ISSN 2612-5056

Diritto e politica dei trasporti

rivista semestrale *open access*
di dottrina, giurisprudenza
e documentazione

Fascicolo I/2022

Promossa da

demetra
CENTRO STUDI

anno 5, n. 8 (I-2022)

La Rivista è pubblicata dal Centro Studi Demetra (Development of European Mediterranean Transportation), con sede a Roma, via F. Civinini, 85, 00197, ed è registrata presso il Tribunale di Roma al n. 150/2018 del 19 settembre 2018.

The Journal is published by the Centro Studi Demetra (*Development of European Mediterranean Transportation*), based in Rome, via F. Civinini, 85, 00197, and was registered at the Court of Rome under No. 150/2018 on 19 September 2018.

Direttore responsabile/Editor-in-Chief: Prof. Francesco Gaspari, Università degli Studi "G. Marconi" di Roma, via Plinio 44, 00193, Roma

http://www.dirittoepoliticadeitrasporti.it/

ISSN 2612-5056

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Diritto e politica dei trasporti is an *on-line, open-access* Anvur class A Journal, subject area 12 (Law). It is indexed in DOAJ – Directory of Open Access Journals (https://doaj.org/) and in ERIH PLUS – European Reference Index for the Humanities and Social Sciences (https://kanalregister.hkdir.no).

Grafica e impaginazione: Centro Studi Demetra
Pubblicato nel mese di ottobre 2022

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ISSN 2612-5056, I/2022, p. 16 - 37

Articoli e Saggi

Employment and Platforms, viz. Self-employed versus Workers, that is the Question (or the Irresolvable Dilemma). Reflections about "Uber v. Aslam" of the UK Supreme Court *

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Abstract
Employment and Platforms, viz. Self-employed versus Workers, that is the Question (or the Irresolvable Dilemma). Reflections about "Uber v. Aslam" of the UK Supreme Court.

The working activity provided via the platform economy has been the subject matter of a number of dicta, and such Court decisions have "sprouted" in different European countries. In this respect it is quintessential to peruse the latest UK judicial stances, based on the Employment Rights Act 1996 in its most recent version, amended in 2020. The analysis, kick-starting from the "Aslam" case, which at the moment epitomises the approach of the British "curia" in this area, sails towards the shores of the Continent and eventually "moors" in the Italian "harbours", the Belpaese being a legal system where both Scholars and Courts have passionately cogitated on this legal conundrum. In the light of this, the contribution fundamentally deals with the area of the legal characterization of the new figure of the "gig worker" or "gig employee", in a scenario where the new borders, signposted by the technology, seem to go farther and further than the pace of law. It goes without saying that this new futuristic painting may give a philosophical thrust to the jurists' souls.

Key words*: gig-economy; "Uber case"; self-employed or workers; platform economy; algorithms in working relationship.*

Summary — 1. Labour law and gig-economy: an introduction — 2. Self-employed versus workers — 3. Uber v. Aslam and others — 4. The gig economy and the "Italian job" — 5. Final connection: current or anachronistic reflections?

* Sottoposto a referaggio.

1. Labour law and gig-economy: an introduction

The legal characterization of the work provided by riders and drivers is part of a wider theme, namely the gig-economy. The latter seems to be the final stage of the application of technological innovations to the world of both trade and transport.

The phenomenon occurred in recent years represents a new mode of intermediation between providers and users of the most diverse and multifarious services, ultimately based on effective exploitation of the latest and more advanced information technology. As a result, there is unprecedented blossoming of computer platforms able to ensure that both supply and demand of different services are matched. This matching entails that users rely on their previous experiences in such a way that each of them is in a position to choose between individuals who boast a degree of professionalism and "work experience," tested and assessed by an increasing number of evaluations and reviews, mainly relating to a retrospective track-record.

With regard to the success of one of these platforms, Uber, it is necessary to investigate its background of origin, namely the United States of America, a country which is, by definition, the logical "chartered" territory where this kind of platform could have developed[2].

Given the essential role played by the "platform"[3], this economy has resulted in being defined "platform economy," in the light of the job carried out by its *sui generis* workers[4]. The platforms (e.g. Uber, Glovo, Foodora) spell out that their activity should

[1] The gig economy is characterized by the presence of intermittent and flexible work performances as well as by the offer of on-demand performances by the gig workers. When approaching work on platforms, reference is made to a very varied phenomenon involving various activities such as, for example, the organization of deliveries and distributions of goods through riders. M. Faioli, *Mansioni e macchina intelligente*, Torino, 2018.

[2] Three factors can be identified, and they all affect the success of Uber in the USA. First and foremost, there is a "philosophical" and political background within the USA, where not only does the individual autonomy play a crucial role, but also it has a pervasive impact on the economic relations. The second is concerned with the federal structure of the American legal system, which is characterised by a tripartite system of powers, as regards the management of urban transport. These are governed by a number of separate jurisdictions with their own rules, particularly as regards the regulation of the employment relationship and local transport. Finally, following the 20008 economic and financial crisis ensuing the Lehman Brothers insolvency, it has had an impact on the standard of living of US citizens, thus encouraging the spark of the gig-economy. C.E. Papadimitriu, M. Percoco, *Le piattaforme digitali tra opportunità e incertezze normative: il caso Uber*, in *Rivista giuridica del Mezzogiorno*, No. 2, 2019, p. 451 ff.

[3] V. Lehdonvirta, O. Kässi, I. Hjorth, H. Barnard, M. Graham, *The Global Platform Economy: a New Offshoring Institution Enabling Emerging-Economy Microproviders,* in *Journal of Management*, No. 2, 2019, p. 567 ff.; M. Finck, *Digital Regulation: Designing a Supranational Legal Framework for the Platform Economy*, in *Law, Society, Economy*, Working Papers, No. 15, 2017, p. 2 ff.

[4] It should be noted that this is a heterogenous phenomenon given that each platform has its own ways to develop. Despite this, it is possible to find the constant presence of three elements: the presence of the platform to be interpreted as a digitised work organisation that brings together the demand for and the supply of a certain performance in the world considered more efficient by the algorithm, the user who turns

be defined as a mere venue of intermediation, mainly limited to the point where demand and supply of work between customers and those who offer their work meet each other[5]. One recurrent element in this scenario is the system of rating the workers: once the professional has carried out his/her performance, the customer may assess the fulfillment of their duties. This involves the possibility for the platform itself to exercise a power of withdrawal, particularly in circumstances where the worker has received a significant number of negative assessments[6].

Often, the platform, for the whole lifespan of a job, is given further entitlements, going well beyond the role of a mere intermediator. The algorithm[7] may identify the worker who has stated his/her willingness to perform this activity. The digital identification of the worker is instrumental in ensuring that there is compliance, on the part of the worker, with some quintessential parameters: the required timeframe; the work to be carried out; the previous evaluations assigned to the "worker" without the latter being aware of the path to be followed, the performance to be assessed[8].

As for the pricing of the "consideration" for the service to be provided, this is established by the platform, albeit unilaterally: the compensation for the service is paid by the user to the platform which, at a later stage, shall pay the worker by retaining a certain percentage[9].

Starting from what has been described above, the problem of the legal characterization of the gig-worker as an employee arises, given the fact that he/she ultimately is the

to the platform to obtain a service and finally the worker who offers the requested service. M. Barbera, *L'idea di impresa. Dialogo con la giovane dottrina giuslavorista,* in *WP C.S.D.L.E.* "Massimo D'Antona", 2016.

[5] M. Faioli, *Gig economy e market design. Perché regolare il mercato del lavoro prestato mediante piattaforme digitali,* in G. Zilio Grandi, M. Biasi (eds) *Commentario breve allo statuto del lavoro autonomo e del lavoro agile*, Padova, 2018, p. 199.

[6] F. Alifano, *La qualificazione del lavoro mediante piattaforme digitali negli ordinamenti esteri*, in *CamminoDiritto*, 7.5.2021.

[7] Recently, the potential problem of the algorithm discrimination has been flagged up too. See Bologna Tribunal (ET), decree 31 December 2020. According to this, mechanism requires the cancellation of the work shifts that were booked in advance, and it supposedly constitutes in itself a neutral behaviour. However, in practice, it places workers participating in an industrial action – to be considered as an actual expression of their personal beliefs – in a situation of disadvantage. In fact, as stated by the Court, the "self-service booking" system becomes discriminatory in two cases: the hypothesis of non-participation in a booked work shift, but not cancelled; the "late cancellation". Indeed, in these instances, the algorithm engenders a reduction in the rider's personal score. Consequently, this action affects the rider's future chances of receiving work opportunities without making any assessment of the reasons proving the employee's behaviour. In more explicit terms, the algorithm does not distinguish situations of a worker cancelling her/his booking late or one who does not carry out her/his activity without having previously cancelled for futile reasons from those which her/his abstention is founded on legally relevant and legitimate reasons". I. Purificato, *Behind the scenes of Deliveroo's algorithm: the discriminatory effect of Frank's blindness*, in *Italian Labour Law Journal,* No. 1, 2021, p. 169 ff.

[8] To these are added further rules that are indicated by the platform itself such as, for example, wearing uniforms, use special packaging to carry products, wear elegant clothes or not to spread music.

[9] In the light of the above, it is possible to consider the platforms as a hybrid model between market and enterprise. In essence, the use of algorithms allows consumers to have more information in order to either choose goods or buy services. In this sense, it can be assumed that platforms are able to reduce information asymmetries by making a given market for goods and services more efficient. At the same time, the algorithms allow one to create a real business organization that grows thanks to the data purchased from the network. Eurofound, *Employment and working conditions of selected types of platform work*, in https://www.eurofound.europa.eu/it/publications/report/2018.

"recipient" of continuous coordinated collaboration that may be reminiscent of a hetero-organization[10].

2. Self-employed or workers?

In the UK, with the entry into force of the amendments to the 2019 Employment Rights Act, which took place on 1 January 2021, amendments were made to several sections of the piece of legislation at stake. The quintessential purpose of such changes is the implementation and strengthening of the legal basis for the protection of workers' rights.
In what can be defined as the earlier version of the Employment Rights Act, i.e. the one in force since the year 2012, the definition of employee, employer and employment relationship were in fact based on the existence – in some cases merely formal – of an employment contract. On the contrary, as a result of the recent changes, the criterion for identifying the essential elements that characterize the work performance is the management and supervision from a party.
In the light of this, the concepts of employee, employer and employment contract are shaped by two elements: the first concerns the existence of a contractual relationship between the two parties; the second concerns the fact that one party – on the basis of the existence of that contract – is paid, managed and controlled by the other party. Finally, it should be noted that a contract of employment is recognized as such not only on the basis of the name on it but also by virtue of its content[11].
It follows that a bilateral agreement on given content may be defined as a contract of employment even if the name of that agreement does not relate to the question of employment. Consequently, it is implied that all agreements which have as their content an employment relationship become employment contracts regardless of the formal features (i.e. the *nomen iuris*) which are provided to them. Based on this reasoning, any person who is offered a job with management and supervision from another subject should be treated as an employee.
By way of example, it is possible to recall *Ferguson vs. John Dawson & Partners*[12] concerning the contractor Dawson & Partners who hired Mr. Ferguson to carry out some work on behalf of the hiring company. However, during the working hours Mr. Ferguson had an accident and subsequently asked the company to take on full responsibility for the consequences. The Court, whose analysis was focused on the possibility of defining Mr. Ferguson as an employee, held that part of Ferguson's salary had not been withheld for social security contributions but that the company had the right to decide the place of work and dismiss Mr Ferguson. The reasoning of the Court showed that the working

[10] For further details of the problems originating from the platform economy, see in Italian G. Arrigo, *Il lavoro al tempo della "subordinazione digitale" (cominciò con clic e finì con un sms"*, in *TRCS*, 2019, p. 86 ff.; A. Aloisi, V. De Stefano, *Il tuo capo è un algoritmo. Contro il lavoro disumano*, Bari, 2020; A.M. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, in *CLLPJ*, 2016; V. De Stefano, *The Rise of the "Just-in-time Workforce": On-demand Work, Crowdwork and Labour Protection in the "Gig-economy"*, in *Conditions of work and employment series*, No. 71, Geneva: Ilo. L. Ammannati, *Verso un diritto delle piattaforme digitali?* In *Federalismi.it*, No. 7, 2019, pp. 1 ff.
[11] An agreement may be regarded as a contract of employment if "when two parties have an agreement on work to be done, wage, management and supervision of one party, such agreement shall be considered as employment contract regardless of its name" (1, art. 13.1).
[12] [1976] EWCA Civ 7 Taken by Royal Courts of Justice on 22/7/1976.

relationship should be determined on the basis of facts rather than the understanding of the relations between the parties.
In other words, although the company treated Mr. Ferguson as an independent contractor, the judiciary came to the opposite conclusion, i.e. the relationship between the two parties could not be defined as a relationship of service provision. Under these circumstances, the factual relationship between the two parties has priority on what was formally stated in the paperwork.
The amendments which entered into force in 2021, on the one hand, make it possible to better retrieve employment contracts which would be otherwise concealed, this giving rise to rights and obligations for both parties, which is not usually part of a worker's contract. On the other hand, they raise questions about the real scope of the agreement that is concluded between two parties. More specifically, a question arises as to whether two parties choose not to enter into an employment relationship, even in circumstances where this is brim-full of requirements relating to a contract of employment. The absolute and rigid implementation of the *de facto* aspect over the formal one may drive a coach and horses through the principle of the parties' autonomy. More in depth, this contrast could reach its pinnacle when a person carries out his or her work on the basis of a contract relating to a *de facto* employment relationship but not the stereotypical employment contract.
The reasons for this demarcation line may be different: for example, the individual already relies on a contract of employment fully protecting his/her rights. Thus, the qualification of an employment contract appears to be a very complex operation, should the worker himself "feel" that his or her legal status is far from being an employee, or if the work is different from what is inferable from the formal contract[13].
According to what has been reported so far, the 2019 amendments may appear a blatant breach of the contract law principle of mutual agreement. As workers are more aware of their rights on the one hand, and legal obligations attributable to their employer on the other, they should be able to choose how to shape the employment relationship[14].
The determination of the employment relationship is therefore based on two elements: the activity of hiring or employing labour; the demarcation line between employee and employer. The term employee is in turn linked to management, control and supervision as elements from which such legal status derives. Consequently, the term employer must be related to the activity of recruitment and employment of the workforce. The right element that makes it possible to distinguish between workers[15] and employees concerns

[13] See *Massey vs. Crown Life Assurance* 1978. In the latter, Mr. Massey was an employee of the Crown Life Assurance from 1971 to 1973 and then, by mutual agreement, had become self-employed. However, his employment, with ensuing rights and obligations, had remained the same, the only difference being that the Company did not pay the pension insurance. The legal question, therefore, followed the possible definition Mr. Massey as employee also after the novation of the original agreement between him and the hiring company. The Court held that it could no longer be defined as an employee at the time of the dispute, because the nature of the contract that related to the employment relationship had changed: both parties, in fact, had agreed to amend the legal status of employee. This case shows that there is a need for respecting the agreement of the parties where there is an overlap with the actual working relationship. The point to highlight is that the employment contract is no exception to contract law, therefore the parties must be granted the right to determine their own legal relationships. [1978] 1 WLR 676.
[14] N. Le Thu, *Legal Considerations for Determination of Employment Relation and Employment Contract*, in *VNU Journal of Science: Legal Studis*, No. 2, 2021, p. 42 ff.
[15] This is a distinct category within the labour market. It enjoys some rights, such as the right to the national minimum wage and paid holidays. However, as regards the taxation matter, this category does not differ

the exercise of the power of management, control and supervision from the employer. It is a key element of the employment relationship: the employer is granted the right to control the employee and the management criteria. The supervision from an employer marks the worldwide interpretation of the recognition of the element of subordination in labour law[16]. The criterion of subordination, or dependence, is one of those proposed by ILO to properly qualify an employment relationship. This is a criterion according to which a person works for another person, and the latter has the possibility to issue orders, directives, carry out control and sanction activities in relation to the violation committed by employees[17]. From a terminological point of view, the concept of subordination is present in civil law systems, while in common law the control test is – traditionally but not exclusively – used to determine working relationships, the application of which has posed several problems.
One of the first cases is *Mersey Docks & Harbour Board v Coggins & Griffiths*[18]: in this, a stevedore had rented a crane with the driver belonging to the port administration on the basis of a contract which provided that the driver, appointed and paid by the port administration, offered its services to the stevedores. During the work, due to the driver's negligence, an inspector was injured, hence the legal question relating to the possible vicarious liability of either the stevedores or the port's board of directors as employers. The Court eventually held that, potentially, each of them could have been regarded as employers of the driver, so long as they were able, and entitled too, to check the details of the job to perform from time to time: although the stevedores could provide instructions, they could not exercise control over the way the crane was operated. In view of this, the employer was to identified as the board of directors[19].
A more developed criterion in order to detect an employment contract is the integration test: according to it, the essence of an employee's work is the respect of the rules and procedures of an organization. This second methodology is an alternative to provide a legal response to situations where it is difficult to apply control testing to highly skilled employees[20].

from independent contractors. Needless to say, they cannot claim unfair dismissal, which in the UK is a right bestowed exclusively upon employees. For a historical perspective N. Whiteside, *State Policy and Employment Regulation in Britain: An Historical Perspective*, in *International Journal of Comparative Labour Law and Industrial Relations* No. 3, 2019, p. 379 ff.
[16] S. Deakin, G. S. Morris, *Labour Law,* Oxford and Portland, 2009.
[17] ILO Recommendation no.198.
[18] [1947] AC 1.
[19] A similar reasoning is given in *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance*: in it was argued that "Control includes the power to decide what needs to be done, the means to do so, the time and place where it needs to be done. All these aspects of control must be considered in deciding whether the right exists sufficiently to make one party the master and the other his servant". On the basis of this argument, the driver was not regarded as dependent, despite the fact that he was wearing his uniform, drove a van with the logo of the Company and carried out its Work according to a program prepared by the Company itself as it appeared to be lacking direct control by the Company. [1968] 2 QB 497.
[20] For an example of application see *Beloff v Pressdram Ltd*: it was argued that a highly specialised journalist who possesses a plentiful remuneration could not claim not to be dependent because "the greater the skill required for an employee's work, the less significant is control in determining whether the employee is under a contract of services". See *Beloff v Pressdram Ltd* [1973] PRC 765.

Where the tests above are not applicable, factors relevant to the definition of an employment relationship are used[21]. The first element relates to the economic reality, i.e. it concerns assessing whether an individual performs a service as an entrepreneur or in favour of another person/entity (the employer) who/which assumes the final risk of both possible loss and profit[22].

The second factor concerns the existence of mutual commitments between the parties to maintain a given employment relationship for a given period of time, for what is called "concept of mutuality of obligations" in common law[23]: hence, the employment contract should not be regarded as a mere contract in exchange of money as what ultimately characterizes the employment contract (or contract of service in the UK terminology) is the existence of a second-tier of obligations consisting of mutual promises/obligations. In other words, an employment contract or contract of service exists when there is an agreement between the parties on the continuity of obligations and reciprocal rights[24].

The final reflection concerns the real capacity of these modifications to be applicable to the forms of labour relations typical of the Fourth Industrial Revolution. The positive aspect of the 2019 changes certainly is the increase in the protection of workers' rights.

On several occasions, in fact, the rulings of the British courts departed from the existing legislation in establishing that certain groups of persons operating in certain categories of the labour market actually had the status of workers when they had previously been qualified as self-employed gig workers. These are progressive developments at a time when they give these people certain rights, such as the right to national subsistence wages. The *Aslam and Others (Claimants) v. Uber BV and Others (Respondents)* case fits into this perspective[25].

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[21] See, among others, Z. Adams, C. Barnard, S. Deakin, S.F. Butlin. *Deakin and Morris' Labour Law*, 7 ed., Oxford, New York, Dublin, 2021, p. 124 ff.; More in general, see also D. Cabrelli, *Employment Law in Context: Text and Materials*, 4 ed., Oxford, 2021, *passim.*

[22] *Market Investigations Ltd v Minister of Social Security* [1969] 2QB173. In this case, the factors to be taken into account were multifarious and, fundamentally, related to: 1) who provides the individuals' equipment; 2) who assumes the risk of activity; 3) who pays for social security; 4) the use and, moreover, the payment of helpers; 5) last and indeed least, the name given by the parties to the contract or, in Latin, the *nomen iuris*. See P. de Gioia Carabellese, *The Employee Shareholder: the Unbearable Lightness of Being .... an Employee in Britain*, in *Maastricht Journal of European and Comparative Law*, No. 22, 2015, p. 81 ff.; P. de Gioia Carabellese, A. Sangiorgio, *Il Lavoratore Subordinato con Azioni ma Liberamente Licenziabile: la Nuova Figura dell'Employee Shareholder in Gran Bretagna*, in *Diritto delle Relazioni Industriali*, No. 26, 2016, p. 319 ff.

[23] The mutuality consists of an ancillary test particularly helpful to define, in the UK, the area of the contract of service, or employee contract, particularly for casual workers, viz. individuals carrying out a job without a permanent basis contract. In the case law, see *O'Kelly v Trusthouse Forte plc* [1983] I. C.R. 728; *Carmichael v National Power plc* [2000] I.R.L.R. 43.

[24] It is also worth noting that in the English common law a further factor that is regarded as essential in order to distinguish between an employee and a worker is the personal nature of the service provided by the individual. Therefore, the more personal is the service provided by the individual, the more likely that kind of service is consistent with a contract of employment. An example of this is given by two *decisa*. In the first one, *MacFarlane v Glasgow City Council* [2001] IRLR 7, EAT, a gym instructor used to work for the Council. Based on his contract, shouldn't he be in a position to take a class, he could arrange the replacement by picking him up from a list of instructors approved by the Council. The replacement instructor would have been paid by the Council, though. In this case it was held that a contract of service did exist, as the delegation to MacFarlane was occasional. There was personal nature of the service. Opposite to this is *Express* and *Echo Publications Limited v Tanton* [1999] ICR 693, where the claim of the individual aimed at the characterization of the work relationship as contract of service was dismissed on the basis of the lack of personal nature.

[25] [2017] IRLR 4.

3. Uber v. Aslam and others

In turning the attention to the controversy at stake, it is worth noting that two drivers for the Uber online platform, previously qualified as self-employed gig workers, claimed to be entitled to the national minimum wage as well as annual leave paid under the Working Time Regulations 1998[26], i.e. rights granted to both employees and workers, but not to the self-employed. The case, precisely, was prompted by the claim lodged by five Uber drivers who asked for their right to a minimum wage under the Nation Minimum Act 1998 as well as paid leave under the 1998 Working Time Regulation. For these two rights to be recognized, the key aspect that the Employment Tribunal needed to assess was the qualification of Uber's drivers as workers, to which Uber had always objected. In other words, the crucial aspect was the solution to the dilemma relating to the qualification of the relationship between Uber and its drivers, that is to say whether the latter were "working under contracts with Uber"[27].

In focusing on the *decisum* of the Employment Tribunal, the applicants meet the criteria set out in Section 230 (3) (b) of the Employment Rights Act 1996[28], defining the concept of work. This decision is based on a variety of reasonings.

First of all, Uber exercised substantial control[29] over drivers by maintaining a behaviour that was reminiscent of an employer: the platform, in fact, deducts the rates from the weekly pay of drivers without any notice: this element certainly strengthens the relationship between driver and passenger. In that regard, the Tribunal held that the explanations contained in the judgment of the North California District Court in *Uber Technologies Inc. v. Berwick*[30] were convincing, namely that Uber not only sold a software package but basically operated a taxi service.

In the contracts that Uber concluded with its drivers, called "Partner Terms," it was written that a Uber driver is "an employee or business partner of ... the Partner of Uber," even though typically the Partner was the driver himself. Although Uber sought to deny the qualification of its drivers' employees, the Court held that drivers should be qualified as Uber workers, leaving the question of their possible qualification as employees unresolved[31].

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[26] SI 1998/1833.

[27] *Uber BV* v. *Aslam* (n 31) at [42]. S. Y. Ching Leung, *How Do Statutes "Speak" in Recent Technology Advancemente Cases? Statute Law Review*, 2021, No. XX, p. 1 ff.

[28] The Court of First Instance held that drivers were in fact workers under the criteria applicable to the present case, namely that the working time began at the time when they entered the area where they were expected to work, in this scenario London, they had access to the app and, therefore, they were to accept the requests.

[29] One form of control exercised by Uber concerns the algorithmic determination of the fee determined by the platform: it encourages drivers to move to certain geographical locations where tariffs are higher. When drivers move from these areas they risk being penalised for giving priority to less favourable paid benefits. In this way Uber has the possibility to prevent drivers from rejecting the least paid job in favour of a more paid one going, consequently, to compress the control that the drivers can carry out on the mode of execution of their work. A. Rosenblat, L. Stark *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, *International Journal of Communication*, No. 10, 2016.

[30] No. 15 – 546378.

[31] 2017] IRLR, [93]:"The drivers fall full square within the terms of the 1996 Act, s 230(3) (b). It is not in dispute that they undertake to provide their work personally. For the reasons already stated, we are clear that they provide their work "for" Uber. We are equally clear that they do so pursuant to a contractual

It can be argued, in fact, that as a result of the facts that emerged in the Aslam pronunciation, Uber drivers can be qualified as workers under the British legislation. Indeed, one could argue that they can be qualified as employees[32]. This second argument is supported by the fact that, according to the Employment Tribunal itself, the drivers concerned were found to be subject to continuous monitoring and control. Although drivers are left with a reduced margin of autonomy, the monitoring on them is very penetrating and invasive to the point of them being subject to penalties if they lose a certain number of runs[33]. To this it should be added that Uber drivers are not able to negotiate with their customers the rates to be applied to the service provided as the drivers must accept the terms and conditions that are prepared by Uber.
The decision taken by the Employment Tribunal and subsequently confirmed by the Court of Appeal[34] had significant consequences. The focus of the public has now shifted to the way the gig economy is structured. Additionally, the British Government has announced a review, to be carried out every six months, to ensure that modern working methods,

relationship. If, as we have found, there is no contract with the passenger, the finding of a contractual link with Uber is inevitable…. Just as in *Autoclenz*, the employer is precluded from relying upon its carefully crafted documentation because, we find, it bears no relation to reality. And if there is a contract with Uber, it is self-evidently not a contract under which Uber is a client or customer of a business carried on by the driver. We have already explained why we regard that notion as absurd". Some Scholars observed that "that it is time to consider ways of transcending this binary divide and ensuring decent work in the labour market irrespective of employment status. Central to this would be to regard the worker as a rights-bearer regardless of the ways in which the contract is configured. The platform economy is only one manifestation of the reality in which large numbers of workers work outside of the standard employment relationship, while having no pretence or aspiration to being independent entrepreneurs". S. Fredam, *One Small Step Towards Decent Work: Uber v. Aslam in the Court of Appeal*, in *Industrial Law Journal*, No. 2, June 2019, p. 274.

[32] Uber drivers would pass all the tests necessary to define employee status, tests that were used in *Autoclenz Ltd v Belcher* [2011] UKSC 41. The system outlined by Uber, in fact, provides for the payment of a salary, provides for control activities by the employer, the personal performance of work. To this it must be added that, as evidenced from the EAT, the drivers of Uber work also in the moment in which the same they do not possess passengers but turn out to be in a situation "of guard" waiting for the successive race. In view of this, therefore, it is possible to say that Uber exercises all the typical functions of the employer. J. Prassl, *The Concept of the Employer* (Oxford: 2015) reviewed in *Oxford Journal of Legal Studies,* 2017, p. 482. The Autoclenz pronunciation appears to be of utmost importance especially since it argues that "the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part". It recalls the dissenting opinion of Judge Underhill LJ that the drivers provided their services only on the basis of a contract that was concluded with the passengers, having the latter no relationship of subordination with Uber.

[33] Obviously this is in contrast to what is claimed by Uber who thinks he has no employees. E. Mcgaughey, *Uber, the Taylor Review, Mutuality and the Duty Not to Misrepresent the State of Employment*, *Industrial Law Journal,* No. 2, 2019, p. 180 ff..

[34] The Appeal Question remained the same, that is to say, limited to the definition of the status of the worker who claimed the minimum wage and the salary paid. To this must be added that Judge Eady pointed out passages of (UNISON) v Lord Chancellor [2017] UKSC 51, [6] regarding the need for the correct application of Workers' Rights. In the case referred to, it is stated that "Relations between employers and workers are generally characterised by an imbalance of economic power. Recognising the vulnerability of workers to exploitation, discrimination and other undesirable practices and the social problems which may arise from them, Parliament has intervened at length in these reports in order to confer legal rights on workers, rather than letting their rights be determined by contractual freedom. More recently, further measures have been taken in the framework of legislation implementing EU law. To ensure the effectiveness of the rights conferred on workers and to obtain the social benefits provided by Parliament, they must be concretely enforceable".

with particular attention to new forms of self-employment, do not fall within standard[35] forms of work. Finally, the Uber case has had repercussions on other pending controversies such as the *Dewhurst v. Citysprint* case[36]. In it, a delivery person, previously qualified as an online platform worker, was given protection as a formal worker[37].

Nevertheless, the judiciary approach to gig economy has not always involved a coherent extension of workers' rights to all the platform workers. This becomes obvious in analysing the Central Arbitration Committee decision relating to the complaint on the working conditions of individuals working for Deliveroo. On that occasion, the conclusion was that the applicants were merely self-employed platform workers. More in depth, in the latter, a crucial aspect was found in the obvious and genuine ability of delivery persons to replace other people for the development of their skills through the platform[38].

Given the contrasting precedents, it can be said that Courts have so far focused on trivial aspects of a "platform job," such as the working hours and remuneration, particularly whether it is fixed or not[39]. By contrast, what should matter in order to shape the contours of these new types of employment are social and labour policies[40].

The *Aslam v Uber BV case* as decided by the Employment Appeal Tribunal shows a problematic aspect with regard to potential ensuing decisions, since this judgment engenders, albeit *inter partes*[41], consequences which may easily contradict the applicable precedent.

Precisely, the function of decisions[42] is to provide guidance for the solution of future controversies that will arise before a Court: "a decision in a case with no value to anyone other than the litigants, the lawyers and Judges involved in the case would be absurd"[43].

Another peculiar aspect of the decision adopted by the Employment Appeal Tribunal concerns the challenge of the principle of reality, with the latter taking over what the parties had formally agreed in the contract. In the present case, EAT held that, although factual elements are rarely prioritized over the formal ones existing in a contractual relationship[44], in the present case the court was empowered to disregard the latter. Therefore, it was possible to verify the unspecified terms of the contractual relationship that reflect reality. The priority given to the factual aspects over contractual ones also

[35] *Taylor, Matthew/Marsh, Greg/Nicol, Diane/Broadbent, Paul*, Good Work: The Taylor Review of Modern Working Practices.
[36] ET/220512/2016 of 5 January 2017.
[37] More in detail, the General Court found that the procedure for hiring drivers involved a two-day training period in which guidance was given on how to carry out the work. In addition, uniforms and other equipment had to be made available. These factors are not likely to qualify a worker as self-employed.
[38] To this it must be added that the recognition by the Courts of the status of workers is not always for the benefit of the subject. In *Pimlico Plumbers Ltd and Another (Appellants) v. Smith (Respondent)* ([2018] UKSC 29) the applicant, previously qualified as a self-employed person, was subsequently qualified as a worker could not claim the large amount of leave arrears that he believed to be due
[39] P. Larkin, *Relationship between Employment Status and Scope of Social Security Protection: The United Kingdom Example,* in U. Becker, O. Chesalina (eds.) *Social Law 4.0. New Approaches for Ensuring and Financing Social Security in the Digital Age*, Baden, 2021.
[40] In this sense Lord Sumption, The Limits of Law, The 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013, https://www.supremecourt.uk/docs/speech-131120.pdf. Accessed 10 July 2020
[41] The decision of Tribunali it is "only applies to the two drivers who brought the case".
[42] In this sense the UK Supreme Court *decisa* in *R (UNISON) v Lord Chancellor*.
[43] *R(UNISON) v Lord Chancellor* [2017] UKSC 51, [67]–[69].
[44] This principle is frequently applied in the Italian legal system; see Italian Supreme Court, 14 May 2009, no. 11207; Italian Supreme Court, 18 February 2009, no. 3894; Italian Supreme Court, 17 June 2009, no. 14054.

derives, in the specific case, from an observation: the subject matter of the employment contractual relationship is concerned, is not tantamount to ordinary commercial relationships, but it is an employment nexus that implies a different contractual power between the parties, where there is a clear gap between the provider/seller and recipient of the services[45].

Uber later appealed against the decision of EAT before the Supreme Court, which, in turn, unanimously dismissed it[46]. More precisely, the highest Italian judiciary body stated that, in the absence of a written contract between the drivers and Uber, the nature of the legal relationship had to be reconstructed starting from the behaviour of the parties. In this direction, it was observed that it was impossible to consider the platform as an intermediary between drivers and customers, given that it is Uber who concludes the contracts with the passengers and hires the drivers for them to perform the services covered by the contract.

In the light of the foregoing, the Court concluded that it is impossible to classify the employment relationship of drivers as independent (or "autonomous", to use the Continental categorisation), in view of the unilateral determination by the tariff platform and the contractual terms of performance of the service, the possibility for Uber to condition the ability of the driver to agree to perform a certain ride, the power of control exercised by the driver evaluation system as well as the measures put in place by Uber in order to limit the communication between passenger and driver to the strict minimum[47].

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[45] G. Pacella, *Drivers di Uber: confermato che si tratta di workers e non di self-employed*, in *Labour&LawIssues*, No. 2, 2017, p. 50 ff.; V. Pietrogiovanni, *L'importanza di chiamarsi lavoratori, ossia delle Corti del Regno Unito alle (p)rese con il lavoro a chiamata sulle piattaforme*, in *Labour&LawIssues,* No. 1, 2019, p. 45 ff..

[46] Supreme Court of the United Kingdom, 19 February 2021, *Uber BV and others v Aslam and others*, UKSC no. 5.

[47] Since then, there have been other rulings which have taken the orientation of the ET with regard to the qualification of the gig-workers. Employment Tribunal, London, 5 January 2017, Dewhurst v. Citysprint UK Ltd., EW No. 2202512/2016. Central Arbitration Committee, 14 November 2017, Independent Workers' Union of Great Britain (IWGB) v. Roofoods (England and Wales High Court, 5 December 2018, Independent Workers' Union of Great Britain (IWGB) v Roofoods (=Deliveroo'), EWHC No. 3342, No. CO/810/2018. Central Arbitration Committee, 14 November 2017, *Independent Workers' Union of Great Britain (IWGB) v. Roofoods*. A peculiar controversy concerns the qualification of a courier of the Yodel Delivery Network platform that has reached the point of involving the EU Court of Justice. In the present case, the applicant had requested the application of the working time safeguards laid down for the workers, despite the fact that the contract concluded with the platform provided for the qualification of the worker as self-employed. The Employment Tribunal of Watford considering subsisting in the contract of the clauses of substitution has remitted the question to the Court of Justice asking if the European Directive no. 2003/88 prevented the application of provisions of national law that provide that the worker must personally perform the work in order to fall within the scope of the Directive. In other words, the national court asked whether the mere presence, at the negotiating level, of replacement clauses was incompatible with the qualification of worker by determining Consequently, a worker's exclusion from the protection provided by the Working Time Directive. Employment Tribunal, Watford, preliminary referral decision of 18 September 2019. The Court of Justice delivered an extremely concise order setting out that the Working Time Directive does not apply to workers who may be covered by substitution clauses without, however, going into the issue of the right of the worker to be replaced. CJEU, 22 April 2020, C-692/19, B. v. Yodel Delivery Network. The decision of the Court of Justice has been highly criticised in doctrine because the concept of worker using by the Court of Luxembourg does not coincide with the homonymous case of English law and, above all, has its own specificity. It was argued that "it would appear that not only is the Community law concept of "worker" not the same of that of "employee" such as it is understood in the domestic law of the different Member States, but that also the Community law concept of "worker" is not consistent even within the different Community law texts". G. Cavalier, R. Upex, *The concept of*

4. The Italian approach to gig economy

The question of the precise qualification of the case with regard to the contractual definition of gig workers[48] has taken on a global scope[49]. As far as the Italian legal system is concerned, the question has been raised as to whether drivers of either Uber[50] or

employment contract in *European Union Private Law*, in *ICLQ*, 2006, p. 589. The peculiar characteristics of the European notion of worker would be essentially three: the submission to the hetero-direction, the receipt of a salary, the exercise of real and effective activities. From this it derives that the category of worker in the law of the European Union possesses an extremely wide scope in how much it comprises various typologies of job without resort to intermediate figures (intermittent job, partial job, formative activity of internship) between subordination and autonomy. G. Pacella, *The euro-unitary notion of employee to the test of the gig-economy: the European Court of Justice*, in *LLI*, No. 1, 2020, p. 18 ff.

[48] For some Scholars, the problem of the contractual qualification of the gig-workers is independent of the rigid "autonomy-versus-subordination" dilemma, for the reason that the gig-worker category is tainted with features and factors belonging to both of them. S. Bellocchio, *Autonomia o Subordinazione nei Riders: Questo è il problema. Riflessioni sul rapporto di lavoro nella Gig-Economy alla luce delle recenti sentenze*, in *Sapienza Legal Paper*, No. 6, 2019, p. 77. See T. Treu, *Rimedi, tutele e fattispecie: riflessioni a partire dai lavori della Gig economy*, in *Lavoro e Diritto*, No. 3-4, 2017, p. 367 ff.

[49] By way of example, it is recalled that in the USA in 2015 the California State Labour Commission categorised an Uber taxi driver as an employed. In Spain, similarly, the Court of Valencia has classified the employment relationship of the couriers used by Deliveroo as an employment contract. A. Perulli, *Capitalismo delle piattaforme,* Padova, 2018, p. 125; G. Pacella, *Alienità di risultato, alienità dell'organizzazione: ancora una sentenza spagnola qualifica come subordinati i fattori di Deliveroo*, in *LLI,* No. 4, 2018, p. 1.

[50] With regard to the services offered by Uber, two more legal aspects have arisen, especially in Italy, compared with the one being analysed here. The former is closely connected with the investigations carried out by the Milanese Public Prosecutor's Office, which requested, and subsequently obtained, the application of the preventive measure of the judicial administration on the basis of a well-founded fear of the existence of the crime of illicit intermediation and exploitation of labour pursuant to art. 603-bis Italian Criminal Code, perpetrated by the companies affiliated to Uber Italy srl against the messengers: see Milan Tribunal, decree ruling 27 May 2020, 9. On this point A. Quattrocchi, *Le nuove manifestazioni della prevenzione patrimoniale: amministrazione giudiziarie e contrasto al "caporalato" nel caso Uber*, in *Giur. Pen. Web*, No. 6, 2020; A. Esposito, *I Riders di Uber Italy Srl*, in *RIDL*, No. 2, 2020, p. 558 ff.; W. Chiaromonte, *Rider senza tutale. Sfruttamento su due ruote*, in *Nigrizia,*No. 2, 2021. C. Inversi, *Caporalato digitale: il caso Uber Italy Srl,* in *Lavoro e Diritto*, No. 2, 2021, p. 335 ff. The second problem relates to unfair competition between taxi transport and Uber drivers, both of which are designed to meet the same requirement, namely customer transport. For further information, S. Serafini, *La concorrenza sleale per la violazione della normativa pubblicistica del trasporto urbano non di linea: Il caso Uber*, in *Corriere Giuridico*, No. III, 2016, p. 368 ff.; C.E. Papadimitriu, M. Percoco, *Le piattaforme digitali tra opportunità e incertezze normative: il caso Uber*, in *Rivista giuridica del Mezzogiorno*, No. 2, 2019, p. 451 ff.; L. Belvisio, *Il caso Uber negli Stati Uniti e in Europa fra mercato, tecnologia e diritto. Obsolescenza regolatoria e ruolo delle Corti,* in *MediaLaws*, No.1, 2018, p. 156 ff.; D. Tega, *Uber in Piazza del Quirinale no. 41: la «gig economy» arriva alla Corte costituzionale*, in *Le Regioni*, No. 3, 2017, p. 580 ff.; V.C. Romano, *Nuove tecnologie per il mitridatismo regolamentare: il caso Uber Pop,* in *Mercato Concorrenza Regole*, No. 1, 2015, pp. 133 ff.; P. Tullio, *In tema di concorrenza sleale sui rapporti tra Uber e le cooperative di radiotaxi,* in *Diritto dei Trasporti*, No. 3, 2017, p. 917 ff. As to the Italian precedents, see Milan Tribunal, Enterprise Special Section, decree ruling 25 May 2015; Rome Tribunal, Enterprise Special Section, decree ruling. 7 April 2017. For the sake of completeness, a ruling by the Court of Justice following a reference for a preliminary ruling made by a Spanish judge asking whether Uber was a transport service. *Asociación Profesional Élite Taxi v Uber Systems Spain SL* (2017) C-434/15. The decision made by the Grand Chamber is of particular importance because it highlights the criticality of the "Uber system": "from information before the Court ... the brokering service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to which the undertaking provides a demand without which

Foodora[51] should be regarded as employees , service providers or, finally, individuals carrying out a type of continuous coordinated collaboration[52] suitable to be defined as the hetero-organization[53].

With particular attention to the so-called "Uber phenomenon," some scholars have argued that "if the digital platform, far from being a mere place of encounters between service providers and users, acts as a true employer, exercising its powers, in regulatory and protective terms, the response is found in the law"[54]. However, it has been pointed out that very often, in the work carried out through platforms, there are not enough traces of either hetero-direction or of hetero-organization[55], since the notion of subordination cannot be over-stretched to encompass the status of protection granted to employees, in employment relationships that cannot be referred to art. 2094, Italian Civil Code[56].

The problem of subordination to the platform[57] arises when the provider not only retains part of the job, but it is also entitled to require the service to be provided according to

(i) such drivers would not be induced to provide transport services and (ii) persons wishing to make an urban journey would not use the services provided by such drivers. In addition, Uber has a decisive influence on the conditions under which this service is provided by such drivers. On the latter point, it seems, inter alia, that Uber determines at least the maximum tariff by means of the application of the same name, that the company receives that amount from the customer before paying a part of it to the non-professional driver of the vehicle, and which has some control over the quality of vehicles, drivers and their behaviour, which may, in certain circumstances, lead to their exclusion". (2017) C-434/15, [39]. E. Mcgaughey, *Uber, the Taylor Review, Mutuality and the Duty not to Misrepresent Employment Status*, in *Industrial Law Journal*, No. 2/2019, p. 194-195. The problem has also been addressed with the *HKSAR* v. *Yuong Ho Cheung* ((2020) 23 HKCFAR 311). See S. Yee, C. Leung, *How Do Statutes "Speak" in Recent Technology Advancement Cases?* In *Statute Law Review*, No. XX, 2021, pp. 1 ff.

[51] M. Midiri, *Nuove tecnologie e regolazione: il «Caso Uber»,* in *Rivista Trimestrale di Diritto Pubblico*, No. 3, 2018, p. 1017 ff.

[52] It is recalled that the European Commission too has clarified that the rise of these new forms of work leads to a structural change in the employment relationship affecting, *inter alia*, even the same boundaries between self-employed and subordinated workers, to the point that this demarcation line becomes increasingly blurred. To this he added that "in order to meet the requirement of subordination the service provider must act under the direction of the collaboration platform, which determines the choice of activity, remuneration and working conditions". European Commission (2016), A European agenda for collaborative economy, COM 2016, 356. The Commission specifically called on the Member States to "fair working conditions and adequate and sustainable social protection". In doing so, the EU Commission assessed "the adequacy of their national employment rules considering the different needs of workers and self-employed people in the digital world as well as the innovative nature of collaborative business models".

[53] The conundrum originally related to the qualification of the pony-express employment relationship. See M. Biasi, *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 *Adapt University Press*, No. 11, 2017.

[54] R. Voza, *Il lavoro reso mediante piattaforme digitali,* in *Il lavoro nelle piattaforme digitali*, *QRGL*, No. 2, 2017, p. 70 ff.

[55] E. Raimondi, *Il lavoro nelle piattaforme digitali e il problema della qualificazione della fattispecie*, in *LLI,* No. 2, 2019, p. 67.

[56] It may also be added that the platform cannot be qualified as an employer, for the reason that it would only cater for the purposes of building a digital labour market, by ensuring that the supply and demand of goods and services can be matched. According to a similar reasoning, some Scholars have pointed out that, in the case just referred, "the trumpets of labour law remain silent as long as the platform is limited to promoting the mere commercial exchange of a good or a service through the Internet or apps, without any emphasis on the work required" (our translation from English). R. Voza, *Il lavoro reso mediante piattaforme digitali, op. cit*., p. 72.

[57] A double-check of the Italian literature in this area may be helpful. See, among others; T. Treu, *Diritto del lavoro e transizione digitale: politiche europee e attori sindacali - La digitalizzazione del lavoro:*

specific modalities in order to guarantee certain quantitative standards to the user. Uber, in this specific case, adopted a service assessment system through either user feedback or ad hoc technological tools installed in the equipment or working tools in charge of carrying out the service[58].

In the light of the above, some would be inclined to frame the collaboration in the digital platform within art. 2094 of the Italian Civil Code: according to this line of reasoning, the power to unilaterally disconnect drivers from the platform has been assimilated to the existence of a disciplinary power and the control carried out on the workers can be interpreted as a symptom of subordination[59].

proposte europee e piste di ricerca, in *Diritto delle Relazioni Industriali*, No. 1, 2022, p. 1 ff.; L. Valente, *La politica sociale UE recente e i progressi possibili per una nozione europea di lavoratore*, in *Rivista Italiana di Diritto del Lavoro*, No. 4, 2021, p. 339 ff.; G. Santoro Passarelli, *La subordinazione in trasformazione*, in *Diritto delle relazioni industriali*, No. 4, 2021, p. 1125 ff.; G. Santoro-Passarelli, *Il lavoro mediante piattaforme digitali e la vicenda processuale dei riders*, in *Diritto delle relazioni industriali*, No. 1, 2021, p. 111 ff.; M. Lai, *Innovazione tecnologica e riposo minimo giornaliero*, in *Diritto delle relazioni industriali*, No. 3, 2020, pp. 662 ff.; A. Zoppoli, *Le collaborazioni eterorganizzate tra antiche questioni, vincoli di sistema e potenzialità*, in *Diritto delle relazioni industriali*, No. 3, 2020, p. 703 ff.; I. Bresciani, *La digitalizzazione del lavoro tra legge e contrattazione collettiva - Il lavoro al tempo di Uber tra interventi normativi e orientamenti giurisprudenziali*, in *Diritto delle relazioni industriali*, No. 3, 2020, p. 611 ff.; O. Razzolini, *I confini tra subordinazione, collaborazioni etero-organizzate e lavoro autonomo coordinato: una rilettura*, in *Diritto delle relazioni industriali*, No. 2, 2020, p. 345 ff.; R. Romei, *I rider in cassazione: una sentenza ancora interlocutoria*, in *Rivista italiana di diritto del lavoro*, no. 1, 2020, p. 89 ff.; B. Caruso, *Il lavoro digitale e tramite piattaforma: profili giuridici e di relazioni industriali I lavoratori digitali nella prospettiva del Pilastro sociale europeo: tutele rimediali legali, giurisprudenziali e contrattuali*, in *Diritto delle relazioni industriali*, no. 4, 2019, p. 1005 ff.; M. Midiri, *Nuove tecnologie e regolazione: il «caso uber»*, in *Rivista trimestrale di diritto pubblico*, No. 3, 2018, p. 1017 ff.; V. Aniballi, *Il lavoro organizzato mediante piattaforma digitale: nuove sfide per le Commissioni di certificazione*, in *Diritto delle relazioni industriali*, No. 4, 2019, p. 1075 ff. Among the commentaries, without any pretence of compeletenes, see P. Ichino, *Subordinazione, Autonomia e protezione del lavoro nella Gig-Economy*, Commentary on Turin Tribunal, 7 May 2018, no. 778, sez. lav.), in *Rivista italiana di diritto del lavoro*, No. 2, 2018, p. 0294B ff.; M. T. Carinci, *Il lavoro etero-organizzato secondo Cass. N. 1663/2020: verso un nuovo sistema dei contratti in cui è dedotta un'attività di lavoro* (*Cassazione civile, 24 January 2020, no. 1663, sez. lav.)*, in *Diritto delle relazioni industriali*, No. 2, 2020, p. 488 ff.

[58] Should negative feedbacks be given, as in circumstances where the driver does not agree on answering 80% of the calls, the platform shall disconnect the worker in such a way as to deprive her/him of the profit opportunity.

[59] A. Consiglio, *Il lavoro nella* digital economy*: prospettive su una subordinazione inedita?*, *LLI*, 4, 1, 2018. The above conclusion has been criticised. First, it was pointed out that the unilateral disconnection from the platform and the related monitoring carried out by the employer cannot be considered as symptomatic indicators of subordination. In this direction, disconnection can be qualified as withdrawal from a relationship of duration compatible, of course, with the autonomous nature of collaboration in the digital enterprise. A dismissal may be classified as such, only on condition that there is an upstream employment relationship. By contrast, the "termination", so long as it is a power, is governed by an ad hoc legal framework, in the light of the type of contract either chosen by the parties or ascertained by the Court. As a result, there is just one constraint and this applies only to the obligation of notice pursuant to art. 3, law no. 81/2017. With regard to the supervision exercised by the platform, it is necessary to distinguish between the way in which it is carried out or the result of the work executed by the worker. Ultimately, the subordinate nature of the employment relationship made through digital platform has been advocated on the basis of a theory of the Italian Constitutional Court, in the decision no. 30/1996 (the so called *"doppia alienità"* theory, or in English "double-extraneousness"). In that judgment, the Court held that, "strictly considered", the subordination is a concept which is both more meaningful and, qualitatively, different from the subordination found in other contracts, such as those involving the working capacity of one of the parties. The difference is due, according to the constitutional judges, to the combination of two conditions

Nevertheless, most scholars[60] still maintain the view that the condition of objective economic dependence on a platform cannot be characterized as technical-functional subordination from an employer. The latter conclusion could be confuted only if certain factual elements could be interpreted as indicators of subordination, so long as they are evidence of the existence of a "governing power." By adopting this perspective, therefore, the unilateral power to dictate contractual conditions e.g. the remuneration of benefits or checks on the work performance would be symptoms of a mere difference in contractual power, which may also be present in an independent employment relationship[61].

The conclusion which can be drawn from the foregoing is that, in order to qualify the employment relationship as "dependent," it shall be necessary to distinguish, on a case-by-case basis, the actual manner in which the contractual relationship is conducted, with the ultimate aim of qualifying the person providing the service as an employed, self-employed or occasional worker[62].

Pending parliamentary work, the question of the qualification of the employment relationship has been the subject of numerous rulings[63]. The first decision of the Court of Turin[64] qualified Foodora riders as self-employed and not subordinated; the same conclusion was reached by the Court of Milan[65] with regard to the legal qualification of Glovo riders.

The latter rulings concerned contracts of continuous coordinated collaboration, for which the claim was made pursuant to art. 409 no. 3, Italian Code of Civil Procedure: the

that are never found in other cases: the first is constituted by the alien nature - in the sense of exclusive destination to others - of the result of the job (i.e. the exclusive destination to others); the second is represented by the alien nature of the organization where this performance takes place (c.d. hetero-organization). The conclusion of the Italian Constitutional Court, which is based on a black-letter of the law, is namely: "when supplemented by these two conditions, subordination is not simply a way of being of the performance inferred in the contract, but is a qualification of the performance resulting from the type of settlement of interest chosen by the parties with the conclusion of an employment contract, involving the incorporation of work in a production organisation over which the worker has no control, being established for a purpose in respect of which he has no legally protected (individual) interest" (our translation). E. Raimondi, *Il lavoro nelle piattaforme digitali e il problema della qualificazione della fattispecie, op., cit.*

[60] This is also supported by a constant judicial trend pursuant to which an irreducible element of employment relationship shall exist. Additionally, there shall be a discretionary feature - which is not so obvious in the self-employment relationship – which results in the employment provider's personal subjection to the managerial power, disciplinary action and supervision of the employer (Italian Supreme Court, 10 September 2019, No. 22632).

[61] C. Smorto, *La tutela del contraente debole nella platform economy*, *GDLRI,* 2018, p. 423 ff.

[62] S. Ciucciovino, *Analisi e proposte sul diritto del lavoro al tempo di Industria 4.0 Le nuove questioni di regolazione del lavoro nell'Industria 4.0 e nella gig economy: un* problem framework *per la riflessione*, in *DRI*, 2018, pp. 1 ff. See Legislative Decree no. 81/2015 and Law no. 128/2019, whereby Law Decree no. 101/2019 has been converted in law.

[63] The common feature of the two Italian courts relates to the way in which work was carried out. According to the agreement, there was a specific procedure to be followed in the performance of the work; it consisted of the employee's declaration about his availability to work in certain time slots, unilaterally arranged by the company. However, it was not necessary to achieve a minimum number of deliveries, as the worker just needed to select the delivery that he would have wanted. This system was hinged upon an app to download in the smartphone or tablet. The refusal or lack of selection of delivery orders determined a down-grade of the riders' loyalty to the company, hence adverse impact on the individuals and on their possibilities to book in the future slots according to their preferences.

[64] Turin Tribunal, no. 778/2018.

[65] Milan Tribunal, no. 1853/2018.

workers' dispute was about the genuine nature of the collaboration and consequently the request to ascertain the subordinate nature of the contractual relationship[66].
Both Court decisions resorted to the criterion developed in the Italian case law that emphasizes the constraint of subjection to executive, organizational and disciplinary power. In the present case, Judges ruled out the hetero-directional constraint because "the relationship between the parties was characterised by the fact that the applicants did not have the obligation to perform the work and the employer did not have the obligation to receive it." The absence of the directive power was supported only on the account that the delivery persons are free to give their availability for deliveries: based on this, they can independently determine both the quantity of the benefit and its temporal position.
Some scholars objected that these judicial stances could be criticized. First of all, it has been pointed out that the freedom to accept an assignment is not a crucial element whereby the subordinate nature of the relationship could be ruled out: the Italian legal system recognizes as an employment relationship intermittent work without obligation to answer a call[67]. The freedom to choose a ride should have induced the Court to find the existence of the type of contract mentioned above and not be interpreted as independent service[68].
Apart from this, the crucial element for the purposes of qualification is the subjection of the employee to the management power of the employer: not only does hetero-direction concern the indication of the places where to carry out the delivery and the relative times, but it also extends to the entire job performance, such as demanding to wear a uniform or keeping a determined behaviour with the final customer.
To such an end, it is worth adding that the freedom granted to the worker as regards the acceptance or non-acceptance of an assignment at a given time may be incompatible with the notion of hetero-organization, as it would point to the absence of the unilateral power of the client with regard to the definition of the time of work provision[69].
Furthermore, the two Court decisions under discussion refrained from double-checking – pursuant to art. 15(1) (lett. a) – whether the coordination arrangements were established by mutual agreement and whether the delivery persons had independently organized their work or, on the contrary, the arrangements had been made by the principal[70].

[66] Connected with the main claim were further disputes, relating to the compensation (which was regarded as inadequate), the workers' exploitation by the company and other issues related to the gig-economy.
[67] G. De Simone, *Lavoro digitale e subordinazione. Prime riflessioni,* in *RGL,* No. 1, 2019, pp. 4 ff.; M. Novella, *Il* rider *non e lavoratore subordinato, ma e tutelato come se lo fosse,* in *LLI,* No. 1, 2019.
[68] The Italian Supreme Court itself has held that the freedom to give his own availability is an element which turns out to be "external to the employment relationship". Italian Supreme Court, 13 February 2018, no. 3457.
[69] V. Bavaro, *Il tempo nel contratto di lavoro subordinato. Critica alla de-oggettivazione del tempo-lavoro*, Bari, 2008, pp. 168 ff.; F. Siotto, *Fuga dal tempo misurato: il contratto di lavoro tra subordinazione e lavoro immateriale*, in *RIDL*, No. 2, 2010, p. 411.
[70] This assessment was not carried out, because – allegedly - the provision at stake constituted a non-rule, therefore devoid of that content that, otherwise, would be capable of producing new legal effects to the different types of employment relationship. P. Tosi, *Art. 2(1), Legislative Decree no. 81/2015: an apparent norm*, in ADL, 2015, 1117; to the contrary, A. Perulli, *Un Jobs Act per il lavoro autonomo. Verso una nuova disciplina della dipendenza economica*, in *WP C.S.D.L.E. "Massimo D'Antona".IT,* 2015, p. 235; L. Zoppoli, *La collaborazione eterorganizzata: fattispecie e disciplina*, in *WP C.S.D.L.E. "Massimo D'Antona".IT*, 2016, p. 296; C. Pisani, *Le collaborazioni coordinate e continuative a rischio estinzione*, in *RIDL*, No. 1, 2018, pp. 43 ff. Some Scholars noted that it is precisely the system of digital platforms that corroborates a form of control exercised by employers over workers. What is crucial is precisely the operation of digital platforms, which impinges on the combination of the maintenance of low operating

What the Tribunal – the First Instance Court – held was not upheld by the Court of Appeal of Turin[71]. Namely, the conditions of art. 2(1), Legislative Decree no. 81/2015 were not met and, consequently, workers had to be treated as employees with regard to remuneration[72]. The messengers, in the reasoning of the Court of Appeal, were not to be qualified as employees, because of the reduced hourly amount of the benefit as well as their freedom to work[73].

The matter of the qualification of the employment relationship of riders reverberates in judgment no. 1663/2020 of the Italian Supreme Court which confirmed the conclusions reached by the Court of Appeal of Turin with regard to the application of art. 2(1), Legislative Decree no. 81/2015. Precisely, the Italian Supreme Court pointed out that art. 21 must be interpreted as a rule of law[74] by valuing, for this purpose, the intent of the legislator derived from the discipline of Law Decree no. 1/2019 as amended by Law no. 128/2019.

As a result of these rules, the discipline of paid employment may be applied to the collaboration relationships which they possess, as those to be expressed in mainly

costs and, on the other hand, a constant positive assessment of the public for the services offered. Ultimately, this is a "hendiadys" made possible by predicting the possibility for the customer to evaluate the worker through a digital vote. Based on this mechanism, those who can count on a high percentage of satisfaction will enjoy benefits that are provided by the platform. From this derives, according to a school of thought, a form of control of the employer which is conflated with a degree of dependence existing between the intermediation site and the community. E. Dagnino, *Uber law: prospettive giuslavoristiche sulla sharing/on-demand economy,* in *AdaptLabourStudies,* 2015.

[71] M. Biasi, *Dai* pony express *ai* riders *di Foodora*, *op. cit.*; R. De Luca Tamajo, *La sentenza della Corte d'Appello Torino sul caso Foodora. Ai confini tra autonomia e subordinazione,* in *LDE*, No. 1, 2019; A. Perulli, *I ciclofattorini sono etero-organizzati*, in *Quotidiano del Lavoro,* 2019; U. Carabelli, C. Spinelli, *La Corte d'Appello di Torino ribalta il verdetto di primo grado: i* riders *sono collaboratori etero-organizzati*, in *RGL*, No. 1, 2019, pp. 95 ff.

[72] Turin Court of Appeal, no. 26/2019.

[73] Unlike the first instance *curia*, the Court of Appeal rules out the subordinate nature of the relationship, although they applied art. 2 of Legislative Decree no. 81/2015 providing a new line of distinction between subordination and hetero-integration. The latter shall apply in circumstances where arrangements are in place for the performance of the service, so that both time and place of performance are established in advance, although the individual is given the freedom to determine in actual terms the activity to be carried out: the employment relationship remains autonomous but the safeguards provided for the employment relationship apply. See A. Perulli, *I sono etero-organizzati,* in *Quotidiano del Lavoro,* 2019. Cfr M. Del Conte, O. Razzolini, *La* gig economy *alla prova del giudice: la difficile reinterpretazione della fattispecie e degli indici denotativi*, in *DLRI*, 2018, p. 673 ff.; V. Ferrante, *Subordinazione ed autonomia: il gioco dell'oca*, *DRI*, 2018, pp. 1196 ff.; M. Forlivesi, *Nuovi lavori, vecchie interpretazioni? Note a margine di una recente sentenza del Tribunale di Milano sulla qualificazione giuridica dei c.d. "riders"*, in *Labor*, 2019, p. 112 ff.; E. Gramano, *Dalla eterodirezione alla eterorganizzazione e ritorno. Un commento alla sentenza* Foodora, in *Labor*, 2018, p. 609 ff.; P. Ichino, *Subordinazione, autonomia e protezione del lavoro nella* gig-economy, in *RIDL*, 2018, II, p. 294 ff.; G. Recchia, Gig economy *e dilemmi qualificatori: la prima sentenza italiana*, in *LG*, No. 7, 2018, p. 726 ff.; C. Spinelli, *La qualificazione giuridica del rapporto di lavoro dei fattorini di* Foodora *tra autonomia e subordinazione*, in *RGL*, 2018, p. 371 ff.; P. Tullini, *Prime riflessioni dopo la sentenza di Torino sul caso* Foodora, in *LDE*, No. 1, 2018; R. De Luca Tamajo, *La sentenza della Corte d'Appello Torino sul caso Foodora. Ai confini tra autonomia e subordinazione*, in *LDE*, No. 1, 2019; M. Del Frate, *Le collaborazioni etero-organizzate alla prova della giurisprudenza di merito*, in *DRI*, No. 4, 2019, p. 937 ff.; R. Del Punta, *Sui riders e non solo: il rebus delle collaborazioni organizzate dal committente*, in *RIDL*, No. 2, 2019, p. 358 ff.

[74] In that respect, it was argued that, by that legal provision, the legislator would only have valued "certain factual indices deemed significant (personality, continuity, hetero-organisational), yet sufficient to justify the application of the rules laid down for the employment relationship exempting from any further investigation the judge who recognizes the competition of such elements in the specific case and who cannot, in the appreciation of them, draw a different conviction in the qualifying summary judgment".

personal continuous work the performance procedures of which are established by the client, also applying the hypothesis in which the execution procedures are organized through digital platforms[75].

The objection to the decision of the Court of Appeal concerns the classification of the contentious case within a *tertium genus* intermediate between autonomous and subordinate[76].

With regard to the identification of the protections of paid employment applicable to hetero-organized collaborations, the Court allows for selective application of paid employment protections to hetero-collaborators organized by excluding those closely related to the essence of subordination or related to the exercise of the hierarchical-disciplinary power of the employer in view of the fact that these collaborations remain autonomous[77].

Although the qualifying question relating to the services rendered via digital platform seems to be concluded, the Court of Palermo intervened on the issue[78] with a recent judgment that qualified the relationship of riders as employment[79]. In that judgment, the Tribunal stated that the employment relationship was subordinate in nature, since there was no freedom, on the part of the employees, to decide if and when they could work, nor was the possibility to agree on a rate of the consideration linked with the work. Last but by no means least, the service appeared to be organized through a digital platform made available by the undertaking; with this, the employer controlled the working energy of the provider of work with management and control powers from which, in their turn, the disciplinary powers originated[80].

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[75] The Italian Supreme Court has postponed its decision, pending the promulgation of the law of conversion despite the object of the decision held previous facts.

[76] C. Spinelli, *Le nuove tutele dei riders al vaglio della giurisprudenza: prime indicazioni applicative*, in *LLI,* No. 1, 2020, p. 89 ff.

[77] U. Carabelli, *Introduzione*, in U. Carabelli, L. Fassina (eds), *La nuova legge sui riders e sulle collaborazioni etero-organizzate*, Ediesse, 2020, p. 22-23; M. Barbieri, *Contraddizioni sistematiche e possibili effetti positivi di una legge di buone intenzioni e cattiva fattura*, in U. Carabelli, L. Fassina (eds), *La nuova legge sui riders e sulle collaborazioni etero-organizzate*, Ediesse, 2020, pp. 100 ff. Some scholars have highlighted that the ruling of the Italian Supreme Court ends up maintaining the view that it is not matter of independent job to which to apply the protections of the subordinate job but a independent job that, just in the course of its development, may develops similar characteristics of dependent job. O. Razzolini, *I confini tra subordinazione, collaborazioni etero-organizzate e lavoro autonomo coordinato: una rilettura,* in *Diritto delle Relazioni Industriali*, No. 2, 2020, p. 345 ff.

[78] Palermo Tribunal, labour section, no. 3570/2020. In such a controversy, a rider from the Glovo platform appealed to the Court of Palermo on the grounds that he had worked as a cyclist continuously until 3.3.2020, when he was disconnected from the platform and never reconnected. In the light of this, the rider challenged the conduct of that platform as oral dismissal, discriminatory and retaliatory, adding the request of subordinate nature categorisation of the employment relationship in the light of the actual modalities of performance of the job, particularly the orders received.

[79] G. Santoro-Passarelli*, Il lavoro mediante piattaforme digitali e la vicenda processuale dei riders*,in *Diritto delle Relazioni Industriali*, No. 1, 2021, p. 111 ff.

[80] The Palermo Tribunal held that "in essence, therefore, beyond the apparent and declared (in contract) freedom of the rider, and of the applicant in particular, to choose the working time and whether or not to render the service, the organisation of the work carried out exclusively by the party agreed on the digital platform in its own availability is reflected in the integration of the hetero-organisational premises, also in making available to the employer by the worker his working energy for substantial periods of time (and unpaid) and in the exercise by the defendant of management and control powers, as well as of a strictly disciplinary nature, which are constituent elements of the employment scenario under art. 2094 ICC" (our translation, not literal, from Italian). See V. Ferrante, *Ancora in tema di qualificazione dei lavoratori che*

Although most Italian scholars[81] do not agree with the final stances of the Court of Palermo, it is necessary to investigate whether other countries have reached similar conclusions[82].
The first "suspect" in this investigation would be the French Supreme Court[83] which has been adamant that in principle a Uber driver should be regarded as a "subordinate."
In the reasoning of the highest Court in France, the person who carries out the job cannot be regarded as a mere commercial partner since the latter, when he enters into a contract, adheres to a transport service that is organized entirely by Uber, thanks to a digital platform and algorithmic processing systems aimed at determining the operation of the platform. The driver who uses the platform does not have the possibility to choose his own customers or to freely determine the rates to be applied. As a result, the perimeter of the rules applicable to this job would be determined from the outside.

operano grazie ad una piattaforma digitale, in *Diritto delle Relazioni Industriali*, No. 1, 2021, p. 215 ff.; G. Fava, *Nota alla sentenza del Tribunale di Palermo no. 3570/2020 pubb. il 24/11/2020 – Il rapporto di lavoro dei riders*, in *LavoroDirittiEuropa*, No. 1, 2021.

[81] It has been argued that, as regards constitutional law, the labour principle encompassed with the Italian Constitutional Charter, is a unique element with respect to the legal provisions of different "Constitutional Charters". This is due to the fact the "working principle" (or "*principio lavorista*") plays a major role. Therefore, particular attention should be paid by the legal system to the strong involvement of the person in all types of work. This conclusion is confirmed by the different constitutional provisions in the field of Italian labour law, where the central role of the human person or individual is quintessential. In light of this, the working principle must be a "compass" that guides not only the decisions of the legislature, but also a "yardstick" for judges, in compliance with their power and duty to interpret the Constitution. C. Salazar, *Diritti e algoritmi: la Gig economy e il "caso Foodora", tra giudici e legislatore*, in *ConsultaOnline*, No. 1, 2019. See M.S. Giannini, *Rilevanza costituzionale del lavoro*, in *Riv. giur. del lavoro*, anno I, No. 1-2, 1949; G. Zagrebelsky, *Fondata sul lavoro. La solitudine dell'art. 1*, Torino, 2013; M. Luciani, *Radici e conseguenze della scelta costituzionale di fondare la Repubblica democratica sul lavoro*, in *Arg. Dir. lav.*, No. 3, 2010, p. 634-640; C. Mortati, *Art. 1.– Principi Fondamentali artt. 1-12*, in G. Branca (eds) *Commentario alla Costituzione* in *Commentario alla Costituzione*, Bologna, 1975; G. Silvestri, *Il lavoro nella Costituzione italiana*, in AA. VV., *Il sindacato e la riforma della Repubblica*, Roma, 1997; R. Nania, *Riflessioni sulla "Costituzione economica" in Italia: il "lavoro" come "fondamento", come "diritto", come "dovere"*, in E. Ghera, A. Pace (eds), *L'attualità dei principi fondamentali della Costituzione in materia di lavoro*, Napoli, 2009; C. Della Giustina, *Quando il datore di lavoro diviene un algoritmo: la trasformazione del potere del datore di lavoro in algocrazia. Quale spazio per l'applicazione dei principi costituzionali?* In *Medialaws*, No. 2, 2021, p. 222 ff.

[82] This is an extremely controversial issue: for the Labour Court of São Paulo, the employment relationship between the drivers and the platform is of a subordinate nature. By contrast, the Court of Appeal of Minas Gerais held, in a different controversy but relating to the same issue, that it need to be treated as an independent employment relationship A. Ingrao, *Uberlabour: l'organizzazione "uberiana" del lavoro in Brasile e nel mondo. Il driver è un partner di Uber o un suo dipendente?* In *Diritto delle Relazioni Industriali*, No. 2, 2018, p. 705 ff.; G. Pacella, *Lavoro e piattaforme: una sentenza brasiliana qualifica subordinato il rapporto tra Uber e gli autisti*, in *Rivista Italiana di Diritto del Lavoro*, No. 3, 2017, p. 560 ff.

[83] Cour de cassation, Chambre sociale, 4 marzo 2020, no. 374, online. This is not an isolated ruling: in late 2018, the French Supreme Court issued a similar ruling in favour of a rider who had worked for "Take it Easy". On that occasion, the Supreme Court reversed the decision of the Court of Appeal, since it recognised the existence of a link of subordination ("lien de subordination"), pursuant to art. L. 8221-6 del *Code du travail. Cour de cassation, Chambre sociale, 28 novembre 2018, n. 1737*; C. Garbuio, *Il contributo della Cour de cassation francese alla qualificazione dei lavoratori digitali: se la piattaforma esercita i poteri tipici del datore, esiste un lien de subordination* in *RIDL,* No. 2, 2019, p. 179 ff.; C. Courcol-Bouchard, *Le livreur, le plateforme et la qualification du contract,* in *RDT,* No. 12, 2018, p. 812 ff.; M. Peyronnet, *Take Eat Easy contrôle et sanctionne des salariés*, in *Revue de Droit du Travail*, No. 1, 2019, p. 36 ff.

This implies a position of economic and contractual dependence[84], to which the supply of work, whether or not within an organization of services, should be added. This second element, also necessary, indicates a symptom of subordination only when the employer unilaterally organizes the conditions for the performance of the work[85]. Precisely, the strict and rigid nature of the prescriptions adopted by Uber would drive a coach and horses through the main objection, namely that there would be freedom of the user to choose if and when to work: in essence, given the wide discretion enjoyed by Uber, these rules would induce the worker to guarantee constant availability and the acceptance of every assignment that is offered[86].

Similarly, the Supreme Tribunal of Spain[87] ruled on the working relationship of the riders of Glovo[88]. Differently from the previous Court decisions, the controversy was identical, albeit extended to the merit too. In essence, the subordinate nature of the employment relationship between the applicant and Glovo was acknowledged[89].

In order to ascertain the subordinate nature of the employment relationship, the Supreme Court assessed the indexes of subordination pursuant to art. 1 and art. 1(3) (lett.G), *Estatuto de los Trabajadores*. With regard to the concept of dependence, the judges noted that the technological innovations blossoming in the current historical moment do require reinterpretation of the contents of the traditional legal concepts: thus, dependency does not imply absolute subordination but only being inserted within a given organizational and disciplinary structure of an enterprise.

It is noted that the riders appear to be part of an organized structure because they do not have a relationship with customers, the profits of the business are fed into the platform system that in turn assumes the obligation to pay the riders[90].

5. Final (food for) thoughts: current or anachronistic reflections?

The legal qualification of the "labour contract" between a gig worker and a platform prompted both scholars and the judiciary to adopt a clear-cut solution.

The different jurisdictions, faced with a common legal issue, have often come to opposite solutions, usually in the light of the different "gut feelings" of each Supreme Court in

[84] This aspect, alone considered, is not sufficient to ensure that a subordination test can be met.

[85] F. Martelloni, *Lavoro coordinato e subordinazione. L'interferenza delle collaborazioni a progetto*, BUP, 2012, p. 42 ff.

[86] A. Donini, *Secondo la Cassazione francese Uber è datore di lavoro*, in *LLI,* No. 1, 2020, p. 4 ff.

[87] Tribunal Superior de Madrid, 19 September 2019, No. 715.

[88] In this *decisum*, the same were classified as Uber drivers, because the Court spotted similarities between the two platforms, which shared a similar organisational model.

[89] These stances seem to be mirrored by the Dutch Courts, particularly in the Amsterdam venue. To elaborate, this Court held that it could not classify the relationship between riders and the platform as a contract of employment; at a later stage, though, they qualified the company, in the Deliveroo controversy, as an employer and, therefore, it held that the relationship with the couriers could not have been regarded as "autonomous". See Rechtbank Amsterdam, 23 July 2018, no. 6622665 CV EXPL 18-2673; Rechtbank Amsterdam, 15 January 2019, no. 7044576 CV EXPL 18-14763.

[90] For a discussion, see G. Pacella, *Il Tribunal Supremo spagnolo ci insegna qualcosa sul lavoro dei riders e anche sulla subordinazione del XXI secol*o, in *LLI,* No. 2, 2020, p. 16 ff.; A. Todolí Signes, *Comentario a la Sentencia del Tribunal Supremo español que considera a los Riders empleados laborales*, in *LLI,* No. 2, 2020; M. Squeglia *"Quante miglia deve camminare un uomo prima di sapere di essere un uomo?". La vicenda irrisolta dei riders in Spagna: analisi di un dibattito de iure condendo*, in *MGL*, No. 2, 2020, p. 423 ff.

exploring and, ultimately, retrieving subordination factors in the way the work is performed, particularly in circumstances where the job is done to the benefit of a platform. In this regard, there is an urgent call, on the part of scholars, to adopt a constitutionally consistent interpretation of labour law, which results in an expansion of the protections to the individual who provides his or her work, regardless of the legal status of the employment relationship[91].

The paradox entailed in this is that, if on the one hand the "game" of the exact qualification of the job relationship of the gig-workers seems to be still "open," on the other hand the question seems to become anachronistic, because of the overwhelming technological evolution. In this respect, we can recall the phenomenon of the so-called "robotaxi"[92] whose "workforce," according to a study will rocket to 26 million across the world by 2030[93].

In view of this, the crucial aspect should shift from the judicial "obsession" with the provision of adequate protection for gig workers to a new philosophical approach: a European legal framework on the management of the phenomenon in question. One of the problems to be addressed is the possible loss of jobs or dismissal. The reference shall be made, by way of example, to the Prime Air project which Amazon is planning to deliver through aerial drones. It goes without saying that there is a serious risk that thousands of jobs will be lost to the benefit of a limited number of ultra-specialists[94].

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[91] G. Davidov, *The Goals of Regulating Work: Between Universalism and Selectivity,* in *University of Toronto Law Journal,* No. 1, 2014. In the same direction, it was held that it is necessary to guarantee an effective need for the protection of workers, irrespective of their qualification. This may depend on an indicator of work which can be defined as rational, fair and based on values of solidarity. A. Perulli, *Il Jobs Act del lavoro autonomo e agile: come cambiano i concetti di autonomia e subordinazione nel diritto del lavoro,* in *WP CSDLE 'Massimo DAntona'. IT,* 2017.

[92] For an in-depth analysis of the problems of unmanned vehicles, see G. Calabresi, E. Al Mureden, Driverless car *e responsabilità civile*, in *Rivista diritto bancario*, No. 7, 2020, *online;* U. Ruffolo (eds), Self-driving car, *auto* driverless e *responsabilità*, in *Intelligenza artificiale e responsabilità*, Milano, 2017, p. 39 ff.; R. Pardolesi, A. Davola, *In viaggio col robot: verso nuovi orizzonti della rc auto ("driverless")?*, in *Danno e Responsabilità*, 2017, p. 616 ff.; D.L.K. Cheng, R. Deng, *Cryptocurrency, Fintech, Insurtech, and Regulation*, London, 2018; L. Noussia, *Autonomous Vehicles: Legal Considerationd and Dilemmas*, in P. Marano, K. Noussia (eds), *InsurTech: A Legal and Regulatory View,* London, 2020; P. de Gioia Carabellese, *Unmanned veichles e i rischi legali ed assicurativi. Una visuale dal Regno Unito della disciplina (nuova e e futura) della responsabilità dei veicoli senza guidatore*, in *Diritto e politica dei trasporti*, No. 1, 2021, pp. 1 ff.; E. Al Mureden, *Autonomous cars e responsabilità civile tra disciplina vigente e prospettive de iure condendo*, in *Contratto e impresa*, 2019, p. 895; L. Cluzel-Métayer, *The Judicial Review of the Automated Administrative Act*, in *European Review of Digital Administration & Law, - Erdalm*, No. 1-2, 2021, p. 101-103; E. Buoso, *Fully Automated Administrative Acts in the German Legal System*, in *European Review of Digital Administration & Law, - Erdalm*, No. 1-2, 2021, p. 113 ff. As regards the relationship between privacy and automated vehicles, see S. Scagliarini, *Smart Roads and Autonomous Driving vs. Data Protection: the Problem of the Lawfulness of the Processing*, in *European Review of Digital Administration & Law – Erdal –* No. 1, 2021, p. 189 ff.; M.G. Losano, *Il Progetto di Legge Tedesco sull'Auto a Guida Automatizzata***,** in *Diritto dell'Informazione e dell'Informatica*, 2017, p. 1 ff.

[93] *Who will win the race to autonomous cars?*, 8 May 2018, online. It is noted that Uber has launched the "Uber Air" project. This arranges for the construction of small electric airplanes to take off and land in a vertical way. This is capable of accommodating four people, to facilitate movements in heavily urbanised area. N. Carnimeo, *Approccio regolatorio a sistemi tecnologici complessi. Profili evolutivi nel settore aerospaziale*, in R. Bellotti, L. Tafaro (eds), *Mezzi aerei a pilotaggio remoto: questioni teoretiche e profili applicativi*, Napoli, 2021, p. 79 ff.

[94] L. Tafaro, *Dai mezzi a pilotaggio remoto ai «droni»: le nuove rotte della tutela della persona e dello sviluppo sostenibile*, in R.Bellotti, L. Tafaro (eds), *Mezzi aerei a pilotaggio remoto: questioni teoretiche e profili applicativi*, Napoli, 2021, p. 1 ff.

The movement of self-driving taxis, in fact, poses different legal problems with regard to the adaptation[95], both physical and legal, of the infrastructure, the rules on security and liability in tort[96], the legal definition of new cases which are difficult to relate to traditional concepts[97].

More in general, a broader and more intriguing dilemma arises out of the replacement and/or coexistence of human beings and "synthetic" ones. The issues entailed to the question pose an even stronger pressure if attention is turned to two recent sources of the EU legislation. Specific reference is made to the Resolution of the European Parliament of 16 February 2017, which acknowledged the legal status of robots, and the Proposal of Directive of the European Parliament and of the Council on the improvement of work conditions via digital platforms[98].

On such grounds, the questions that can be asked are at least two: first and foremost, if the coexistence of human and artificial beings may engender a form of discrimination against either category. Possibly, some cautions and procedures will be necessary to ensure that both categories of "workers" will be safeguarded. In simpler terms, both human workers and robots should be provided with "representatives," future versions of trade unions, both human and synthetic figures, who/which, in the dialogue relating to the collective agreement, may well put forward and stake claims in order to protect both parties.

The second question is the one relating to whether there is a progressive and increasing replacement of the artificial with the human; this feature poses, on its turn, the fundamental conundrum whether the technological evolution is even in a position to "give the last rites" to the human work, or, alternatively, it sparks off the creation of a new typology of work.

To simplify, the phenomenon of Uber, if associated with autonomous vehicles, may be self-explanatory. This "incestuous" link will determine either the end of human work or, alternatively, an evolution of the drivers' work in such a way to better respond to the needs of using self-driving vehicles. Furthermore, self-driving vehicles bear with them some issues relating to insurance, including the protection of the data of their clients. Further issues are concerned with their status, particularly if they are remote drivers, or insurance advisers, or even privacy advisers. Ultimately, human beings may see their jobs and activities switched in the future by an algorithm, or they may continue carrying out a quintessential role of mediation between human and non-human or even para-human elements. Admittedly, the connection between the two perspectives hinted in this work appears to be self-explanatory, that is to say the co-existence of humans and synthetic beings, and the possible replacement of the former with the latter.

[95] P. Tullio, *Da Uber ai Robotaxi: spunti comparatistici per una riforma degli autoservizi pubblici non di linea*, in *Diritto dei Trasporti*, No. 3, 2018, p. 677 ff.
[96] A. Brinklow, *Mission District cabbie attacks self-driving car*, 7 March 2018, in *https://sf.curbed.com/2018/3/7/17091412/taxi-cab-driver-attacks-selfdriving- car-uber*).
[97] V. Zeno Zencovich, *Uber: modello economico e implicazioni giuridiche*, in *MediaLaws* No. 1, 2018, pp. 141 ff.
[98] Bruxelles, 9.12.2021 COM(2021) 762 final 2021/0414 (COD).

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