DISPATCH NO. 13 - ITALY

‘WITH GREAT POWER COMES VIRTUAL FREEDOM’ A REVIEW OF THE FIRST ITALIAN CASE HOLDING THAT (FOOD-DELIVERY) PLATFORM WORKERS ARE NOT EMPLOYEES

Antonio Aloisi†

INTRODUCTION

While platform work is on the rise at a global level, attracting intense media attention and provoking considerable discussion among social partners, academics and international organisations[1], there are only a few reported European court cases on the employment status of workers – a key controversial issue inherent to this phenomenon. Concomitantly, current social institutions seem to be under pressure: the heated debate revolves around the scope of application of employment protection and its suitability and adaptability in the midst of the ongoing digital transformation.

† Max Weber Postdoctoral Fellow in the Law Department at the European University Institute and Teaching Fellow in European Social Law at Bocconi University. Contact: antonio.aloisi@eui.eu

1. For most recent contributions see, for instance, Eurofound (2018), *Employment and working conditions of selected types of platform work*, Publications Office of the European Union, Luxembourg; ILO, (2018), Digit*al labour platforms and the future of work: Towards decent work in the online world*, International Labour Office – Geneva.

On the one side, existing legal categories are deemed unable to accommodate tech-enabled organisational patterns and their 'non-standardness', on the other, 'disruption' and 'innovation' come at a high price for workers. Indeed, several 'titans' are gaining their competitive advantage thanks to an aggressive (paradigmatic) mode of business based on avoiding the vast bulk of labour-related responsibilities whilst retaining a command-&-control position towards the contracted-out workforce.

Nevertheless, over the last years, tribunals and public bodies – in the wake of labour lawyers and advocates – have played an active role in raising public awareness on employment and working conditions in non-standard arrangements facilitated by digital infrastructure (mainly apps)[2]. At the European level, the preliminary judicial results are mixed or even truly contradictory. Admittedly, it would be imprudent to generalise specific conclusions, as they are fact-dependent, let alone the heterogeneity of conditions across different types of platform work. In a few cases, the legal disputes lean towards the recognition of an employment relationship. More often, on the contrary, they have resulted in the rejection of platform workers' claims because of the supposed freedom they enjoy in deciding *if* and *when* to turn on the app and complete a task or project. This argument seems far from persuasive and, above all, it does not consider the formidable and even boundless advances of digital tools when it comes to organising and vetting workers[3].

The first Italian ruling has long been awaited for various reasons, including the possibility of assessing both the enduring legacy of settled case-law and the relevance of a new provision introduced by the 2015 labour market reform which, according to prudent interpretations, could extend labour protections to self-employed workers whose personal activity is organised by a client[4]. Yet, last April, the Employment Tribunal of Turin rejected a claim from six riders of the platform *Foodora* to be reclassified as employees. More recently, the Employment Tribunal of Milan made a similar decision for a

---

2. Notably, the European Court of Justice reveals expressly the Uber business model: *'[the platform] influence[s …] the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion'*. The Court took the view that the service provided by the platform was more than a matching activity connecting, by means of a digital app, a nonprofessional driver with a private individual wishing to make 'urban journeys'. It is important to stress the fact that the Advocate General's Opinion refrains from addressing the crucial issue of worker classification, denying that the intrusive control is *'exercised in the context of a traditional employer-employee relationship'*. C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain* (2014) ECLI:EU:C:2017:981

3. For a preliminary mapping exercise, see De Stefano V. (2018, May 23), *Platform work and labour protection. Flexibility is not enough*, retrieved from https://goo.gl/w6Ujai.

4. Donini A. (2016), *Il lavoro su piattaforma digitale 'prende forma' tra autonomia e subordinazione. Nuove regole per nuovi lavori?*, *Diritto delle Relazioni Industriali*, *26*(1), p. 164.

delivery courier working for the platform *Glovo* and using his own car[5]. The importance of these rulings goes beyond the specific situations at stake, since they touch on the judicial interpretation of the notion of employment for the purposes of Italian labour law. This review mainly covers the *Foodora* case, which presents the greatest hermeneutical complications, but to a certain extent similar considerations are valid as regards the second case.

The dispatch is organised as follows. Section I describes the main facts underlying the legal dispute. Section II offers a context analysis of the Italian legal framework by clarifying the differences between the notions of employment and self-employment. Particular attention is paid to the most recent legislative interventions aimed at extending labour protections to independent workers whose personal activity is organised by the client. By arguing that the judge failed to consider the specificities of the digital work model, section III criticises the reasoning relying on a too narrow and formalistic understanding of the notion of subordination as well as the conclusive relevance attributed to the riders' presumed flexibility. Section IV closes by summarising the main rulings decided in a set of European countries. It also provides some reflections on the possibility of applying the current legislation to platform worker. In sum, the dispatch advocates that, in order to properly classify the nature of the actual activity performed by platform workers, judges should assess the role of digital tools when it comes to organising, monitoring and disciplining the workforce, rather than merely focusing on discontinuity and flexibility.

A SNAPSHOT OF THE MAIN FACTS UNDER SCRUTINY, ACCORDING TO THE JUDGE'S DESCRIPTION

The facts underlying the first litigation on platform work ever decided in Italy were briefly outlined by the judge[6], who specifically refused to consider the appropriateness of the agreed remuneration, the risk of labour exploitation and *'the other complex issues concerning the gig-economy'*. Six riders were hired by the Italian branch of *Foodora* under a 'coordinated and continuous collaboration' contract (a subcategory of the self-employment model, as discussed in more detail below). The contract expired and was not renewed by the platform at the end of November 2016. The group of workers filed an employment claim demanding: (i) wage differentials according to either the national collective agreement for logistics or that of the service sector; (ii) job reinstatement after the wrongful termination; (iii) compensation for the harm suffered as a result of the infringement of privacy; and (iv) actions for damages for breach of safety and health regulations. They also alleged they

5. Employment Tribunal of Milan, 10 September 2018, No. 1053
6. Employment Tribunal of Turin, 11 April 2018, No. 778; AA v. Digital Service XXXVI Italy S.r.l.

were dismissed as a form of retaliation against their decision to lead or take part in a collective demonstration against the shift in the payment system from an hourly-based to a piece rate model, announced in October 2016.

According to the judge's assessment (the case also involved witness examination), after filing an online form, the six riders attended a preliminary interview where middle managers clarified that a bicycle and a smartphone with internet access were required for the work and requested a deposit of € 50 of their riders for safety devices such as helmets, fluorescent jackets and a lunchbox. The appellants voluntarily signed a *'collaborazione coordinata e continuativa*'[7] pre-formulated standard contract according to which *'the worker shall be free to apply or not apply for a specific delivery depending on her or his personal availability'* (p. 4). The gross hourly pay was € 5.60. The workers had to enrol in a separate social security regime and were covered by insurance paid for by the platform (only two thirds of the premium). Moreover, the contract stipulated that, *'the necessary coordination aside, the worker shall not be subject to any hierarchic or disciplinary power or time and availability obligation to the platform'*. Despite that, once the order was accepted, the worker had to deliver the meal 'mandatorily' within 30 minutes of collection – a penalty of € 15 would otherwise apply.

Slots were assigned through an online scheduling software (named 'Shyftplan') and an app downloaded on the worker's smartphone ('Hurrier', previously 'Urban Ninjia'). At the beginning of every week, the platform published a list of available shifts and the relevant number of riders needed. Having collected the personal preferences, a *Foodora* team leader confirmed the shift allocation. Based on the agreed calendar, the workers wearing the company's branded clothes had to reach one of the 'hotspot areas', turn on the app with their own credentials, log into it and activate the geo-localisation widget. The app displayed orders and location. Once accepted, the rider had to reach the restaurant, pick up the order, check it and notify the result via the app (in the event of any cancellation, the rider had to send a message to the support staff). After that, informed of the details concerning the exact address and location, the rider had to deliver the meal to the final customer and send confirmation of the completed drop. Admittedly, this format of service provision is commonly found in the food-delivery (sub)sector.

THE NORMATIVE BACKGROUND (AN 'ALL-OR-NOTHING' SCENARIO), THE CASE-BY-CASE APPROACH AND THE 'JOBS ACT' REFORM(S)

Before reviewing the judicial reasoning, it is worth sketching out the Italian system where there exists a fundamental strict binary divide between

7. Literally 'coordinated and continuous collaboration'.

employment (*lavoratore subordinato*) and self-employment (*lavoratore autonomo*), reinforced by the recent legislative interventions. Although in a civil law system, the discretion enjoyed by the Employment Tribunals as regards the assessment – and the subsequent qualification – of a work relationship is remarkable. Tribunals normally base their rulings on evidence, irrespective of how the parties classify a given contractual relationship. For the purposes of the distinction between the two categories, the way in which tasks are structured and accomplished is crucial. The 'primacy of facts' is established as a general principle according to which substance must prevail over form, i.e. the label placed on the relationship is a factor in the judicial outcome, but it is certainly not the most important one[8]. Moreover, neither the legislature nor the contractual parties can classify a relationship in order to exclude the protective regime attached to its actual nature (according to the principle of 'non-availability of the legal regime').

Article 2094 of the Civil Code defines a subordinate employee as *'a person bound, in return for a remuneration, to cooperate in the firm by providing either physical or intellectual labour, under the direction of the entrepreneur'*. The key element of the employment relationship is the worker's personal subjection to the command, organisational and disciplinary powers of the employer (for example, the ability to modify the content of the contractual relationship unilaterally, to monitor performance execution and to implement sanctions in case of failure to comply with guidelines)[9]. More specifically, managerial power – whatever the means used to exercise it – and protective obligations are hallmarks of employment status, together with a complementary trade-off: employees have to follow their employers' orders in exchange for economic stability and legal security[10]. Understandably, this legal template allows for the implementation of a hierarchical structure, enabling the employer to implement flexible strategies in the use of the labour force in such a way as to cope with changing organisational needs.

A variety of doctrines have been developed to ensure that the law qualifies a relationship according to the realities of the situation. A ruling could disregard or override the contractual label that the parties choose when the substance of the work relationship contains legal indications of subordination

8. See also International Labour Organisation, Recommendation 198 of 2006. For a detailed guide, see ILO (2013), *Regulating the Employment Relationship in Europe: A Guide to Recommendation No 198*, Geneva.

9. See, for instance, Cass., 29 November 2007, No. 24903 (*'the principal element of an employment contract – and the criterion that distinguishes it from a self-employment contract – is subordination, understood as a link of personal subjection to the power of direction'*). See also Cass. 13 May 2004, No. 9151; Cass., 11 May 2005, No. 9894 (on the notion of 'hetero-organisation'). For a complete overview, see Nogler L. (2009), *The concept of 'subordination' in European and comparative law*, Trento.

10. Prassl J. (2018), *Collective voice in the platform economy: challenges, opportunities, solutions*, retrieved from https://goo.gl/L3x2R6.

and if the level of dependence is such that in reality the relationship is one of employment. Because of the complexity and diversity of the process, case law developed a wide spectrum of 'symptomatic' factors that could suggest the existence of an employment relationship 'by approximation'. The so-called 'typological' test (i.e. a balanced assessment) covers a range of complementary and accessory 'indexes' such as (i) the requirement that the worker follows reasonable work rules or even non-specific guidance; (ii) the length of the relationship and its continuous nature; (iii) the respect of set working hours; (iv) the form of remuneration (i.e. a fixed monthly salary); (v) integration with the employer's core business; (vi) the absence of risk of loss related to the business. The analysis is multifactorial and no single factor is dispositive.

On a different note, article 2222 of the Civil Code provides for the definition of a contract for services ('*contratto d'opera*') under which *'a self-employed worker performs work or services in exchange for remuneration mainly through her own effort and in the absence of a relationship of subordination vis-à-vis the principal'*. However, more than 40 years ago, the Italian legislator has introduced a subset of the self-employment category, which has been mistakenly considered an intermediate category. Act No. 533 of 1973 modified article 409 sub-section 3 of the Code of Civil Procedure by declaring the legislation concerning the settlement of labour disputes applicable to commercial agents and to all *'contractual relations implying a continuous performance of work, mainly of a personal character, although not in a position of subordination*' (*collaborazione coordinata e continuativa*, the so-called *Co.Co.Co.*). As a result, some protection was extended to a tranche of self-employed workers ('quasi-subordinate worker', *lavoratori parasubordinati*). Hiring these employees is substantially cheaper than hiring an employee who is entitled to substantive labour rights such as annual leave, sick leave, maternity leave, overtime, and job security against unfair dismissal[11].

After a permanent process of legislative intervention[12], the ultimate result is a return to the binary distinction of employee and self-employed workers. In particular, article 2 of Legislative Decree 81 of the 2015 Jobs Act reform has meritoriously extended employment protection to workers whose performance is organised by the client, *also* as regards place and working hours[13]. This new provision, applicable only when the performance displays a purely personal and continuous nature, has given rise to conflicting interpretations

11. See Cherry M. A. and Aloisi A. (2017), *Dependent contractors in the gig economy: a comparative approach, Am. UL Rev.*, Vol. 66, No. 3, p. 635.
12. See Cherry M. A. and Aloisi A., *op. cit.*
13. However, collective agreements may lead to opt-out from labour law regulation.

and criticism of its unfortunate wording[14]. Despite that, it could provide for an easing of the burden of proof[15]. In 2017, the legislature further amended the article governing (genuine) coordinated and continuous collaborations whose scope is now limited to *'collaborators organising the work activity independently, in accordance with the coordination arrangements mutually agreed by the parties*'. In short, if job performance is organised by the principal, the collaborator must be treated as an employee, if the work is organised autonomously, although in coordination with the client, then the activity is outside the domain of labour law.

THE JUDGES' NARROW INTERPRETATION OF THE NOTION OF SUBORDINATION: AN INADEQUATE SOLUTION TO THE LONG-LASTING DILEMMA

At first glance, the judge in the commented Foodora case relied on a very narrow understanding of the notion of subordination, *'defined as the worker's subjection to managerial, organisational and disciplinary powers, resulting from specific orders given by the employer as well as to a constant surveillance and monitoring over the performance execution'*[16]. Dissimilarly, alternative case-law acknowledges that workers could have a considerable amount of autonomy – granted by general directives – yet they could be still classified as employees. It must be said that case law has moved towards a 'soft' notion of subordination in order to bring both creative and complex as well as menial and repetitive activities under the protective scope of employment status[17]. Yet, the judge fully subscribed to a traditional approach, based on a continuous and detailed notion of control (an analogic version of this power), without even exploring alternative and pluralistic conceptualisations[18]. In this regard, it should be recalled that the European Commission's Communication on the agenda for the collaborative economy stresses that

14. Tosi P. (2015), *L'art 2, comma 1. d.lgs. n. 81/2015: una norma apparente*, *Argomenti di Diritto del Lavoro*, No. 6, p. 1117; Lunardon L. (2018), *Le reti d'impresa e le piattaforme digitali della* sharing economy, *Argomenti di Diritto del Lavoro*, No. 2, p. 375.

15. The criteria which should be considered are: (i) a continuous collaboration; (i) a purely personal nature of the activity and (ii) the organisation of the performance, including time and place of work, by the client (a criterion based on space-temporal coordination). If that is the case, the application of employment protection legislation is 'automatic'.

16. Cass. 8 February 2010, No. 2728 as mentioned in the *Foodora* case (p. 6).

17. This was done by taking into account accessory indexes such as 'general guidance merely indicating an objective which requires subsequent implementing actions' or the 'integration into the employer's core business'.

18. Del Conte M. and Razzolini O. (2018 forthcoming), *La Gig Economy alla prova del giudice: la difficile reinterpretazione della fattispecie e degli indici denotativi, Diritto del Lavoro e delle Relazioni Industriali;* Recchia A. G. (2018), *Gig economy e dilemmi qualificatori: la prima sentenza italiana*, *Il Lavoro nella Giurisprudenza*, No. 7, p. 721.

'[t]he existence of subordination is not necessarily dependent on the actual exercise of management or supervision on a continuous basis'[19].

Moreover, it is striking how the examination was limited to a merely formalistic analysis (*'there was no obligation the workers offer their services and no obligation for the company to provide further work'*). Nothing is said on the subtle or implicit forms of constraint affecting the worker's will. The metrics on availability, time-to-respond, and success rate, not to mention the erratic evaluation outsourced to customers, might impact on a rider's personal career and determine whether the worker will be assigned the selected shifts in the future and will receive further orders. Therefore, it could be said that the implicit threat of unspecified consequences, together with the inevitability of following the platform's guidelines, makes workers compliant with 'tacit binding instructions', thus minimising their autonomy. There can be little doubt that platforms monitor, admonish or even terminate workers for failing to meet internally set standards, *'in [a] form […] that far exceeds the level of supervision experienced by most traditional employees'*[20]. Hence, the supposed autonomy could be, in a way, merely virtual. Moreover, technically speaking, riders are free because the platforms can rely on an almost infinite range of 'fungible' workers, promptly recruited thanks to near zero transaction costs.

In spite of this strict definition of command-and-control, the judge emphasised a factor bearing little or no relation to it. By relying on a previous interpretation developed in the context of a misclassification lawsuit filed by a motorcycle messenger (known as 'pony express') in the late 1980s (a broadly comparable, but not identical situation, also in the light of the non-digital organisation of that business)[21], the judge claimed that *'subordination is at odds with the possibility for a worker to interrupt the performance'*[22]. In short, the Tribunal stated that the workers were free to decide when to work, by accepting or refusing a particular call, and even to disregard previously

19. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European agenda for the collaborative economy' {SWD(2016) 184 final}, referring to Danosa (C-232/09). See also Aloisi A. (2018), *The role of European institutions in promoting decent work in the collaborative economy* in Bruglieri M. (Ed.), *Multi-disciplinary design of sharing services*, Cham, Switzerland, p. 161

20. Kennedy E. J. (2016), *Employed by an Algorithm: Labor Rights in the On-Demand Economy*, *Seattle UL Rev.*, Vol. 40, No. 3, p. 987.

21. Cass. 10 July 1991, No. 7608, in *RIDL*, 1992, 1, 103; Cass. 20 January 2011, No. 1238, in *RFI*, 2011, No. 721. On the contrary, Cass. 21 March 1989, in *FI*, 1989, II, col. 462. See Biasi M. (2018 forthcoming), *Il Tribunale di Torino e la qualificazione dei riders di Foodora, Argomenti di Diritto del Lavoro*, vol. 4/5.

22. The Tribunal of Milan and the highest judicial authority, *Corte di Cassazione*, agreed that the worker was independent. See Employment Tribunal of Milan 10 October 1987, in *Rivista italiana di diritto del lavoro*, 1987, II, p. 688 *('[t]he work, performed by the courier assigned to pick up and delivery by using the own vehicle, has not to be considered 'subordinate,' in the absence of the crucial requirement of continuity. Those workers are not required to appear every day at the workplace and the can refuse to complete the performance.'*). See also Cass. 14 April 1989, No. 5671.

agreed shifts. In the eyes of the judge, this instantiation is *'in itself, a decisive factor when it comes to excluding the workers' subjection to the managerial and organisational power of the employer, since it is evident that, if [the platform] cannot request work, then it cannot exercise its command power'* (p. 7). After this 'cursory assessment'[23], the judge scrutinised the existence of managerial and disciplinary prerogatives, *'once workers are in a shift, after communicating their availability'*, but without success, in spite of the allocation of shifts, the specification of locations, the repeated follow-up phone calls, the remote monitoring, and the internal ranking of the best performers.

This section concludes by focusing on the restrictive interpretation given to art. 2 of Legislative Decree 81/2015. As argued above, the 2015 reform marked a paradigm shift: instead of amending or rewording traditional definitions, the protective effects of employment status were 'attached' to a specific group of collaborators – nominally independent – whose personal activity is unilaterally organised by the principal (a criterion based on space-temporal coordination). According to preliminary comments, the new regulatory tactic could have captured atypical arrangements facilitated or, even better, organised via a digital infrastructure[24]. However, these new provisions are much-debated in relation to their effectiveness in 'updating' the scope of employment. Nevertheless, only by way of 'obiter dictum', the judicial interpretation goes even further, thus neglecting the expressed intention of the law-maker as well as the text of the law and its systematic interpretation[25]. It is indeed contradictory that the requirements to be met in order for a worker to qualify for the protection traditionally afforded to employees are even stricter than the ones defining the status of employment[26].

THE ITALIAN RULINGS IN A COMPARATIVE PERSPECTIVE: DISCUSSING THE WAY FORWARD

The strong intermingling of old and new legal challenges constitutes the underlying reason why the gig-economy has attracted so much interest in recent times. Roughly speaking, across Europe the 'qualifying dilemma' has been dealt with in two conflicting ways. In June a ruling by the Valencia court stated that *Deliveroo*'s riders are employees because they are subject to tight

23. Del Conte M. and Razzolini O. (2018 forthcoming), *op. cit.*
24. Aloisi A. (2016), *Il lavoro 'a chiamata' e le piattaforme online della* collaborative economy*: nozioni e tipi legali in cerca di tutele*, *Labour & Law Issues*, Vol. 2, No. 2, p. 16.
25. Ichino P. (2018), *Subordinazione, autonomia e protezione del lavoro nella gig-economy*, *Rivista Italiana di Diritto del Lavoro*, No. 2, p. 294.
26. In particular, the judge argued that, in order to qualify for the protection afforded by art. 2 of the Legislative Decree 81/2015, the worker *'must be subject to the [fully-fledged] managerial and organisational power of the employer – and not only as regards the time and space requirements'* (p. 14). See Tullini P. (2018b), *La qualificazione giuridica dei rapporti di lavoro dei 'gig-workers': nuove pronunce e vecchi approcci metodologici*, *Lavoro, Diritti, Europa*, No. 1, p. 1.

control by the platform monitoring their delivery rides, with GPS features, and to the laying down of the main terms and conditions, including prices[27]. Last March, a Belgian administrative commission came to similar conclusions[28]. Conversely, in 2017 the Paris Court of Appeals held that a *Deliveroo* courier could not be reclassified as an employee because he was free to select his shifts, in addition to refusing to work without any consequences[29]. Two other British cases involving drivers and couriers respectively were decided in the opposite way. The first, dating back to 2016, has placed *Uber* drivers in an intermediate category entitled to minimum wage and working time protection. By fully upholding the Employment Tribunal's findings[30], the Employment Appeal Tribunal argued that the platform exercised significant control over how drivers performed their work[31]. On the contrary, an administrative committee[32] and a High Court denied food-delivery workers statutory collective labour rights by virtue of a clause, allowing them to be replaced by other colleagues, purposely introduced and hardly practicable.

As emerges from this case note, the judge in Turin decided the case by looking at the rear-view mirror. The ruling uncritically embraces the case-law considered crucial for the determination of employment, of whether workers are free to decide their time schedule. In the search for a legal precedent, the judge applied the same reasoning made thirty years ago for delivery couriers on mopeds, even though technological progress and the regulatory framework have taken significant steps forward. He renounced investigating in depth the impact that the digital transformation is having on employment relationships, specifically in the last mile logistics sector. He argued that elements such as working conditions determined by the platform, the indication of the places where and precise time limit within which the deliveries must be completed, the frequent monitoring activity through the GPS feature must be considered *'defining patterns of the business model, rather than distinctive elements of the nature of the relationship'* (p. 11), arguably a strong legal argument[33]. Still, the *Foodora* case is a squandered opportunity to apply to platform work a provision of the Jobs Act, seeking to extend employment protection to workers who are only nominally independent,

27. Roj: SJSO 1482/2018 - ECLI: ES:JSO:2018:1482
28. Commission administrative de règlement de la relation de travail 23 février 2018.
29. As in the Italian case, it emerged that non-responses and absences did not result in disciplinary sanctions. Other factors taken into account were the autonomous organisation as regards time and space, the absence of exclusivity clauses and non-compete agreements. See CA Paris, pôle 6 – ch. 2, 9 nov. 2017, No 16/12875.
30. Employment Tribunal, Mr Y Aslam, Mr J Farrar and Others v Uber, 2202551/2015 & Others, 28 October 2016.
31. Employment Appeal Tribunal, Uber B.V. and Others v Mr Y Aslam and Others, UKEAT/0056/17/DA, 10 November 2017.
32. Independent Workers of Great Britain v RooFoods Ltd (TUR1/985 (2016)).
33. Gramano E. (2018 forthcoming), *Dalla eterodirezione alla eteroganizzazione e ritorno. Un commento alla sentenza Foodora, Labor, il lavoro nel diritto.*

without too much upheaval. *'[A]s [art. 2 of Legislative Decree 81/2015] is worded, it has a narrower scope than the notion of employment'* (p. 14), as disputed by the judge, but this puzzling reading would appear to violate the spirit, if not the letter, of the new law.

At the time of writing, several remarkable initiatives have been taken, namely a new national collective agreement regulating the job position of the 'rider' in the logistics sector, the draft of a new legislative decree proposed by the Labour and Industry Minister (this project was abandoned), and a number of local efforts carried out by municipalities, workers' representatives, spontaneous movements and food delivery platforms[34]. However, in many cases, the delimitation of the 'border areas' of the employment and self-employment statuses has regularly posed insurmountable difficulties. In Italy, as well as in other European countries, ascertaining employment status is not merely a dogmatic issue, as is pivotal to determine the scope of workers' protection. Therefore, it is important to interpret the quintessence of the notion of subordination as a legal subjection to the managerial control and disciplinary authority of the employer. To this extent, the flexibility of workers to refuse individual calls does not preclude the existence of unilateral management or reinforced surveillance[35], nor does it justify the exclusion of non-standard workers from labour protection[36]. In addition to this, a more in-depth examination of working conditions could instead lead to different solutions. Indeed, despite the seeming novelty of the medium, the hierarchical or, at least, organisational power over platform workers might be robust at times when performance is executed, as illustrated by the case at hand.

34. De Stefano V. and Aloisi A. (2018), *Employment and working conditions of selected types of platform work. National context analysis: Italy. Publications Office of the European Union,* Luxembourg.
35. Cagnin V. (2018), *Gig-economy e la questione qualificatoria dei gig-workers: uno sguardo oltre confine* in Perulli A. (ed.), *Lavoro autonomo e capitalismo delle piattaforme*, Padova, p. 31.
36. Sachs B. (2018, May 15), *Enough with the Flexibility Trope,* retrieved from https://onlabor.org/enough-with-the-flexibility-trope/.