Nothing New Under the Digital Platform Revolution? The First Italian Decision Declaring the Employment Status of a Rider

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Abstract

In 2020, an Italian tribunal classified a food-delivery rider working via a digital platform as an employee for the first time. Italian courts and scholars have struggled with new, ambiguous legal notions with the aim of (re)shaping the border between subordination and self-employment. In this case, a Sicilian judge ruled that the working relationship between the digital platform's owner and the rider using it to acquire work is characterized by hetero-direction – the basic element of subordination pursuant to Art 2094 of the Italian Civil Code. This article examines the arguments regarding the nature of both the platform and the rider's working relationship with the provider. The article analyses how the judge concretely subsumed the case into the legal framework and underlines the weaknesses in the reasoning regarding the role of continuity in qualifying a working relationship. The article further demonstrates a problematic surplus of arguments and exegetic techniques that risk weakening one another.

I. Introduction: 'Nothing New Under the Sun'?

On 24 November 2020, Palermo Tribunal ruled on a case concerning a rider who worked with a well-known food delivery service's digital platform. The decision comes after other similar cases, which are already abundantly disputed in Italy[1]. Since the management of staff and work performance using apps and algorithms represents an innovation that is already global and potentially inter-sectorial, the decision equally rests within heterogeneous case law and foreign national and supra-national decisions.[2]

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[1] Cf Tribunale di Torino 5 July 2018, *Rivista giuridica del lavoro*, II, 317 (2018), Corte d'Appello di Torino 4 February 2019 no 26, *Rivista italiana di diritto del lavoro*, II, 340 (2019) and Corte di Cassazione 24 January 2020 no 16633, *Lavoro Diritti Europa*, 1 (2020); Tribunale di Milano 10 September 2018, *Labor*, 1, 112 (2019).

[2] Cf the report 'Taken for a Ride: Litigating the Digital Platform Model' by the International Lawyers Assisting Workers Network (ILAW) available at https://tinyurl.com/4c4usvfj (last visited 30 June 2021).

These new digital tools have challenged the traditional legal patterns governing work contracts and relationships worldwide,[3] because they can potentially obscure the entrepreneur's command and control power while simultaneously leaving room for greater flexibility and freedom for both parties in the working relationship. Analysis of the case in question is particularly merited in view of the rider's qualification as an employee pursuant to Art 2094 of the Italian Civil Code (Art 2094 hereinafter), a norm that was issued in 1942, when digitalization lay beyond the bounds of imagination.[4] The case is not a unique case in the international context,[5] but it represents the first of its kind in Italy, where – to date – the lawmaker and the courts have strived to distinguish between gig/crowd economy workers and traditional employees, creating and interpreting new legal notions, such as the hetero-organization, the negotiated coordination and the digital platform itself.[6] From a legal perspective, this court case raises doubts as to whether these recent legislative and exegetic efforts are useful or whether digital work can be managed through the legal labour patterns of the last century. In actuality, examination of the phenomenon raises the question of whether these new digital tools give rise to different (less hierarchical) models of human resource management or whether they simply obscure and enhance older vertical business models.[7] It is impossible to definitively answer these questions, which require legal and managerial knowledge; however, analysis of the strengths and weakness of the Tribunal's reasoning and arguments can contribute to the discussions about these contradictory hypotheses.

[3] The main case law concerns the legal qualification of the working relationship; however, there are decisions about other specific issues, such as, discriminations (Tribunale di Bologna 31 December 2020, *Rivista italiana di diritto del lavoro,* forthcoming (2021) and Tribunale di Palermo 12 April 2021, available at www.dejure.it) and unfair labour practices (Tribunale di Firenze 9 February 2021 and Tribunale di Milano 28 March 2021, available at www.dejure.it). For a criminal case about illegal digital hiring cf Tribunale di Milano 28 May 2020 no 9 available at www.GiurisprudenzaPenale.com, 7-8 (2020).

[4] Art 2094 describes an employee as a person 'who undertakes an obligation to *cooperate* in the business in exchange for a remuneration by performing his work manually or intellectually at the *dependence* and *under the direction* of the entrepreneur'.

[5] In France, Cour de Cassation 28 November 2018 no 1737 *Revue de droit du travail*, 12, 812 (2018); in Belgium, Commission Administrative de Règlement de la Relation de Travail (CRT) 9 March 2018 no 113; in Switzerland, Cour de Justice de Geneve, Chambre Administrative 29 May 2020 no 535; in Netherlands, Rechtbank Amsterdam 23 July 2018 no 6622665 and Rechtbank Amsterdam 15 January 2019 no 7044576. Outside Europe, cf 33a Vara do Trabalho de Belo Horizonte 14 February 2017 no 0011359- 34.2016.5.03.0112.

[6] Respectively, Art 2 decreto legislativo 15 June 2015 no 81, as revised by decreto legge 3 September 2019 no 101, Art 409 Code of Civil Procedure, as revised by legge 22 May 2017 no 81, and Art 47-*bis* decreto legislativo 15 June 2015 no 81.

[7] This is why the heated debate on digital revolution also pertains to sociology and management studies. Cf F. Miele and L. Tirabeni, 'Digital technologies and power dynamics in the organization: A conceptual review of remote working and wearable technologies at work' *Sociology Compass* 14 (2020), K.C. Kellogg, M.A. Valentine, and A. Christin, 'Algorithms at Work: The New Contested Terrain of Control' 14 *Annals,* 366 (2020).

First, this article lists and reorders the main facts of the case, highlighting the (many) analogies and the (few) differences between the parties' allegations (Section II). Second, the article considers the nature of the platform and its effective corporate purposes (Section III). Third, the article examines the reasoning about the qualification of the working relationship, scrutinizing the ambiguous role assigned to the working relationship and performance continuity/permanency within the concrete subsumption of the case into the relevant legal patterns (Section IV). Fourth, the article examines the Tribunal's interpretative approaches to the relevant law and notions implemented to avoid applying the new intermediate patterns between subordination and autonomy (the hetero-organization) in favour of qualifying the courier as an employee (Section V). The arguments' respective shortcomings (Section IV) and strengths (para V) will be highlighted, and general considerations on the issues at stake will be presented at the end of this article (para VI).

II. From the Uncontested Facts to the Controversial Legal Interpretations at Stake

It should first be noted that the facts presented by the rider are substantially uncontested. According to the judge, they do not essentially differ from the company's allegations regarding the events that occurred but only with respect to their interpretations and legal qualifications (cf Section III and IV). For this reason, the case was decided without any hearings and investigations, as is typical in matters concerning the qualification of working relationships.[8] At first glance, this may be surprising, since algorithm management and the use of digital platforms are potentially characterized by greater obscurity in terms of their functioning; thus, they can overshadow the exercises of the hierarchical powers of direction and control (or the freedoms allowed) on an unprecedented scale, as noticed above. In this instance, however, this is not the case for at least two main reasons: this case concerns a location-based platform, which means that the riders' tasks are ontologically physical (delivering food), and so the exercise of management and powers may be hidden but their effects can hardly be denied or disputed, since they imply material actions and reactions on the part of the workers. Rather, the algorithm obscurity represents a real threat to the judicial investigation of facts where online web-based platforms are concerned,[9]

[8] The point has been immediately highlighted in the literature. Cf F. Martelloni, 'Il ragazzo del secolo scorso. Quando il rider è lavoratore subordinato a tempo pieno e indeterminato' *Questione Giustizia*, 24 December 2020, 4. V.A. Poso, 'Qual è la natura giuridica dei rider? Sono subordinati, bellezza! Commento a prima lettura della prima sentenza-zibaldone che farà discutere' *rivistalabor.it*, 1 December 2020.

[9] Regarding the numerous kinds of digital platform from a labour viewpoint, cf the ILO report 'World Employment and Social Outlook 2021'. The role of digital labour platforms in transforming

in contexts wherein workers perform tasks online and remotely (common examples include translation and graphic design services) or where it matters of specific aspects of the employment relationships (the most obvious example is probably litigation regarding discrimination).[10]

Moreover, these new digital tools, as a matter of their ambiguity, seem to exclude only one or a few elements of working relationships patterns – and specifically of the employment relationship – while maintaining other characteristics of these legal patters. Digital revolution induces (bigger or smaller) shifts in an ideal *continuum* between subordination and autonomy and a concentration of work performances on the border between the two opposite poles.[11] Thus, the debates work to establish whether these adjustments are sufficient to change the legal qualifications of the working relationship facilitated by digital means. Ultimately, the parties' efforts to influence the qualification of the rider have concentrated on the interpretations of the relevant statutes – in a sort of a stress test – rather than on the interpretation of the mere facts.

Another aspect to highlight is that the judge carefully describes these undisputed relevant facts for each step of the rider's performance. Since the facts are acknowledged, this may seem inconsistent or an example of futile verbosity; after all, such detailed recounting of facts is not particularly common in Italian case law.[12] In general, it is an unescapable choice when it comes to wisely deciding the legal qualification of the working relationships. However, the meticulous attention to the facts of the case is indisputably appropriate because it concerns a new phenomenon that the judge brought under Art 2094 for the first time.

The facts go as following. First, at the beginning of the relationship, the courier signed a contract as a self-employed worker, without any negotiation. The platform owner asked him to obtain a VAT number for a subsequent freelancer contract.

Second, for almost two years, the claimant worked as a rider using the app provided by the company, which was an essential instrument in the service delivery. Specifically, every week, the digital platform allowed the rider to book available shifts (so-called *slots*) as a means of scheduling his own working

the world of work' 23 February 2021 available at https://tinyurl.com/8bbnpmc2 (last visited 30 June 2021).

[10] The anti-discrimination law covers workers and employers, without any distinction whatsoever: cf G. Gaudio, 'Algorithmic management, poteri datoriali e oneri della prova: alla ricerca della verità materiale che si cela dietro l'algoritmo' 6(2) *Labour & Law Issues*, 19 (2020), who scrutinizes possible solutions for a fair decision in cases where the algorithm's functioning is obscure.

[11] A. Perulli, Oltre la subordinazione. La nuova tendenza espansiva del diritto del lavoro (Torino: Giappichelli, 2021), 21 and 114.

[12] M. Barbieri, 'Il luminoso futuro di un concetto antico: la subordinazione nella sentenza di Palermo sui riders' 6(2) *Labour and Law Issues*, 63, 71 (2020).

hours. Thus, he could determine if, when, and where he would deliver food. However, the algorithm governing the app influenced the worker's prerogative through the ranking periodically assigned to him, which was based on his efficiency and experience, customers' and partners' feedback, and his previous bookings of high-demand slots. Shift cancellations, delays in logging into the app, and the rider's absence from the area where he was expected to work were treated as penalties in the ranking system. Each week, the best-scored riders could book their preferred shifts before the other low-ranking couriers; these latter workers were restricted to the remaining slots.

Third, during the execution of the work, the digital platform 1) offered (and, in case of acceptance, assigned) one request at a time, 2) proposed an efficient track (also used to establish the compensation), and 3) provided specific automatic procedures for communication in case of logistic/technological problems. The rider' compensation was delivered every two weeks; the riders were required to return the customers' cash (if used to pay for the service) to the platform's owner by bank transfer through a specific procedure unless individually authorized to retain it as partial compensation. The platform created an invoice for each service on the rider's behalf. The claimant worked more or less eight hours per day and/or forty hours per week.

Fourth, before the end of the working relationship, the courier protested in front of a manager at the lack of safety devices and about periods of suspension from the digital platform; after complaining publicly about riders' working conditions, he was suspended permanently. All things considered, the Sicilian rider demanded to be recognized as an employee of the digital platform's provider and sought a fair remuneration pursuant to the national collective agreement (CCNL) applied to the company employees or applicable in view of the productive sector along with compensation for the retaliatory and oral dismissal represented by the suspension of his account disconnection.

Other allegations by the company as cited in the decision concern two main aspects. First, the company ascribed the temporary disconnections to the claimant's delay in transferring cash received from customers and the definitive account blockage to a technical fault. However, the disconnections could not be classed as dismissal since he was not an employee. Second, the written contract was rightly qualified as a self-employment contract because the rider could choose when to work, since the ranking system should be considered a rewards system rather than a punitive arrangement. Each rider could choose from and work the available residual shifts even if they had lower scores or no scores, for example in the case of new couriers. Ultimately, both parties recognized the freedom with respect to scheduling working time while the disputed point concerned the capacity of the external constraints arranged for ranking purposes to nullify these freedoms, influencing the qualification of the working relationship.

Many of the uncontested facts are the same across Italian and foreign case law regarding platform-based work, at least in their main profiles,[13] and mount similar challenges to the corresponding patterns of working relationships worldwide.[14] This confirms the global relevance of the issue and unveils the oligopolistic framework – or at least the similar strategies – of the few multinational enterprises providing analogous services through similar models based on algorithms and digital platforms.[15] This background explains another peculiarity of the decision, which is the comparative approach employed in the ruling: the judge cited numerous decisions from European and non-European case law to build her reasoning and enhance her arguments, finding support in other national jurisdictions even if they operated within different legal frameworks. The comparative approach is rightly considered perilous or useless with respect to issues falling within national rules, but it is becoming increasingly helpful in view of the global context of various phenomena.[16] Digital work is probably the latest and most salient example of this trend, alongside labour law literature, which is more and more open to European and international scientific interactions in this field.

III. Digital Platforms as Intermediary or Transport/Delivering Services: An Issue no Longer at Stake

The first issue concerns the corporate purpose of the defendant company and consequently the real economic activity carried out through the digital platform and the algorithm that governs the app. This point is correctly discussed as a preliminary aspect, since the qualification of the working relationship demanded before the Tribunal clearly centres on the enterprise's aims and objectives. This issue is rarely disputed where the qualification of working relationships is concerned. However, digital platforms are now

[13] An overview of the digital work conditions is provided in a report by V. De Stefano and A. Aloisi, *European legal framework for "digital labour platforms"* (Luxembourg: Publications Office of the European Union, 2018), 16.

[14] J. Prassl, 'What if your boss was an algorithm? The rise of artificial intelligence at work' 41(1) *Comparative Labor Law & Policy Journal*, 123 (2019).

[15] D. Dazzi, 'Gig economy in Europe' 2(12) *Italian Labour Law e-Journal,* 68, 94 (2019).

[16] M. Biasi, 'Uno sguardo oltre confine: i "nuovi lavori" della gig economy. Potenzialità e limiti della comparazione' 4(2) *Labour & Law Issues*, 3 (2018), who points out the risk inherent in applying that method to very different legal frameworks. Cf M.A. Cherry and A. Aloisi, 'Dependent contractors in the gig economy: a comparative approach' 66 *American University Law Review*, 635 (2017); S. Giubboni, 'La subordinazione del rider' *Menabò di Etica ed Economia* 140, 14 December 2020, 1; M. Barbieri n 12 above, 87, who affirms that the legal frameworks of the decisions cited are similar or identical; M. Magnani, *Diritto sindacale europeo e comparato* (Torino: Giappichelli, 3th ed, 2020), 3 affirms that comparison is necessary in today's global economy. Cf P. Adam, M. Le Friant, Y. Tarasewicz eds, *Intelligence artificielle, gestion algorithmique du personnel et droit du travail* (Paris: Dalloz, 2020), A. Baylos Grau's contributions on his blog, https://tinyurl.com/4b4ssnt3 (last visited 30 June 2021).

affecting enterprises' organization so intensely that not only the nature of the working relationships involved but also the corporate purposes are ultimately overshadowed or transformed.[17] It was not by chance that the first decisions on digital platforms did not centre on working relationships but on corporate and competition law.[18]

At first glance, controversy surrounds whether the platform's purpose was to provide a virtual place to match supply and demand for transport and delivery services, allowing the company to play the role of an intermediary services provider (and sometimes that of booking agent for the partners – namely riders or drivers, food providers, customers) or whether the platform's main activity involved the direct supply of transport and delivery services for customers realized through the riders' work. Various national and supranational jurisdictions have already dealt with this dilemma with the aim of verifying the compliance with the regulations established to deliver particular services (such as the licenses needed to operate private vehicles). In doing so, they had to verify who actually delivers the services and who effectively organizes and influences them. Thus, these jurisdictions assigned particular relevance to who determines the fares, the quality, and other circumstances pertaining to the services, which indirectly describes the relationship between platform owners and workers. The case law of the Court of Justice of the European Union (CJEU) closely examined working relationships to make competition law rulings, establishing that the control and influence of off-line (and material) work functional to the main economic purpose of the digital platforms and their owners is crucial to solving the dispute.[19] Ultimately, the CJEU decided to treat these companies as supplying transport services in the case of digital platforms, which govern/influence drivers' work, while treating other companies as mere intermediaries in the case of digital platforms delivering different services, such as accommodation.[20]

[17]This is why different legal hypotheses aimed at qualifying the phenomenon have been proposed in the literature. Cf L. Ratti, 'Online platforms and crowdwork in Europe: A two-step approach to expanding agency work provisions' 38 *Comparative Labor Law and Policy Journal*, 477 (2017); A. Rosin, 'Applying the temporary agency work directive to platform workers: Mission impossible?' 36(2) *International Journal of Comparative Labour Law and Industrial Relations*, 141 (2020).

[18] Tribunale di Milano 9 July 2015, *Rivista Italiana di Diritto del Lavoro*, II, 46 (2016), Case 434/15 *Professional Elite Taxi* v *Uber Systems Spain SL* [2017] ECLI:EU:C:2017:981, Case 526/15, *Uber Belgium BVBA* v *Taxi Radio Bruxellois NV* [2016] ECLI:EU:C:2016:830, Case 320/2016 *Uber France SAS* [2018] ECLI:EU:C:2018:221. Cf V. Brino, 'Il caso Uber, tra diritto del lavoro e diritto della concorrenza', in M. Biasi and G. Zilio Grandi eds, *Commentario Breve allo Statuto del Lavoro Autonomo e del Lavoro Agile* (Milano: Wolters Kluwer, 2018), 135.

[19] A. Aloisi, 'Demystifying flexibility, exposing the algorithmic boss: A note on the first Italian case classifying a (food-delivery) platform worker as an employee' *Comparative Labor Law & Policy Journal*, forthcoming (2021), available at SSRN: https://tinyurl.com/3hkud4wd or https://tinyurl.com/ybp2vt57, 5-6 (last visited 30 June 2021).

[20] Case 390/18 *Airbnb Ireland* [2019] ECLI:EU:C:2019:1112. Cf J. Morais Carvalho, 'Airbnb

The Palermo Tribunal follows this homogeneous case-law. First, it ignores the official business purposes declared in the company's certificate and in the two contracts concluded with the claimant. These documents, in fact, refer to an alleged broking function of the digital platform, which the judge appears to consider formal and thus auto-referential. However, the tribunal does not really investigate the case by interpreting the facts and subsuming them into the proper legal framework, as an orthodox approach requires in a civil law system. Rather, it simply mentions the foreign and CJEU decisions on the issue, overlapping them with the specific case in question. Theoretically, this construction of the reasoning could be questionable because the conventional technique is replaced by a comparative approach.[21] As noted, this latter method is risky because of the different legal frameworks within which case law stands. However, it is increasingly considered beneficial (or necessary) when comparable multinational entrepreneur patterns are concerned (cf above fn no 16), since it facilitates the efficient employment of similar reasoning and arguments (avoiding redundancy) and promotes a homogeneous approach to global phenomena, such as digitalization. In this case, however, the risk lies not in the different legal frameworks, since EU and Italian jurisdictions are notoriously intertwined, but in the diverse characteristics of the services provided: driving services in the case of the CJEU decisions (cf above fn no 18) and food delivery in the Sicilian case. From this perspective, the decision merely affirms that the CJEU's approach is 'certainly referable to commodities transport, other than to people transport'. The conclusion is probably agreeable, but it surely deserved to be boosted by an examination of the similarities and differences between the cases already decided in other jurisdictions and in the case in question. For example, in European case law concerning drivers, the contractual relationships involve the digital platform owner, the drivers, and just one category of customers (the passengers), while in the case of food (and commodity) delivery services, the contractual relationships that must be considered are more fragmented, because they involve two categories of clients, the commodity providers (analogous to restaurants) and the buyers (analogous to diners). This difference could have confirmed the judge's stance, because the stronger contractual fragmentation likely renders the digital platform more crucial in the management of the overall service and riders' performances.

A closer look at the case at hand reveals that the hasty approach of this part of the decision also seems to rest on the litigation strategies of both parties. In

Ireland case: One more Piece in the Complex Puzzle Built by the CJEU Around Digital Platforms and the Concept of Information Society Service' *Italian Law Journal*, 463 (2020) for a critical review. J. Gil García, 'Las múltiples formas de trabajo en las economías colaborativas y su regulacíon: el caso de «Airbnb»', in A. Todolí Signes and M. Hernández Bejarano eds, *Trabajo en plateformas digitales: innovación, derecho y Mercado* (Madrid: Aranzadi, 2018), 359.

[21] F. Capponi, 'Lavoro tramite piattaforma digitale e subordinazione: il ruolo dell'algoritmo secondo il Tribunale di Palermo' *Bollettinoadapt.it*, 30 November 2020.

fact, the ruling does not consider the contractual documents and relationships between the rider and the company, on one side, and the two customers at stake (the providers and buyers of the commodity delivered), probably because the firm itself accepted the homogenous qualifications already devised by other courts worldwide, while focusing on the main – still disputable – issue concerning the qualification of the company's working relationship with the rider. Furthermore, this preliminary aspect is not momentous from the perspective of competition law, since the services provided are not regulated by public bodies; thus, the platform different qualification does not involve illegal behaviours. The Palermo Tribunal refers to this preliminary matter and corresponding case-law only to deny relevance to the formal documents provided and begin the reasoning from a point that is now acknowledged among courts and scholars. This assumption means that a staple on a previous heated debate has been fixed but only for deregulated services such as food delivery. A recent UK Supreme Court judgement confirms this hypothesis.[22] In that case, in fact, the company strongly asserted its broker function as well as the workers' autonomous status, with the aim of preserving a business model designed to deal with both competition and labour law. For this reason, the Supreme Court thoroughly analysed both written agreements and relationships between Uber and its drivers (paras 22-26) as well as Uber and its passengers (paras 27-29).

IV. The Predetermination of Working Time and the Role of Performance Continuity in the Qualification of the Working Relationship: An Issue to Probe Further

If the decision follows the mentioned case law on the nature of the digital platform and the purpose of tech companies, it represents a breakthrough vis-à-vis the legal qualification of the riders' status. As recognized by the Tribunal, the first Italian rulings on the riders focused on the new liberating features associated with working for organizations operated via digital platforms. Thus, they strongly rejected the workers' claims about their alleged employment status. First, they recognized self-employed relationships,[23] and later they applied the new *intermediate* pattern designed for the so-called hetero-organized work pursuant to Art 2 decreto legislativo 15 June 2015 no 81 (henceforth Art 2).[24] At first, the

[22] Uber BV and others v Aslam and others [2021] UKSC 5.

[23] Tribunale di Torino 7 May 2018, *Argomenti di Diritto del Lavoro*, 4-5, 1227 (2018); cf G.A. Recchia, 'Gig economy e dilemmi qualificatori: la prima sentenza italiana' *Lavoro nella Giurisprudenza*, 7, 726 (2018) and Tribunale di Milano 10 September 2018, *Labor*, 1, 112 (2019).

[24] Art 2 (as reformed in 2018) states that the employment regime shall be applied to collaboration that is mainly personal, continuative and whose performance is organized by the contract. Art 2 has given rise to considerable debate that cannot be comprehensively cited here. It stems from the idea that the norm has no effects since it formalizes the outcome of the case law

new legal pattern was considered by a court to be a *tertium genus* between subordination and autonomy, recognizing only selected employers' prerogatives to the riders;[25] eventually, Art 2 was applied more extensively, extending almost all these prerogatives to the digital workers with the exception of the employment disciplines that ontologically fit the hetero-direction exercised pursuant to Art 2094 upon subordinated workers.[26] In a climax of sorts, the Palermo Tribunal now qualifies the rider as an employee under Art 2094, challenging all the heated discussions and efforts put in place to emphasize the new characteristics of digital platform work.

The substance of the ruling is significant and problematic for various reasons. First, it openly criticizes previous Italian decisions for having excluded the riders' subordination by only observing the relationship during the time immediately preceding the working performance, when the couriers can actually exercise their contractual prerogative to choose if, when, where, and how much they work. According to relevant opinions, in fact, these recognized freedoms are inconsistent with the subordination pursuant to Art 2094, which requires not only cooperation and dependence but particularly hetero-direction.[27] The Palermo Tribunal, rather, elects to follow an approach aimed at investigating the effective performance of the work, thus focusing on the central phase of the

interpretation of Art 2094, or that the norm updates or enlarges the classical notion of subordination, to the idea that the norm represents a step toward a real third category (and regime) between subordination and autonomy. Cf A. Perulli, n 11 above; P. Tosi, 'Il diritto del lavoro all'epoca delle nuove flessibilità – le collaborazioni eterorganizzate' *Giurisprudenza italiana*, 737 (2016); Id, 'Autonomia, subordinazione e coordinazione' *Labor*, 245 (2017); O. Mazzotta, 'L'inafferrabile etero-direzione: a proposito di ciclofattorini e modelli contrattuali' *Labor*, 1 (2020); G. Santoro Passarelli, 'Ancora su eterodorezione, etero-organizzazione, su coloro che operano mediante piattaforme digitali, i *riders* e il ragionevole equilibrio della Cassazione n. 1663/2020' *Massimario di Giurisprudenza del Lavoro*, 203 (2020); L. Nogler, 'La subordinazione del d.lgs. n. 81 del 2015: alla ricerca dell'autorità dal punto di vista giuridico' *WP C.S.D.L.E. "Massimo D'Antona".IT*, no 267 (2015); O. Razzolini, 'I confini tra subordinazione, collaborazioni etero-organizzate e lavoro autonomo coordinato: una rilettura' *Diritto delle relazioni industriali*, 2, 360 (2020); G. Cavallini, 'Le nuove collaborazioni etero-organizzate: cosa cambia dopo la riscrittura dell'art. 2 d.lgs. n. 81/2015 (e la Cassazione sul caso Foodora)' *Giustiziacivile.com*, 2, 13 (2020); S. D'Ascola, 'La collaborazione organizzata cinque anni dopo' *Lavoro e diritto*, 1, 3 (2020).

[25] Corte d'Appello di Torino 11 January 2019, *Rivista Italiana di Diritto del Lavoro*, II, 350, 358 (2019); G.A. Recchia, 'Controrordine! I riders sono collaboratori eterorganizzati' *Lavoro nella Giurisprudenza*, 403 (2019).

[26] Corte di Cassazione 24 January 2020 no 1663, *Lavoro Diritti Europa*, 1 (2020); R. Romei, 'I riders in Cassazione: una sentenza ancora interlocutoria' *Rivista Italiana di Diritto del Lavoro*, I, 89 (2020); M.T. Carinci, 'Il lavoro etero-organizzato secondo Cass. n. 1663/2020: verso un nuovo di sistema di contratti in cui è dedotta un'attività di lavoro' *Diritto delle Relazioni industriali*, 2, 488 (2020); A. Lassandari, 'La Corte di Cassazione sui riders e l'art. 2, d.lgs. n. 81/2015' *Massimario di Giurisprudenza del Lavoro* 123 (2020); A. Perulli, 'La prima pronuncia della Corte di Cassazione sull'art. 2, co. 1, d. lgs. n. 81/2015: una sentenza interlocutoria' *Lavoro Diritti Europa*, 1 (2020).

[27] Hetero-direction has been considered the crucial criterion according to the case-law. Cf references in M. Pallini, 'Towards a new notion of subordination in Italian labor law?' 12(1) *Italian Labour Law E-Journal*, 1 (2019) and Corte di Cassazione 10 July 1991 no 7608, *Rivista Italiana di Diritto del Lavoro*, I, 103 (1992) about the so-called pony express.

working relationship.

An examination of the reasoning's construction, however, reveals that the decision is not innovative with respect to this abstract assumption: as a matter of fact, the criticized case-law – in its last rulings – also assigned relevance to the execution of the performance to recognize the hetero-organization pursuant to Art 2, and the Sicilian judge also identified the hetero-organization in this phase of the working relationship. The decision, furthermore, expressly confirms that the issue of the free predetermination of the working time remains a crucial point in qualifying a working relationship. Thus, it is at odds with the views of some authors, according to whom the qualification of the relationship shall depend *only* or *mostly* on the effectiveness of the performance delivered (when the issue of *how* to work is concerned).[28] Ultimately, it concretely assigns relevance to *both* the effective performance and the workers' exercise of their prerogatives prior to performing the tasks (at what time *if*, *when*, *where*, and *how much* to work are concerned).

Actually, the novelty of the decision regards the interpretation of the respective prerogatives in the times preceding the material tasks. The decision intensifies the investigation of this segment of the relationship by questioning how effectively the rider's liberties could be exercised. To support the approach, a recent CJEU order is cited, which excludes couriers by the scope of the EU law if national courts verify that their independence is merely notional – also in terms of predetermination of the working time – thus hiding bogus self-employed workers.[29] Even if the CJEU order is not really foundational, the relevant point is that, according to the judge, the riders' freedoms to determinate their working times are fictitious because of the algorithm's influence on the couriers' decision, exerted via awards and discouragements in the system of shift booking and cancellation.

The conclusion is agreeable in practice but problematic from the legal perspective.[30] On the one hand, the conclusion is correctly founded on the firm determination to transcend contractual formalism – such as assigning relevance only to written agreements – and to focus on the effective overall working relationships. The approach is appropriate and represents an 'established legal tradition'[31] in the specific sense that, in Italy, the need to adopt such a technique is clearly established by Art 1362 Civil Code. The latter affirms that 1) in the interpretation of a contract, the parties' common intentions shall be investigated

[28] M. Barbieri, n 12 above, 74-79.

[29] Case 692/19 *B* v *Yodel Delivery Network Ltd*, [2020] ECLI:EU:C:2020:288. Cf. A. Aloisi, 'Time is running out'. The Yodel order and its implications for platform work in the EU' 13(2) *Italian Labour Law E-Journal*, 67 (2020), J. Adams-Prassl et al, 'EU Court of Justice's decision on employment status does not leave platforms off the hook' *Regulation for Globalization*, 29 April 2020, available at https://tinyurl.com/yt22sc97 (last visited 30 June 2021).

[30] F. Martelloni, n 8 above, 7.

[31] A. Aloisi, n 29 above, 7.

and not only the literal meaning of the words and 2) to determine the parties' intentions, their comprehensive behaviour, even following the agreement, shall be considered. In the case of the working contract, the parties' comprehensive behaviour usually plays a more relevant role than that played in other kind of agreements, since it is a freeform contract and because of the unbalanced power in the bargaining process.[32] It is not by chance that these principles for interpreting contracts are common to other legal systems.[33] However, in interpreting the relevant behaviours, the decision regarding how the algorithm constraints became a legal exegetic element that allows the formal workers' freedoms to determine if, when, where, and how much they work to be ignored is not clear. In fact, it is affirmed that the freedoms were fictitious not because of their absolute ineffectiveness but because their exercise was altered by predicted negative effects, ultimately resulting in *constrained freedoms*.[34]

This knot is difficult to disentangle and scholars remain divided. Ultimately, the problem is linked to the function and meaning of work performance continuity within the employment relationship. If it is considered to be an essential element for the identification of an employee, continuity – as one of the consequences of the working time hetero-determination – has to be identified as an *a priori* obligation burdening somehow the riders even before the performance, not only as a *de facto* characteristic proved *a posteriori*.[35] In literature and case law, this critique is quashed in two different ways: first, by pointing out that subordination shall not necessarily focus on the stage that precedes the effective performance[36] – namely, saying that continuity is not essential but merely a possible indicator of subordination; and second, by highlighting that continuity does not concern the effective performance *per se*, but the *contractual relationship*, resting on the obligation to be available by a deadline after which the rider's account will be definitively disconnected.[37] The

[32] Cf L. Castelvetri, Perché discutere (ancora) di alternativa tra contratto e rapporto di lavoro?' *Diritto delle Relazioni Industriali* 467 (2002); C. Smuraglia, *Il comportamento concludente nel rapporto di lavoro* (Milano: Giuffrè, 1963); F. Benatti, 'Che ne è oggi del testo del contratto' *Banca Borsa Titoli di Credito*, 1 (2021). Corte di Cassazione 10 April 2000 no 4533, *Foro italiano*, I, 2196 (2000).

[33] Eg *Uber BV and others* v *Aslam and others* [2021] UKSC 5, paras 58-64.

[34] Cf A. Maresca, 'Brevi cenni sulle collaborazioni eterorganizzate' *Rivista Italiana di Diritto del Lavoro*, I, 73 on the distinction between directives and performances induced by the management.

[35] F. Carinci, 'Tribunale Palermo 24/11/2020. L'ultima parola sui rider: sono lavoratori subordinati' *Lavoro Diritti Europa*, 12 (2021); E. Puccetti, 'La subordinazione dei Riders. Il canto del cigno del tribunale di Palermo' *Lavoro Diritti Europa*, 12 (2021). Cf also A. Perulli, 'Il diritto del lavoro "oltre la subordinazione": le collaborazioni etero-organizzate e le tutele minime per i riders autonomi' 410 *WP CSDLE "Massimo D'Antona".IT*, 71 (2020).

[36] M. Barbieri, n 12 above, 76, M. Barbieri, 'Della subordinazione dei ciclofattorini' 5(2) *Labour & Law Issues*, 35 (2019), G. De Simone, 'Lavoro digitale e subordinazione. Prime riflessioni' *Rivista Giuridica del Lavoro*, 11 (2019). Cf also Razzolini, n 24 above, 371. For a different approach to the issue, see P. Ichino, 'Le conseguenze dell'innovazione tecnologica sul diritto del lavoro' *Rivista Italiana di Diritto del Lavoro*, I, 525 (2017).

[37] M. Barbieri, n 12 above, 81, V. Bavaro, 'Questioni in diritto su lavoro digitale, tempo e libertà'

decision does not take a clear stance regarding these different hypotheses because it ultimately considers continuity to be an essential aspect of the subordination, without establishing if and how the constraints on the workers' freedoms give rise to an *a priori* obligation to work or to be available. The vagueness (or the contradiction) became evident when the judge, at a different stage of the reasoning, returns to the issue of continuity and treats it also as a mere hint of subordination.

The issue is worth disentangling before the courts, which are now required to clarify whether an *a priori* obligation is required by law and, if so, what the content of such an obligation should be. The dilemma at stake is politically crucial since the given solution involves the possibility of applying the maximum level of labour protections – but also employers' prerogatives[38] – within the so-called gig economy. This latter, in fact, consists of the management of casual work – now easily reachable and exploitable due to the use of algorithms – and on the relinquishment of the continuous working relationships that have been the most efficient means of benefiting from work during the Fordism era.[39] One possible answer could be suggested by a recent decision of the German Federal Labour Court (BAG), which has recognized the contractual relevance of a *de facto* continuity of the working relationship because it has been 'induced' (rather than 'imposed') by the digital platform.[40]

V. From the Hetero-Organization to the Classic Subordination: A Surplus of Arguments

The dilemma posed by working time predetermination and performance continuity is relevant to the exclusion of a rider's status as purely self-employed. However, it is not sufficient to distinguish among hetero-directed workers pursuant to Art 2094 Civil Code and other *intermediate* patterns, such as the hetero-organization pursuant to Art 2 and the so-called 'co.co.co.' (continuative and coordinated collaborations) pursuant to Art 409 Procedural Civil Code.[41] It should be recalled that continuity (however it may be defined, cf section IV) is expressly provided for in Art 2 and Art 409 Procedural Civil Code, while Art 2094 Civil Code has traditionally been interpreted as inferring continuity even without literal references, owing to the implications of coordination, hetero-

Rivista Giuridica del Lavoro, 53 (2018).

[38] A. Aloisi, V. De Stefano, *Il tuo capo è un algoritmo* (Bari: Laterza, 2020), 141.

[39] V. De Stefano, A. Aloisi, n 13 above, 25, P. Ichino, n 36 above, 526.

[40] Cf the comment on the press release by L. Nogler, 'La Corte federale del lavoro tedesca risolve il rompicapo della qualificazione dei lavoratori delle piattaforme' *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 835 (2020). Cf the decision (in German language) https://tinyurl.com/m9p3c45p (last visited 30 June 2021).

[41] A. Perulli, n 11 above.

direction, and dependence.[42]

The judge leads towards the rider's subordination by also focusing on other aspects of the case and applying different legal interpretation techniques to them. From a methodological perspective, the decision simultaneously invokes two classic methods traditionally employed by Italian courts to identity subordination: the *subsumption* and *typological* techniques.[43] The first is aimed at connecting (ie *subsuming*) the worker and his/her relationship exactly (in)to the abstract provision of the law (Art 2094, in the case of employment status); the typological method consists in the study of analogies and differences between concrete circumstances and the relevant abstract provisions, through empirical indicators derived from experiences that represent indirect manifestations or presumptions of subordination.[44] This latter method is commonly used when the subsumption does not help in the specific case because of the difficulty in identifying specific and continuous command-and-control powers.[45] In this decision, rather, they are overlapped.[46]

Beginning with the subsumption method, the decision first recalls the necessity of updating the interpretation of Art 2094, since it was devised in 1942 when the archetypal workers were Fordist labourers.[47] This consideration has been condemned as a false myth by some scholars, who point out that in 1942, the number of agricultural workers was too significant to be ignored by lawmakers[48] and/or because Art 2094's wording was strongly influenced by Barassi's thoughts on employment relationships delivered during the first decades of the 1900s.[49] These critiques are significant because they aim to demonstrate that Art 2094 was written also for casual and daily workers, who are similar to present-day couriers with respect to their work performance

[42] O. Razzolini, n 24 above, 360, P. Digennaro, 'Subordination or subjection? A study about the dividing line between subordinate work and self-employment in six European legal systems' 6(1) *Labour & Law Issues,* 4, 33 (2020). Cf F. Ferraro, 'Continuatività e lavoro autonomo' *Labor*, 5, 583 (2020).

[43] L. Nogler, 'Metodo tipologico e qualificazione dei rapporti di lavoro' *Rivista Italiana di Diritto del Lavoro*, I, 182 (1990), Id, 'Ancora sul "tipo" e rapporto di lavoro subordinato nell'impresa' *Argomenti di Diritto del Lavoro*, 109 (2002), G. Proia, 'Metodo tipologico, contratto di lavoro subordinato e categorie definitorie', *Argomenti di Diritto del Lavoro*, 37 (2002).

[44] Cf V. Pietrogiovanni, 'Between Sein and Sollen of Labour Law: Civil (and Constitutional) Law Perspectives on Platform Workers' 31(2) *King's Law Journal*, 313, 317 (2020) for further references.

[45] Corte di Cassazione 5 March 2009 no 5314, available at www.dejure.it, Tribunale Genova 11 January 2016 no 5, available at www.dejure.it.

[46] As already noted (section IV), continuity is employed both as an essential element and as indicator of subordination.

[47] The decision wrongly cites (twice) as the historical framework of the Civil Code's entrance into force the first Industrial Revolution (which happened in 1700) instead of the Third Industrial Revolution.

[48] M. Barbieri, n 12 above, 84.

[49] F. Martelloni, n 8 above, 7. Cf L. Barassi, *Il contratto di lavoro nel diritto positivo italiano* (Milano: Società editrice libraria, 1st ed, 1901; reprint Milano: Vita & Pensiero: 2003).

(dis)continuity; thus, no significant exegetic efforts shall be invested in including digital work under the subordination pattern. The quarrel is probably theoretical: on the one hand, the 1942 lawmakers could not have ignored agricultural (and casual) work, which was still widespread in Italy; on the other hand, the industrial work model was equally significant for a lawmaker wishing to forge an updated legal framework. In fact, the report annexed to the Italian Civil Code for the king's ratification expressly explains that the phrasing chosen to describe the employee should necessarily be 'ample' and 'comprehensive'.[50]

Moreover, the judge revises the Art 2094 analysis by eliciting a purposive interpretation of it, in line with recent foreign courts' attempts.[51] She defends her purposive approach by highlighting that innovative interpretations of the subordination pattern have already been delivered within case law to cover employment relationships that do not clearly show the essential character of the hetero-direction. The first concerns high-skilled and low-skilled workers – such as managers and employees performing simple and recurrent tasks – for whom mitigated ('attenuated') subordination is sufficient, since they do not need continuous and relevant commands.[52] The second is based on the 'double alienness' (or alienity) theory, proposed by a minor portion of case law and literature.[53] It consists in the assumption that only in an employment relationship does the worker not own the product of the enterprise nor its organizational means, so that the subordination relies on a unique framework of different/oppositional interests, rather than a particular manner in which the activities should be executed.

The concrete handling of the subsumption method shows (again) the judges' (problematic) inclination to overlap and mix different approaches to the relevant legal pattern. In fact, while the mitigated/attenuated subordination theory seems to be cited simply to demonstrate the abstract possibility of innovating the subordination pattern without actually being applied to the case,

[50] Report to the Italian Civil Code, Libro V, 1942, available at https://tinyurl.com/3ejxwfcx (last visited 30 June 2021).

[51] M. Biasi, 'Tra fattispecie ed effetti: il "purposive approach" della Cassazione nel caso Foodora' *Lavoro Diritti Europa*, 2020. *Uber BV and others* v *Aslam and others* [2021] UKSC 5, paras 65-78; *Autoclenz Ltd* v *Belcher* [2011] UKSC 41; [2011] ICR 1157. Cf A. Bogg, 'For whom the bell tolls: "Contract" in the gig economy' OxHRH Blog, available at https://tinyurl.com/v6ebbsw (last visited 30 June 2021).

[52] Corte di Cassazione 28 October 2020 no 23768, available at www.dejure.it regarding a home delivering job and Corte di Cassazione 29 October 2020 no 23927, available at www.dejure.it regarding a manager.

[53] Corte costituzionale 12 February 1996 no 30, *Diritto del Lavoro*, II, 52 (1996), V. Pietrogiovanni, 'Redefining the Boundaries of Labour Law: Is "Double Alienness" a Useful Concept for Classifying Employees in Times of Fractal Work?', in A. Blackham, M. Kullmann, and A. Zbyszewska eds, *Theorising labour law in a changing world: new perspectives and approaches* (Oxford: Hart Publishing, 2019), 55, S. D'Ascola, 'Platform Work and "Double Alienness", in A. Perulli and T. Treu eds, *The future of work: labour law and labour market regulation in the digital era* (Alphen aan den Rijn: Kluwer Law International, 2020), 307.

the rider's working relationship has actually been declared as having satisfied both the *orthodox* requisite of subordination – namely the hetero-direction – and the requisite of the 'double alienness'.

As if the satisfaction of these two requisites was not enough, the typological technique has been employed (as mentioned above) as a subsidiary and complementary approach to confirm and enforce the working relationship subsumption into Art 2094. The decision, in fact, identifies several empirical indices of subordination: the *de facto* continuity (as already noted in the previous section), worker availability even in times of no orders, the exercised of unorthodox disciplinary power ended up to a disconnection which can be considered as an oral dismissal and, last but not least, the absolute dependence to the digital platform and the lack of room for autonomous initiative even in case of technical algorithm disfunction This last index is highlighted because, according to the judge, it reveals that the rider was toothless before the platform and wholly unaware of its functioning to the extent that it leaves the courier exactly at the same level of dependency or even at a lower level than a Fordist labourer of the last century, saying that he is hetero-directed in the classical meaning.[54]

Ultimately, the reasoning seems to be influenced by the urge to fortify a (hitherto) unique decision, but the surplus of approaches and interpretative techniques risks undermining the ruling by weakening arguments that cannot easily and efficiently coexist.

VI. Final Remarks: 'Mind the Gap' Between National Legal Orders and Global Digital Platforms

First, the case confirms that in the digital era, every human activity can be the object of employment relationships, self-employment, and other intermediate patterns.[55] Actually, Italian case law offers the maximum array of legal solutions and approaches to the issue, following this recent decision, which breaks the last taboo regarding the employment status of digital workers and imposes a discussion without restraints on any hypotheses. This ruling's influence on case law cannot be predicted, since each case is unique in a civil law system and considering that litigation strategies and the realities that emerged (or not) before the judges may differ significantly. However, the courts are dealing with business models that are similar worldwide owing to the oligopolistic framework

[54] Cf Opinion of Advocate General Szpunar delivered on 11 May 2017, case 343/15 *Asociación Profesional Elite Taxi* v *Uber Systems Spain* [2017] ECLI:EU:C:2017:364, according to whom 'indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, makes it possible to manage in a way that is just as – if not more – effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders'.

[55] Corte di Cassazione 15 June 2020 no 11539, available at www.dejure.it.

within which big tech companies operate;[56] thus, the heterogeneity of the case law comes at the expense of certainty and predictability as well as the possibility of the national legal system's ability to better influence global business models and work management. It is not by chance that several companies reacted to this first phase of the fight by preparing to hire riders as employees while other companies simply resisted or updated the algorithm in light of the worldwide jurisprudence stance.[57]

It is not easy to describe what relationship bounds facts (like business and management) and (case)law and to determine whether and to what extent the latter influences entrepreneurs' organizations and command-and-control power or whether and how far business and managerial trends affect lawmakers and interpreters of the law.[58] However, this case and the worldwide case-law on digital work and platforms represent an exemplar and updated illustration of the complex dialogue between economic actors (firms, workers, customers, and unions) and legal orders.[59] Clearly, the only way to exert greater influence on the economic and production system is to build a homogenous case-law at both the national and international levels – a goal that cannot be easily reached since the national statutes approach the gig economy and digital platforms in ways that are as heterogenous as the jurisprudence stances.[60] However, the next stages in this story will depend on the understanding of the digital platform's core nature: if it will be regarded as the manifestation of a new (less hierarchical) business model, the new freedoms (for all the actors involved) that it allows could be better recognized by courts. On the contrary, if digital platforms will be assumed as the new means for already-known underlying (vertical) business models, the judicial trend in favour of riders' subordination will not be easily stopped worldwide.

[56] N. Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (Oxford: Oxford University Press, 2020).

[57] S. Sciorilli Borrelli and D. Ghiglione, 'Italy Emerges as Next Front in Gig Economy Labour Battle' *Financial Times*, available at https://tinyurl.com/9sd4v8x4 (last visited 30 June 2021).

[58] M. Barbieri, n 12 above, 69.

[59] M. Novella, 'Il rider non è lavoratore subordinato, ma è tutelato come se lo fosse' 5(1) *Labour & Law Issues*, 85 (2019), L. Mengoni, 'Diritto e tecnica' *Rivista trimestrale di diritto della procedura civile*, 1, 6 (2001).

[60] V. De Stefano and M. Wouters, 'Embedding Platforms in Contemporary Labour Law', in J. Drahokoupiland and K. Vandaele eds, *A Modern Guide to Labour and the Platform Economy* (Cheltenham: Edward Elgar Publishing, 2021), forthcoming.