339]. Within this setting, "the digital platforms that determine the characteristics of the services provided or the goods sold, and set the price thereof" would have a sort of "social responsibility" towards their fleet[340]. As a result, they must grant access to three specific rights: access to the trade unions, insurance against work accidents, and training.

Articles L. 7342-5 and L. 7342-6 state that all self-employed platform workers have the right to form, join and assert their collective interests through trade unions. Workers also have the right to organize strikes legitimately. In any case, strikes cannot be a reason for the termination of the contractual relationship with the platforms.

Then, Article L. 7342-2 obliges the platform to cover the insurance costs related to the risk of "accidents at work and occupational diseases". Here, the platform must pay a sum within a cup set by a decree. However, it can avoid the payment when a worker adheres to a collective insurance contract, provided that the latter ensures at least the same level of protection as the equivalent insurance contract he would have joined on an individual basis.

Lastly, Article L. 7342-4 gives workers access to professional training rights. According to the law, the platform pays a specific contribution for any "professional training" path the worker adheres to, whether directly or through reimbursement. Moreover, it covers the costs of personal qualification certificates acquired at work (*Validation des Acquis de l'Expérience,* VAE).

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[339] GILLIS D., LENAERTS K., WAEYAERT W., Lessons from the French legislative framework on digital platform work, European Agency for Safety and Health at work, 2022, p. 2;

[340] According to the original version of Article L. 7342-1: *"Lorsque la plateforme détermine les caractéristiques de la prestation de service fournie ou du bien vendu et fixe son prix, elle a, à l'égard des travailleurs concernés, une responsabilité sociale qui s'exerce dans les conditions prévues au présent chapitre".*

Overall, the new *Loi Travail* opens the door to further rights for platform workers. However, it connects the exercise of these two last rights to the achievement of a minimum income threshold established by a specific Decree[341]. In this way, it creates a *discrimen* that may force the Rider to work more than necessary, feeding an implicit distinction between rights considered not equally important.

To make a step forward, in this sense, the lawmaker has intervened with the *Loi D'Orientation Des Mobilités* n. 2019-1428, also called the "Mobilités" Act. Through this provision, it has introduced into the Labour Code some norms relating to platform workers, explicitly referring to the "self-employed who use platforms to carry out two types of activities: the transportation of people or the delivery of goods through a two or three-wheeled vehicle[342]".

These measures aim to establish transparency obligations for platforms as regards the workers they mediate.

Following the bill, workers gain the right to refuse whatsoever delivery service. Moreover, they are free to decide their working slots and inactivity periods, having the possibility of disconnecting during these times.

Platforms, on their part, cannot apply any sanctions, nor can they terminate, for such a reason, the contractual relationship with them. However, here, they would have to declare the foreseeable minimum price per service, and workers would have the possibility to refuse to provide the performance at any time.

Furthermore, as a part of their social responsibility toward workers[343], platforms should publish income indicators - such as working hours and the average price of their services - on their websites. Moreover, they could establish a "social charter" to determine the terms and conditions that regulate the working relationship.

Thought to ensure greater transparency between workers and the company, these charts contain the main traits of the working conditions, ranging from the way to develop

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[341] The provision that ensures platforms "to bear the costs of insurance against occupational accidents and diseases, as well as the costs related to the validation of academic credit due to work experience" Is only for those "self-employed platform workers who earn at least 13% of the annual social security ceiling of sales revenue through platform work (which stands at €5,347.68 in 2021, as set by Decree)". Here, see: GILLIS D., LENAERTS K., WAEYAERT W., *Op. Cit.*, p. 2;

[342] Article 44 of the Law 2019-1428 says: *"Dispositions spécifiques à la mise en relation de travailleurs ayant recours à des plateformes pour exercer une activité de conduite d'une voiture de transport avec chauffeur ou de livraison de marchandises au moyen d'un véhicule à deux ou trois roues"*

[343] As recalled by the Loi Travail and ensured under Article L. 7342-9 of Law 2019-1428.

skills to the measures to prevent occupational risks and safety[344]. According to the law, they encompass a double benefit. In case of approval by a competent administrative authority, they represent a legal presumption of self-employment, thus binding the parties for their specific content.[345] On the one hand, once approved, they would protect the platforms against the risk of reclassification of the commercial contract in Court. On the other hand, they would have the same power to ensure Rider the respect of the contract.

III.I. The French Scenario

Although the French legislative framework is often referred to as a "good practice example in the literature and debate"[346], some critical points fail to address. In this sense, the framework may not be very effective as the legal classification of platform workers remains unsettled. Such a system, while recognizing rights to the so-called autonomous, has indeed backed a certain ambiguity, jeopardizing job stability more than ever.

As the *Loi Travail* proposed a step forward to critically reviewing the platform work, massive strike movements have spoken up against its logic. In August 2016, just a few months after the law's approval, several demonstrations took place in Lille, Paris,

[344] The Charter must contain: *"1.The conditions for exercising the professional activity of the workers with whom the platform is in contact, in particular, the rules according to which they are put in contact with its users as well as the rules that can be implemented to regulate the number of simultaneous connections of workers in order to meet, if necessary, low demand for services by users. These rules guarantee the non-exclusive nature of the relationship between the workers and the platform and the freedom for the workers to use the platform and to connect or disconnect, without activity time slots being imposed; 2. The procedures aimed at enabling workers to obtain a decent price for their services; 3. The methods of developing professional skills and securing professional careers; 4. Measures aimed in particular at: (A) improving working conditions; (B) preventing occupational risks to which workers may be exposed as a result of their activity as well as damage caused to third parties; 5. The terms and conditions with regard to the sharing of information and the dialogue, between the platform and the workers, on the conditions for exercising their professional activity; 6. The terms and conditions under which workers are informed of any changes in the conditions of practicing their professional activity;7. The expected quality of service, the methods of control by the platform of the activity and its realization, and the circumstances which may lead to a termination of the commercial relations between the platform and certain workers; 8. If applicable, the additional guarantees for social protection, negotiated by the platform, from which workers can benefit".* See: GILLIS D., LENAERTS K., WAEYAERT W., *Op. Cit.*, pp. 4-5;

[345] CHATZILAOU KONSTANTINA, Can digital platforms challenge French Labour Law?, in Modern Forms of Work: A European Comparative Study, Sapienza University Editrice, 2020, p. 101.

[346] In these terms GILLIS D., LENAERTS K., WAEYAERT W., *Op. Cit.*, p. 6.

Bordeaux, and Marseille[347]. Based on the precariousness of the service contract, they all blamed the core of the reform, which, beyond giving companies more flexibility, reshaped but did not improve the workers' self-employed *status*.

While sharing the possibility of joining a trade union, riders can have access to one or more sets of rights depending on their income threshold. However, as the income largely depends on the continuity of the working relationship, they are supposed to work as typical employees without all the related benefits.

Moreover, under the new framework, the bargaining power of employees and unions moves to the single-firm level, overcoming the industry benchmark and potentially opening the door to layouts opportunities. Here, companies can negotiate cost-effective solutions without any regard for workers. But, at the same time, workers cannot escape from what can turn into a race to the bottom. As a result, the lawmaker can potentially undermine the workers' rights compendium more than it increases.

In order to fight these inequalities, trade unions have given birth to a real microsystem of spontaneous organizations supporting the local riders' communities. Under the impulse of CoopCycle, in particular, dozens of new cooperative forms have taken the request for fairer conditions to the streets, where they did not go unnoticed.

As an International Federation of bike delivery co-ops, CoopCycle has then gathered riders from all over the country and beyond, aiming to foster solidarity and re-think new ways of work. Leveraging a platform-based system, CoopCycle constitutes a clear alternative form of food delivery in Europe. At first, it aims to support other cooperatives owned and managed by the same riders, giving consultancy services related to several aspects of the business. Then, on the practical side, it works as a traditional intermediary between restaurants and customers, handling the whole working performance through software and an algorithm, although under an ethical spirit[348].

The goal is to build a business model that puts the worker at the center, providing good working conditions and decent wages. Therefore, full-time work is possible, with pay above € 1,522 gross per month, plus a minimum number of weekly working hours

[347]See:https://www.leparisien.fr/economie/en-direct-mobilisation-contre-la-loi-travail-200-km-de-bouchons-en-ile-de-france-des-lycees-parisiens-bloques-09-03-2016-.php.
[348]See: https://coopcycle.org/en/; See also: https://www.eurofound.europa.eu/it/data/platform-economy/initiatives/coopcycle.

guaranteed[349]. Nonetheless, different working statuses still apply depending on the local market's needs or the single cooperative.

Roughly speaking, in France, cooperative platform workers are employees. The cooperative applies a permanent contract (*Contrat à Durée Indéterminée* or CDI), which ensures that workers have full access to social protection, professional insurance, and other benefits, no matter what[350]. The platform worker has a salary that consists of two components: a fixed component, which does not change, and a variable component tailored to the individual platform worker's contribution to the cooperative's total revenue[351]. Three years after joining the cooperative, the employee becomes an associate, which means he takes full responsibility for the management of the activity and participates in the democratic decision-making process[352].

In this context, such organizational forms assume particular relevance. Indeed, they are quickly increasing. Activity and employment cooperatives are now part of the so-called social economy, which involves more than 6,500 employees and an eight-digits yearly turnover[353].

CoopCycle specifically includes more than 60 affiliate partners, with a significant presence in other European countries and overseas[354]. Starting from the city, it has progressively covered all the places touched by the Rider's phenomenon, getting to drive other similar alternative experiences, like those of *Courcyclette, Feel à Vélo, La Poit' à vélo, Les Coursiers Nantais*, and *Olvo*[355].

Moreover, over the years, informal trade unions have followed the same path, adapting to advocate precarious food delivery workers' rights. The CGT (Confédération générale du travail), for instance, has organized several campaigns to mobilize precarious riders,

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[349] As remarked by researchers: *"the objective, for the employees of cooperatives and associations members of Coopcycle, is to make it possible to work on a full-time basis, paid above the legal minimum wage: € 1,500 € net per month (compared to € 1,522 gross monthly for the minimum wage, i.e. € 1,204 net as of 1 January 2019). The objective is hence, approximately 25% above the minimum wage. The remuneration is set on an hourly basis, not by shift. A minimum number of working hours per week is guaranteed, as well as predictability on working hours". Note these exact words in the report available at:* http://www.dontgigup.eu/wp-content/uploads/2019/11/Casestudy_FR.pdf.

[350] See: https://www.eurofound.europa.eu/it/data/platform-economy/initiatives/coopcycle.

[351] See: https://www.eurofound.europa.eu/it/data/platform-economy/initiatives/coopcycle

[352] See: https://www.eurofound.europa.eu/it/data/platform-economy/initiatives/coopcycle

[353] See: http://www.dontgigup.eu/wp-content/uploads/2019/11/Casestudy_FR.pdf

[354] See:https://www.eurofound.europa.eu/it/data/platform-economy/initiatives/coopcycle

[355] See:https://digitalplatformobservatory.org/nitiative=new-forms-of-cooperation

giving birth to local sub-movements, such as *SCVG Bordeaux, Couriers de Lyon en Lutte, Scala Nantes,* and *Scoud Dijon*[356]. At the same time, grassroots groups such as the CLAP (Collectif des Livreurs Autonomes de Paris) and Indépendants.co have raised attention through national press agencies, lobbying actions, and conferences, shedding the spotlight on a situation that remains unsolved despite the law.

These initiatives substitute for the doubts posed by the lawmaker. They are practical and positively impact worker's life, empowering and "raising awareness around the working conditions in the platform economy"[357]. However, they cannot fill the gaps forever.

While cooperatives aim to increase their market shares, it remains challenging to compete in the sector, especially where leading players have better resources, more effective access to capital, and no-borders growth potential. Without further regulation, the latter can then undoubtedly carry on with their mission, even to the detriment of their riders.

Here, the case law here is still trying to assess the problem. Nevertheless, it has contributed to introducing new rules. In this context, two ordinances of April 21, 2021 provide particular provisions.

On the one hand, Ordonnance No 2021-484 provides collective rights for self-employed platform workers, establishing new terms and conditions for their exercise.

This ordinance, in particular, organizes the social dialogue at two levels: first at the sector level and eventually at the platform level. First, it creates a new authority, the Employment Platforms Social Relations Authority (*Autorité des relations sociales des plateformes d'emploi*, ARPE), mainly to facilitate the relationship between platforms and workers and settle disputes between them[358]. Then, it sets new rules for handling the platform workers' representativeness.

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[356] See:https://digitalplatformobservatory.org/nitiative=new-forms-of-cooperation

[357] Again:https://www.eurofound.europa.eu/it/data/platform-economy/initiatives/coopcycle

[358] The role of ARPE, in detail, consists in: i) *"Organising and supervising the election of platform workers' representatives, on behalf of the state; ii) Financing the training of representatives and compensating their training and delegation hours; iii) Facilitating social dialogues between workers and platforms, particularly for the first round of social dialogue, and approving the agreements signed between workers and platforms; iv) Settling disputes between workers' representatives and platforms, in particular, to avoid any risk of discrimination against representatives; v) Collecting the data transmitted by platforms and producing studies and statistical reports based on the collected data. When collecting the data, the*

Under these rules, the workers can vote for trade union organizations. Each worker has one vote. To be eligible to vote, the latter must have worked in the same economic sector for at least three months. Likewise, an organization must have existed for almost six months to win at least 8% of the total votes.

On the other hand, Ordinance No 2021-487 poses the ground for greater transparency between platforms and competent authorities. Doing this introduces the primary obligation of sharing data and information.

Under this rule, therefore, platforms must communicate any findings suitable for accomplishing an inspection, committing themselves to provide "by any medium, on the spot or upon summons", books, invoices, and other professional documents[359]". Here, platforms have to guarantee unconditional access to stored data or algorithms. As a result, even where the business secrecy regime is effectively applicable, they cannot withdraw from providing any useful source.

Within this scenario, platforms are now under the wing of innovation. Overall, the legislative framework increases transparency and representativeness, which are the critical ingredients for change. These enable platform workers to raise their voices, which, in turn, can foster a social dialogue to improve their working conditions.

However, the legal framework's scope is not as comprehensive as to delete uncertainty. For many stakeholders, this is at odds with rules on fair competition. Workers are always self-employed. Thus, platforms, despite giving access to minimum rights, keep the flexibility that allows them to operate efficiently on the market.

For others, similarly, this would constitute a set of rules difficult to apply, which can transform into nothing more than mere indications. Big companies here hold the whip hand, possibly collaborating in their own way to satisfy the *ratio* of the norms.

Social Charters, in the first place, have almost already been forgotten. Since the Supreme Court has abrogated the benefit linked to a certified - and untouchable - legal

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ARPE needs to ensure that the data transmitted by platforms shall only be related to the activities of platforms and their workers and shall not include any personal information of consumers".
See:https://www.eurofound.europa.eu/data/platform-economy/initiatives/ordinance-no-2021-484-of-21-april-2021-to-establish-representation-for-platform-workers.

[359] See: GILLIS D., LENAERTS K., WAEYAERT W., *Op. Cit.*, p. 5.

presumption of self-employment[360], there is no way to force platforms to implement them[361].

In the same way, data and information the company must share are often unavailable and, when available, incomplete. As preventable, a certain shyness in this sharing is noticeable. Accordingly, the situation is not likely to improve in the short term.

IV. The European Directive Proposal

Besides the regulations outlined at a country level thus far, the platform work issue has recently met a broader interest. In a situation where more than 500 platform companies led the current digital transactions process - involving more than 28 million people[362] - the Europan Union is indeed studying how to regulate "top-down" the whole sector, specifically concerning the workers' safeguards.

The supranational institutions, to be fair, had already tried to set guidelines to protect platform workers, yet unsuccessfully. In 2019, with Directive n. 2019/1152, the lawmaker had amended for transparent and foreseeable working conditions within digital markets and platform economy, proposing harmonizing the European concept of "worker". Nonetheless, the question remained unsolved, attending the faculty - left to the member state - to decide on the main issues related legal classification aspect.

With this background, the European Union, especially in the last five years, has faced specific challenges in the labor market[363]. First, from the increasing "markets, services,

[360] According to the new wording of the law, the Social Charter «ne peut caractériser l'existence d'un lien de subordination juridique entre la plateforme et les travailleur»".
[361] The Social Chartes, as seen above, "was not, in fact, simple unilateral commitments, comparable to Codes of ethics or other self-regulating tools, but they were also capable of condition the outcome of judicial actions for the redevelopment of contracts. In following the administrative approval, the preparation of a Charter and compliance with the commitments contained therein, even if concerning rights e constitutive obligations of subordination indices, could have prevented ascertaining a subordinate employment relationship between the platform and worker". By disabling this mechanism, "the interest (and convenience) of platforms for the adoption of social charters" has been reduced. See: DONINI A., Secondo la Cassazione francese Uber è datore di lavoro, in *Labor & Law Issues*, Vol. 6, No. 1, 2020, p. 6;
[362] Note: BARCEVICIUS E., GINEIKYTÉ-KANCLERÉ V., KLIMAVIČIŪTĖ L., Et Al., Study to support the impact assessment of an EU initiative to improve the working conditions in platform work, Final Report, Luxemburg: Publications Office of the European Union, 2021, p. 84.
[363] In this regard see the research of DE GROEN W., KILHOFFER Z., WESTFHOFF L., Et Al., Digital Labour Platforms in the EU: Mapping and Business Models, Luxemburg: Publications Office of the European Union, 2021, pp. 37-54.

and jobs digitalization, it has focused, in general terms, on the poor transparency and traceability of the work[364], deeming its characteristics in tension with the EU Charter of Fundamental Rights and the Action Plan of the European Pillar of Social Rights.[365] Then, driven by platform workers' precariousness, it has shed light on the lack of fundamental rights, such as the right to health, safety, and, more generally, fair working conditions[366].

Overall, the question has therefore touched on three elements: i) the issue of the employment status and the risk of misclassification; ii) the "algorithmic system" that controls the whole working performance; iii) the cross-border nature of work and services offered[367].

To tackle these issues, the lawmaker has proposed a new "regulatory package" to improve the conditions of all working "under the platform". The initiative - presented on December 9, 2021, and discussed by the European Parliament following a Draft Report of May 3, 2022 - takes the cue from the fragmentation of the current legal framework, which has seen dozens of case laws and different interpretations all over the continent.

Here, the Proposal integrates a new Directive, made by 24 articles distributed over six chapters and ideally ascribable to two goals, namely the (re)qualification of the working relationship between the platform and its workers and the introduction of a specific treatment to "algorithmic management" to ensure individual and collective rights, as well as greater transparency[368]. In this regard, the initiative frames a set of minimum requirements, which would have to be implemented progressively by the single jurisdictions of the European countries once the Proposal becomes law.

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[364] Note: http://www.eduardorojotorrecilla.es/2021/12/el-trabajo-en-plataformas-digitales.html

[365] PONTERIO C., La direzione della Direttiva, in *Lavoro Diritti Europa*, No. 1, 2022, p. 4.

[366] On the theme, note: GIL OTERO L., Análisis y valoración de la propuesta de directiva relativa a la mejora de las condiciones laborales en el trabajo en plataformas, in *Lex Social, Revista De Derechos Sociales*, Vol. 1, No. 12, 2022, pp. 91 – 92.

[367] As depicted by the text of the proposal, the specific objectives are:
"(1) to ensure that people working through platforms have – or can obtain – the correct employment status in light of their actual relationship with the digital labor platform and gain access to the applicable labor and social protection rights; (2) to ensure fairness, transparency, and accountability in algorithmic management in the platform work context; and (3) to enhance transparency, traceability, and awareness of developments in platform work and improve enforcement of the applicable rules for all people working through platforms, including those operating across borders".

[368] According to Article 1: "*The purpose of the Directive, namely to improve the working conditions of persons performing platform work by ensuring correct determination of their employment status, by promoting transparency, fairness and accountability in algorithmic management in platform work and by improving transparency in platform work, including in cross-border situations".*

As for the first goal, coherently with the Draft report of the E.U. Parliament - the Directive means to eliminate the problem of bogus self-employment, considering as recipients of these provisions all the workers who - regardless of their formal *status*[369] - work for "digital labor platforms" that organize, supervise, or act as an intermediary in their job, whether "online" or "in person"[370].

From the practical side, Chapter I outlines the personal and material scope of the Proposal. Then, Chapter II introduces basic tools to address the problem, starting from the obligation of the Member States to set up adequate procedures to verify and guarantee the correct qualification of digital work up to an *iuris tantum* presumption of employment.

First, the reform revolves around the need to overcome the numerous borderline cases – already observed here - by assuming that the platform workers are automatically employees under certain conditions. The Proposal, in this sense, provides that any *"contractual relationship between a digital platform that controls [...] the execution of work and a person who performs work on platforms through the said platform*" is presumed to be labor.

Specifically, Article 4.2 of said text states that a platform worker - and hence a rider - is presumed to be an employee when he is subject to at least two" elements, among which:

"a) effective determination of the level of remuneration or setting of maximum limits for this level;
b) obligation, for the person who carries out work through digital platforms to comply with specific binding rules regarding the appearance, the behavior towards the recipient of the service, or the execution of the work;
c) supervision of the execution of the work or verification of the quality of the work results, including by electronic means;
d) effective limitation, including through sanctions, of the freedom to organize one's work, in particular, the right to choose working hours or periods of absence, to accept or refuse assignments, or to use subcontractors or substitutes;
e) effective limitation of the possibility of building one's own clientele or carrying out work for third parties".

[369] The proposal leans on the principle of "the primacy of facts" – mentioned by Art. 3 - which provides that. correct determination of the employment status *"should be [..] guided primarily by the facts relating to the actual performance of work and the remuneration, taking into account the use of algorithms in platform work, and not by how the relationship is defined in the contract. Where an employment relationship exists, the procedures in place should also clearly identify who is to assume the obligations of the employer".*
[370] Under the definitions recalled by Article 2.

Within this setting, the legal presumption integrates the scope of the power of control exercised by the platform. Therefore, a worker is an employee, yet only in specific cases.

Through a closed and binding list, the norm has an undoubtedly high value in Court, where it aims to solve, or better, avoid further litigations. Under its precept, an allegedly misqualified worker - to come back to the labor law area - has indeed only to prove that the platform controls the execution of his work. For this purpose, the worker has the possibility of testing just two indices or criteria, which, in turn, are enough to presume his legal qualification as an employee[371].

Such a presumption applies in all judicial and administrative proceedings, including those promoted by the competent national authorities. However, it can be refuted against contrary proof when the platform demonstrates the absence of an employment relationship, according to its national laws[372].

According to Article 5, once the worker has proved the two signs of control, the platform owner can deactivate the general presumption of employment. To do this, similarly to the worker, it must demonstrate that the contractual relationship does not constitute an employment relationship as defined in the legislation, in the collective agreements, or under the current practices of each Member State, rather configuring a collaboration or autonomous work form.

Article 5, in this sense, combines the presumption of general employment with the concepts of employee and self-employed worker. Here, the possibility of refuting the presumption implies nothing more than a counter-argumentation of the worker's test, so the presumption of control does not necessarily include the presumption of employment[373].

Even when the presumed worker demonstrates the concurrence of the two signs of control, the digital platform can always prove other elements to demonstrate self-employment. Accordingly, the comfort of this counterproof depends on the requisites stated by the single Member States, which have full autonomy in deciding what it means to be a worker or a self-employed.

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[371] Following the same line of reasoning of GIL OTERO L., *Op. Cit.*, p. 101.
[372] See: GIL OTERO L., *Op. Cit.*, p. 101.
[373] This is the precept of Article 4. In this regard, see: PONTERIO C., *Op. Cit.*, p. 4.

Besides the employment issue, however, the Proposal focuses on the algorithmic management system. Regarding this, the text inserts a "statute of rights" that concerns all workers related to platforms beyond subordination. Here, the provisions contained in Chapter III), as well as those on remedies and enforcement of Chapter V), referring "*also to persons who carry out work through digital platforms and who do not have an employment contract or employment relationship"*, recognize a range of rights to their safeguard.

Concerning the specific provisions, Articles 6, 7, 8, and 9 ensure transparency, human supervision, and the social dialogue around the functioning of digital platforms.

Taking the cue from the incomplete scope of the General Data Protection Regulation[374] - which does not consider the employment perspective[375] - Articles 6 and 7, in detail, adopt specific measures on the algorithmic management system that handle the platforms.

Under these precepts, digital platforms can have two types of automated systems. On the one hand, these systems can supervise, evaluate, or monitor, through electronic means, the execution of the work[376]. On the other hand, they can act directly in the decision-making process, making or supporting decisions that affect the working conditions of platform workers[377]

Based on that, Article 6.5 expressly provides what kind of data these systems could not process. According to the text, the platform cannot process those workers' personal data that are not intrinsically related to their working contract, nor can it collect personal data while a worker is not offering or performing any work.[378] Moreover, it prohibits processing those personal data related to the emotional or psychological sphere, whether about the worker's health or his private conversations, including his exchanges with legal representatives[379].

[374] E.U. Regulation 2016/679, from now on: GDPR.
[375] In this point, it may be useful to see the point of view of ALAIMO A., Il pacchetto di misure sul lavoro nelle piattaforme: dalla proposta di Direttiva al progetto di Risoluzione del Parlamento europeo. Verso un incremento delle tutele?, in *Labor & Law Issues*, Vol. 8, No. 1, 2022, p. 18.
[376] As meant by Article 6.1 (a).
[377] As meant by Article 6.1 (b).
[378] Article 6.5 (d).
[379] Art. 6.5 sections (a) ,(b), (c).

At the same time, Article 7.2 forces platforms to assess the risks of these "automated monitoring and decision-making systems" to the safety and health of platform workers and *"ensure that such systems do not in any manner put undue pressure on platform workers"* or otherwise put at risk their physical and mental health.

If applied correctly, these construction and monitoring measures can provide a firewall to illicit or unfair algorithmic decisions, "contributing to a respectful design of automated systems"[380]. However, they do not imply an active approach by the platform owner nor a full awareness on the part of workers. For this reason, the same articles integrate a human role in exchanging information or managing this technology.

Article 6, in this sense, gives workers further individual information rights, which go beyond the simple and generic right to be *"fully and promptly informed in written form"* of E.U. Directive 2019/1152 - already applicable to platform workers – as well as the compendium of (mainly personal) rights provided for by the GDPR. Accordingly, it institutes the right to know the characteristics and use of automated monitoring systems and decision-making systems able, in practice, to affect working conditions, including the categories of actions monitored, supervised, and assessed, as well as the parameters that the systems use to take them.

Article 7, similarly, recalls the need for digital labor platforms to guarantee sufficient human resources for monitoring those automated systems. In detail, It obliges platforms to periodically monitor and assess the impact of algorithmic decisions on working conditions through personnel *"with sufficient competence, training, and authority"*, which is free to act sheltered "*from negative consequences (such as dismissal or other sanctions) for overriding automated decisions*".

In this perspective, Article 6 addresses information asymmetries between platforms and workers *ex-ante* in a phase prior to the start-up or modification of the automated decision-making system[381]. However, once the automated system is up and running, it could make or suggest decisions that contradict this prior information[382].

Tackling this dystopia, Article 8 moves the right to information in an *ex-post* logic. Specifically, Art. 8 aims to ensure adequate channels for discussing and reviewing

[380] GIL OTERO L., *Op. Cit.*, p. 108.
[381] GIL OTERO L., *Op. Cit.*, p. 109.
[382] GIL OTERO L., *Op. Cit.*, p. 109.

automated decisions. To do this, it introduces the right to know the motivation behind any decisions made by those systems able to affect the working conditions significantly.

Recalling Article 6.1, when the automated system determines certain work features - including working time, safety and health at work, access to given tasks, wages, promotions, or account deactivations - workers have the right to know whatever has led to this epilogue. Articles 8.1 and 8.2, on this point, affirm that for any decision which strictly affects the contractual situation of the workers, the platform is obliged to offer a written statement containing the specific reasons adopted or supported by these systems. In fulfilling this obligation, the latter has to designate *"a person with sufficient training and authority"* to discuss and clarify the information provided and, more importantly, the facts, circumstances, and reasons behind these decisions. Here, workers would have the right to ask for a review of any decision, and the platform owner, specularly, would have an obligation to make rectification in case of worker's rights violation.

To serve this provision, workers and digital platforms need to cooperate. Yet, given the high conflictuality in this context, cooperation is facilitated by collective bargaining. In this regard, Article 9, which completes this section, ensures that information platforms have to share with their workers must be available also for their representativeness, thus promoting the social dialogue on these algorithm-based decisions[383].

On the theme, further guidance is given by Articles 11 and 12, which compose chapter IV, entitled "Transparency on platform work". First, Article 11, in detail, introduce the obligation to declare work. As a result, digital platforms must declare their employment status to the public authorities of each Member State, accounting for the work they carry out in that State and other relevant data. In the second place, Article 12 states that platforms must inform authorities and the same workers' representatives about the number of regular platform workers employed, their contractual framework, and the general conditions that would apply to these relationships.

Overall, these measures allow greater control by the authorities over less visible digital platforms, that is, those established in a State other than the one where the workers

[383]In detail, the provision of Article 9, which only applies to a working relationship classified as such, *" requires digital labor platforms to inform and consult platform workers' representatives or the platform workers themselves on algorithmic management decisions*", coherently with Article 6.

provide their services[384]. Moreover, they indirectly address the challenge related to the cross-border nature of platform work, guaranteeing that they comply with the labor and social security regulations of all the States in which they operate[385].

However, they still may require additional insights from the case law. Although this is not their main objective, both of these provisions, alongside most of those others contained here, have further procedural implications.

Until now, most of the legal proceedings have been started by workers, mainly for allegations of their employment *status*. Nonetheless, the issue of algorithmic management systems can change this trend.

In this respect, the last provisions of the Proposal, thus those of Chapter V, entitled "Law enforcement and remedies", provide a specific focus on the problem. Art. 14, on the theme, grants all the workers' representatives (not just those legally recognized as employees) - or even external entities with a legitimate interest - the right to initiate proceedings in support of or on behalf of platform workers themselves. Article 16, at the same time, to facilitate the worker's burden of proof, allow public bodies to order the platforms to reveal any relevant evidence under their control, including those related to confidential information[386].

The Proposal, finally, concludes with two rules that aim to protect the worker from any treatment or adverse consequence deriving from his complaints against the platform. Article 17, here, limits the latter's possibility of interrupting the working relationship, impeding the dismissal, or any other equivalent act, that integrates a retaliatory measure. Article 18, moreover, states the obligation to justify any decision to expel the worker from the system, limiting the faculty of disconnection of his account, which usually can follow certain behaviors and a negative performance valuation of the rating systems.

[384] GIL OTERO L., *Op. Cit.*, p. 114.
[385] GIL OTERO L., *Op. Cit.*, p. 114.
[386] Including those related to algorithmic management.

Conclusions.

As seen in previous chapters, the platform work business model highlights the backwardness of the classic labor law provisions. In this context, the typical elements of subordination are no longer enough to mark the boundary between employment and self-employment, with the result that figures as that of the riders can remain excluded from most of the forms of social protection typically provided for the so-called employee.

Without doubts, a rider, in the execution of the performance, has a very limited range of autonomy. However, he is still formally considered a freelance, often in light of his weakness within the negotiating scheme with his counterpart.

In this sense, the instrumentalization of autonomous work forms fits in a context wherein the worker often depends economically on the platform, which represents his main, if not unique, income source[387]. At first glance, right the dependence and the personal nature of the service would constitute his common traits with the employee's figure and, at the same time, the main distinction from traditional self-employment. Nonetheless, in more and more situations, these elements would appear blurred, not being thus well-defined nor - effectively - circumscribed.

Given the nuance of the concept of subordination, particularly noticeable in such new jobs, it is indeed arguable if riders are, or not, included in a sort of grey zone between the two opposite categories typically provided by the law. As it is noticeable, on the one hand, platform companies provide the organizational structure for the delivery activity, while digital platforms take advantage of the algorithmic systems to manage, control, select and potentially reward the workforce. However, on the other hand, workers enjoy greater daily flexibility when it comes to choosing their shifts and schedules, as well as greater autonomy in determining how much to work and how to carry out the performance in concrete.

[387] As we have seen in Chapter I, in the European scenario 80% of workers opt for platform work form as a supplementary occupation, to be performed voluntarily and occasionally. In this sense, it tends to fit with the needs of those looking for additional earnings, resulting mostly suitable for students or those who combine work with other duties or leisure. However, in the specific case of riders, especially in Italy, France, and Spain, such a work form often constitutes a primary, full-time, necessary working activity.

In this respect, it is noted how the legal systems analyzed here deal with the work classification issue from different views. Besides employment and self-employment categories, each country has its own - more or less effective - system. While some countries effectively set a third or intermediate *genus* – at least theoretically – suitable to include platform work, other does not provide anything in the middle of such a traditional binary.

Italy and Spain, in this sense, set up a specific category for those who, despite being collaborators or freelancers, are either way dependent, juridically or economically, on another. In contrast, France limits itself to ensure specific and targeted safeguards in case of given self-employed activities.

Within this setting, it is known to what extent many recent case laws have highlighted an objective difficulty in establishing the exact nature of riders', in line with the different interpretations that affect the way of conceiving their work *lato sensu*.

As a preliminary observation, the Courts have dealt with the specification of the legal nature of digital platforms themselves. Starting from the assumption that they can carry out either a business activity or mere intermediation, the qualification of their *status* has been *per se* the key to including or excluding workers from the labor law area[388]. In this sense, jurisprudence - assessing the link between working schedule predetermination and presence, even attenuated, of a bond of subordination - has first declared them as autonomous and then as employees.

Concerning the Italian, French, and Spanish cases, more in detail, judges had initially ruled that riders cannot be subordinate, coherently with the fact that they could decide, with a high degree of freedom, if and when to work. However, after a few rulings, the same judges, with the subsequent backing of the respective Supreme Courts, have sentenced that some factors, specifically depicted from time to time, would have retraced them to the employment area.

[388] See: PACELLA G., Il lavoro tramite piattaforma digitale nella giurisprudenza dei Paesi di civil law, in *Labor Law & Issues*, Vol. 5, No. 1, 2019, pp. 20-21.

Thus, in Foodora and Glovo's cases, a particular focus has regarded, beyond the facts, the elements that shape the business model in practice. About Foodora, the *Corte di Cassazione* has stated that the applicability of the norms related to the subordinate worker is precisely connected to the platform's capability to modulate the *an* and *quantum* of the performance. In the Glovo case, at the same time, the *Tribunal Supremo* has ascribed the subsistence of symptomatic indices of dependence and alienation to the role of the company as a real employer.

Similarly, in the Take Eat Easy case, particular attention has been paid to concrete work methods. The *Chambre Sociale,* here, has observed the basic principle of the prevalence of the actual methods of execution of the performance on the parties' will. In this case, the power to control the rider, specifically through a geolocation system, and the power to impose sanctions seem to overcome the agreement's content, thus being enough to identify the rider as an employee.

In line with the high number of rulings, the misclassification issues are systematic and pose the ground for further, specific interventions of the law. Here, the national lawmakers provide a compendium of safeguards by recognizing the peculiarities of riders. In each of these legal systems, the law introduces different solutions, all converging on the goal of applying or extending an effective protection regime.

Given the difficulty of subsuming platform work within subordination, in Italy, the so-called Rider's Decree addresses the category of "*workers who carry out goods delivery activities [..] through platforms*" - formally gathered under the umbrella of hetero-organized collaborations - on par with an employee, with the consequent extension of all the rules normally applicable in this sense by the labor law.

At the same time, in France, the Loi Travail, albeit keeping the *"workers who, in the course of their professional activities, use digital platforms"* under the self-employed category, guarantees them basic targeted individual and collective rights, otherwise inaccessible for all the autonomous workers overall.

Again, in Spain, the ley Rider considers anyone "*which provides paid services consisting of the distribution of any consumer product or merchandise, for employers who exercise the powers of organization, management and control directly, indirectly or implicitly, through [..] a digital platform*" automatically employed, under a direct legal presumption that needs no implementation.

Besides these solutions, European law also considers the matter, proposing a Directive to regulate or better frame the platform worker's notion. Here, it introduces a set of norms primarily aimed at requalifying the working relationship and strictly defining the "algorithmic management" powers. Moreover, to ensure individual and collective rights and greater transparency - the Directive set a legal presumption of employment that, in line with Spanish regulations, would open the door to a general solution to the problem.

With that being said, overall, the rider's case involves a combination of various actors. Beyond law and case law, the current scenario in these countries is somehow shaped by the experiences of trade unions, informal workers' organizations, and start-ups. All of them, in one way or another, have contributed to implementing best practices that overcome the regulatory's power and intent.

On their part, traditional unions have struggled to obtain better working conditions in the lack of rigid norms. Moreover, informal organizations have shown a certain foresight, promoting the spontaneous aggregations of workers in cooperative forms, gaining the attention of the media, and then shedding light on the real social weight of these jobs, otherwise belittled.

On the other hand, startups and companies have started to appreciate the idea of granting rights to their fleet, investing in the aspects linked to sustainability and social governance. Here, many European cases show that it is possible to grow and acquire market shares even by employing workers with a legal contract and all that entails. From this perspective, the Italian, France, and Spain examples are encouraging. Despite being almost irrelevant in quantitative terms, they are promoting a new way of operating in the sector, which can also become known for positive things and not just for shaming facts and the bad reputation of its big players.

At the end of this thesis, we may argue that rethinking the techniques for protecting riders is necessary.

In this regard, the matter should not rely on the possible application and implementation of new norms. Rather, it should take the cue from that virtuosity that seems able to bypass the ever-present constraints of the legal system.

The Spanish experience teaches us that a radical framework reform could not solve the problem. As the benefits and attractiveness of platform work are still anchored to its intrinsic flexibility, changing the legal qualification of workers would *de facto* change the game's rules, thus jeopardizing thousands of jobs.

Even if riders are, in many cases, full-time exploited workers, a compendium of provisions to protect them should not go against those who, having different needs, can work under a just-in-case logic and thus wish to remain self-employed.

In the same way, the same mechanism of the employment legal presumption embraced by the European lawmaker, in our opinion, may be suitable to cause more problems than it pretends to solve in the first place.

The European Directive, in this sense, would imply, for its effectiveness, a not simple opera of transposition and adjustment to each internal legal system, which, in turn, could further complicate the *quaestio* instead of facilitating it.

In line with the lack of a unitary notion of "worker", such a measure lies on the national law's definitions, and above all, on "the CJEU's case law, amending for a restyling of the internal legislation[389] that, coherently with the generally broader scope of European proceedings, may produce ambiguous and not always obvious results.

Even including all the platform workers as a whole, the different safeguard regimes provided by the Directive[390] would seem to clash with the peculiarities of some existing national settings, which, obscuring the border between the internal and supranational

[389] See FALSONE M., What Impact Will the Proposed EU Directive on Platform Work Have on the Italian System?, in *Italian Labour Law e-Journal*, Issue 1, Vol. 15, 2022, p. 103.
[390] Under the EU Directive, workers are placed on two distinct levels of legal protection: those who have a contract or an employment relationship benefit from the so-called strong safeguard regime of the Directive; in contrast, all people" who work on the platform", regardless of their contractual relationship have right to the protection provided for by Article 10.

discipline, can transform situations where a third area between autonomy and subordination exists into potential sources of legal disparities[391].

In light of that, it is even clearer to us that the rider's case could be equally faced through more transversal and out-of-the-box approaches.

One of the reforms that must be addressed - in addition to that relating to the extension of the protection mechanisms – is, in our opinion, that relating to the tax wedge cutting, which, while closely affecting someone more than someone else, would create the conditions for resolving, or at least delimiting, the question *a priori*.

Although today's food delivery companies show a system that is only sustainable through the employment of an external workforce, it is healthy to think that they will be able to employ workers legally defined as such if and only when the economic system wherein they operate will facilitate that, with less bureaucracy and more reasonable tax and contribution costs.

At the same time, it may be helpful to reason on the possible entry into force of a European minimum legal salary, which, if implemented properly, could potentially constitute a win-win situation.

When companies can afford to pay an hour of work less than the market average, the competition abstractedly follows a race to the bottom. Fixing a low-cap, in this context, would allow saying goodbye to ridiculous hourly wages but with no prejudice to the profitability within the sector. Given the high demand for these services, the higher cost would be transferred to the consumers with no or little consequences. As a result, leading players could take advantage of their know-how and brand positioning, while "top employer" start-ups would have no repercussions, keeping working with the same margins.

[391] See TULLINI P., La Direttiva Piattaforme e i diritti del lavoro digitale, in *Labor & Law Issues*, Vol. 8, No. 1, 2022, p. 50 ff;

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