DISPATCH NO. 35 - ITALY

DEMYSTIFYING FLEXIBILITY, EXPOSING THE ALGORITHMIC BOSS: A NOTE ON THE FIRST ITALIAN CASE CLASSIFYING A (FOOD-DELIVERY) PLATFORM WORKER AS AN EMPLOYEE

Antonio Aloisi†

INTRODUCTION

In November 2020, the Palermo Tribunal—a court of first instance in the capital of the region of Sicily—reinstated a Glovo rider and reclassified him as a full-time, permanent employee, to be remunerated according to the collective bargaining agreement for the service sector, on the grounds that his autonomy was merely notional, since the platform could organize the execution of work and discipline noncompliance with rigorous instructions issued through the internal booking system.[1] The judge ordered compensation for wage differentials and reimbursement for the unpaid time the worker spent waiting for orders.

This case is groundbreaking for two main reasons. First, it results in direct, full recognition of the existence of an employment relationship, proving that current legal categories and concepts have not been superseded by allegedly modern business models. The judge agreed that the platform retained a command-and-control position over the rider, who was subjected to its managerial powers—an arrangement coinciding impeccably with the classical category of "subordination." Second, this case reinforces a trend

† Assistant Professor and Marie Skłodowska-Curie Fellow, IE Law School, IE University, Madrid.
This article is written in the framework of the "Boss Ex Machina" project, which has received funding from the European Union's Horizon 2020 Research and Innovation Programme under the Marie Skłodowska-Curie grant agreement No 893888.

1. Trib. Palermo, 24 novembre 2020, n. 3570 (It.).

towards the *Europeanization* of social issues, particularly as regards jurisprudential methods for determining who is an employee and, more broadly, as regards the uniform and effective application of EU policy. By assessing the manifold judicial parameters used by the local tribunal and comparing them with the rationales of similar recent judgments in France, Spain, and Italy, one can detect a consistent set of patterns emerging across Europe. In this network of inspirations, the exposure of the "autonomous worker" fiction, confuting the contractual classification, also resonates with the settled case law of the Court of Justice of the European Union (CJEU).

This commentary aims to unravel the judge's reasoning. For the very first time in a long saga, an Italian tribunal found the worker to be engaged in a standard employment relationship (whereas other workers' claims have been dismissed or only partially upheld on the grounds of the supposed flexibility that they enjoyed in deciding whether and when to accept a call). This important step forward was made possible by a detailed analysis of the factual circumstances of the job performance and by a modern understanding of "subordination" that does not fit the archetype of physical supervision over the worker's shoulders. Moreover, unlike other Italian judges,[2] the judge approached the classification through the classical binary divide between employment and self-employment, without resorting to a "remedial tactic" based on a specific provision, adopted in 2015 and reformed in 2019,[3] that extends labor protection to self-employed workers who are organized by another party, including those organized by means of a platform.

ALL WORK AND NO AUTONOMY MAKE THE RIDER A SHAM SELF-EMPLOYED PERSON

What emerges from a very detailed description is that the multinational company Foodinho, which operates in Italy through the brand Glovo, organizes a delivery service by coordinating a network of scattered riders. The workers' performances are managed by the platform in all their highly standardized phases, from the acceptance of the call to the delivery and the transfer of any cash received from final customers. The algorithm forecasts demand by digitally processing available data and determines the number of workers needed in a given slot and area. It sets the delivery schedule and the route according to which fares are calculated. The work is organized—

2. Gionata Cavallini, *Libertà Apparente del Rider vs. Poteri Datoriali Della Piattaforma: Il Tribunale di Palermo Riapre L'opzione Subordinazione*, GIUSTIZIA CIVILE: APPROFONDIMENTI (Dec. 21, 2020), https://giustiziacivile.com/lavoro/approfondimenti/liberta-apparente-del-rider-vs-poteri-datoriali-della-piattaforma-il.

3. Federico Martelloni, *Il Ragazzo del Secolo Scorso. Quando il Rider è Lavoratore Subordinato a Tempo Pieno e Indeterminato*, QUESTIONE GIUSTIZIA (Dec. 24, 2020), https://www.questionegiustizia.it/articolo/il-ragazzo-del-secolo-scorso-quando-il-rider-e-lavoratore-subordinato-a-tempo-pieno-e-indeterminato; Tiziano Treu, *Rimedi, Tutele e Fattispecie: Riflessioni a Partire dai Lavori della Gig Economy*, 31 LAVORO E DIRITTO 367, 367–406 (2017).

planned, allocated, and managed—by a fine-grained internal staffing system that remains opaque. Riders are requested to download a proprietary app that tracks their location through GPS widgets and monitors the battery level of their personal smartphone (when the battery drops below 20%, the worker cannot receive any delivery requests).

All riders sign an agreement stipulating that they are self-employed workers carrying out repetitive activities. Their much-advertised ability to choose time slots is constrained by an internal ranking, calculated as a combination of "productivity" metrics (based on availability during high-demand hours, efficiency, and customer satisfaction rates). Riders who have accrued a high "excellence" rating have priority in booking the available slots. Workers who do not abide by the internal rules are downgraded, in what amounts to an unorthodox disciplinary sanction. Payment is 1.75 euro per drop, plus a sum proportional to the length of the ride and a lump sum for the waiting time. Since customers may pay in cash, workers must transfer any amount they personally collect to the company's bank account within two weeks, under penalty of exclusion from the system through the temporary suspension of the account.

The judge next considers the specific claim. Mr. Tuttolomondo had been working for Glovo for fourteen months. He signed two separate freelance contracts. In general, his working time has been acknowledged to be close to eight hours per day or forty per week (in 2019). After a preliminary blocking of his digital account, the rider took part in a television talk show on which he deplored precarious working conditions, further exacerbated by the COVID-19 emergency, and the failure of the company to provide personal protective equipment. The worker was removed from the platform for an unintentional delay in the transfer of money received from customers. At this point, the worker demanded access to his data pursuant to the GDPR and, after a vague response, brought a claim before the national Data Protection Authority.

Assisted by his lawyers and with the support of CGIL, a long-established Italian union, the rider filed an employment claim demanding (i) reclassification as an employee of the food-delivery company, and, consequently, (ii) retroactive payment of the difference in wages, according to either the national collective agreement for logistics or that for the service sector; (iii) job reinstatement; and (iv) compensation for infringement of a worker's right to receive written information.[4] The respondent maintained that the worker was free to decide whether and when to work. Moreover, according to the company, while it was true that the booking system was based on the rider's rating, several slots were left available irrespective of

4. *See* Decreto legislativo 15 giugno 2015. n. 81, Lex. June 15, 2015, Art. 47-ter (It.).

that rating. The company challenged the claim that the rider had a right to reinstatement because the dismissal had been oral and therefore improper.

THE MULTITIERED JUDICIAL ASSESSMENT

The judge arrives at the conclusion that the rider has been treated as an employee after considering the following four factors.

A. THE NATURE OF THE SERVICE RENDERED BY THE FOOD-DELIVERY COMPANY

In particular, the question is whether the platform acts a mere intermediary or whether the underlying service provided is a transportation or delivery one—a critical assessment that is reminiscent of the heated legal dispute about the service offered by the Uber app. While the company in its documents attempted to depict itself as a matchmaking infrastructure, the judge refers to the CJEU's well-known ruling that:

> an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as 'a service in the field of transport' … ."[5]

It is worth mentioning that a crucial factor justifying this ruling was the platform's significant degree of "influence" on the key terms and conditions of the service operated and, more importantly, on the drivers themselves.[6]

In short, since the company offers a tangible service (not a purely digital service), workers are more likely to be employed by the company itself, rather than operating as mere customers of the ICT infrastructure. This "two-stage reading" is strongly influenced by the comprehensive assessment carried out by the CJEU, which did not go as far as to scrutinize and classify the relationship between the platform and the worker (a driver in that case), but offered a glimpse of how the system works. Early in the development of the platform economy, rhetoric claiming that platforms were mere intermediaries was used in courts all over the world to elude compliance with

5. Case C-434/15, Asociación Profesional Elite Taxi v. Uber Systems Spain, ECLI:EU:C:2017:981, ¶¶ 48, 50 (Dec. 20, 2017).

6. For a detailed analysis, see the Opinion of Advocate General Szpunar delivered on May 11, 2017, Advocate General's Opinion in Case C-434/15 Asociación Profesional Elite Taxi v. Uber Systems Spain, SL (May 11, 2017).

statutory requirements as regards licenses and prior authorizations by competent authorities.

B. CLASSIFYING NONSTANDARD WORKING RELATIONSHIPS

A comprehensive catalogue of cases in several civil law jurisdictions promise to elucidate the (mis)classification issue.[7] What is crucial is the courier's degree of autonomy in deciding whether and when the performance is to be executed.

The judge retraces the evolution of jurisprudential practices in such cases within Italy.[8] According to the lower courts of Milan and Turin, the worker's initial freedom prevents the company from exercising a full-fledged command-and-control power: by simply deciding not to turn on the app, the worker can exercise self-determination.[9] Many commentators strongly criticized this anachronistic interpretation. The judge in question disagrees, too: in her view, this understanding fails to consider the factual circumstances of performance execution, during which workers are "functionally integrated in the company's business."[10] This distinction between the starting moment of the relationship and its central phases is of utmost importance, as it demystifies the alleged freedom of the workers.

The judge also builds on a ruling of the Italian Supreme Court,[11] giving a far-reaching interpretation of a new provision that expands employment protection to dependent self-employed workers.[12] On closer inspection, even assuming its existence at an early stage, the worker's autonomy becomes increasingly less intense, to the point where freedom vanishes, and the worker cannot help but follow orders and procedures set by the company. Therefore, the worker's nominal flexibility in deciding whether, when, and

---

7. The following cases found workers to be employed by the platform. *See* TRF-3, Apelaçao Cível No. 0011359-34.2016.5.03.0112, Relator: Des. Márcio Toledo Gonçalves, 13.02.2017, 1, Diario de Justiça [D.J.] (Braz.); Juz. Soc., June 1, 2018 (R.J. No. 244) (Spain). The following cases recognized the independent nature of the relationship. *See* Sun Yongling v. Beijing Yixin Yixing Auto. Tech Dev. Servs. Ltd. Lab. Dispute, Beijing First Inter. People's Ct., Civil Judgment No. 176 (2015) (China); Juz. Soc., Sept. 3, 2018 (R.J. No. 284) (Spain); T.S.J., Sept. 19, 2019 (R.J. No. 715) (Spain).

8. Trib. Milano, 10 settembre 2018, n. 1853 (It.); Trib. Torino, 7 maggio 2018, n. 778 (It.); App. Torino, 4 febbraio 2019, n. 26 (It.).

9. In a previous dispatch, I introduced the Italian legal framework. *See* Antonio Aloisi, '*With Great Power Comes Virtual Freedom': A Review of the First Italian Case Holding that (Food-delivery) Platform Workers Are Not Employees*, Dispatch, COMP. LAB. L. & POL'Y J. (2018). *See also* Silvia Borelli, *Italy*, *in* THE PLATFORM ECONOMY AND SOCIAL LAW: KEY ISSUES IN COMPARATIVE PERSPECTIVE 63, 63–73 (Isabelle Daugareilh, Christophe Degryse & Philippe Pochet eds., 2019).

10 Trib. Palermo, 24 novembre 2020, n. 3570, 26 (It.).

11. Cass., sez. lavoro, 24 gennaio 2020, n. 1663 (It.).

12. In November 2019, Legislative Decree No. 101/2019 was amended and became Law No. 128/2019, a set of provisions that was not used by the judge in the case at stake. *See*. Antonio Aloisi, *'A Fascinating Chapter in the 'Gig' Saga: How to Deliver Decent Work to Platform Workers in Italy?,* Mutual Learning Programme, DG Employment, Social Affairs and Inclusion, European Union (2020).

where to provide the service should not exclude the possibility of classifying him or her as an employee.[13]

Here the judge moves on to apply the reasoning developed in the Yodel case, which confirms that the Working Time Directive does not apply to self-employed persons as long as they enjoy genuine, not notional, organizational autonomy. It then leaves the critical assessment of the professional statuses up to the remitting domestic court, urging that court to "tak[e] account of all the relevant factors . . . , in the light of the criteria laid down in the [settled] case-law."[14] The Italian decision openly mirrors the reasoning of the Spanish and French Supreme Courts. Although the three cases differ in their potential to set a binding precedent, they are substantially similar. The Spanish Supreme Court declined to ask the CJEU for a preliminary ruling under Article 267 TFEU;[15] the Palermo Tribunal uses this precedent to reinforce its own prerogative. That is, it holds that the classification of a working relationship is a matter for local courts to decide.

C. A MODERN UNDERSTANDING OF THE NOTION OF SUBORDINATION

The judge reiterates that, as the Italian Supreme Court stressed, rulings ought to be based on factual circumstances, no matter how the parties agree to classify a contractual relationship. This approach is in line with an established legal tradition that strives to transcend contractual formalism focused on misleading external elements, and instead to analyze working relationships in their complexity (and expose the pitfalls of constrained freedom).

For the purposes of distinguishing between employment and self-employment, the way in which tasks are structured and accomplished is essential.[16] Borrowing from the Spanish ruling of prime importance, the tribunal states that subordination should not be defined as total subjection to managerial prerogative.[17] In a highly digitalized labor market, where workplaces are decentralized, workforces fragmented, and organizations networked, the "subordination test" can be also passed when subordination

13. The fact that there is no obligation on workers to accept a shift is irrelevant. *See* Case C-256/01, Debra Allonby v. Accrington & Rossendale Coll., ECLI:EU:C:2004:18, ¶ 72 (Jan. 13, 2004).

14. Antonio Aloisi, *'Time Is Running Out'. The Yodel Order and Its Implications for Platform Work in the EU*, 13 ITALIAN LAB. L. E-J., 67, 76 (2020).

15. This system is designed to ensure the uniform interpretation of EU law by all Member States.

16. Neither the legislature nor the contractual parties can classify a relationship to exclude the protective regime attached to its actual nature (according to the principle of "non-availability of the legal regime"). *See* Corte Cost., 29 marzo 1993, n. 121 (It.); Corte Cost., 31 marzo 1994, n. 115 (It.).

17. S.T.S., Sept. 25, 2020 (J.T.S., No. 4746) (Spain) ("In the post-industrial society, the notion of dependency has become more flexible, technological innovations have facilitated the adoption of systems of digital control. The emergence of a new productive model forces interpreters to update legal concepts.").

is "attenuated", as the CJEU allowed,[18] or when the worker's contribution is instrumentally integrated into the company's core business.[19]

Surprisingly, the judge justifies this stance in the light of the new Directive (EU) 2019/1152 on transparent and predictable working conditions, according to which "[p]rovided that they fulfil [criteria that the CJEU has established for determining the status of a worker], domestic workers, on-demand workers, intermittent workers, voucher based-workers, *platform workers*, trainees and apprentices could fall within the scope of this Directive."[21]

To the argument based on European Union (employment) law must be added two references to the abovementioned ruling of the Italian Supreme Court and to an explanatory communication released by the Italian Ministry of Labor,[22] according to which employment protection applies to platform workers "should the factors defining the existence of an employment relationship be met" (p. 1). According to the judge, while the interpreter must assess those factors according to the realities of the situation, the Supreme Court's evolving criteria take into account the transformation of the industrial context.

After this argument, the judge offers a perhaps unnecessary interpretation of the notion of subordination formulated in a ruling issued by the Italian Constitutional Court.[23] In that case, the Court defined subordination as a condition of "double alienness" of the workers from the productive organization owned by the employer and the end purpose of their work.[24] When these two conditions are met, the workers' performance is indeed embedded in "an organization over which he has no control at all and for whose purposes he has no individual, legally protected interests."[25] In fact, it seems that in these passages the judge wanted to present complementary notions of employment, perhaps to make the decision

18. Case C-232/09, Dita Danosa v. LKB Līzings SIA, ECLI:EU:C:2010:674 (2010).

19. Adrián Todolí-Signes, *Notes on the Spanish Supreme Court Ruling That Considers Riders to Be Employees*, Dispatch, COMP. LAB. L. & POL'Y J. (2020).

21. *See* Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on Transparent and Predictable Working Conditions in the European Union, 2019 O.J. (L186) at 106 (emphasis added). *See generally* Case C-66/85, Deborah Lawrie-Blum v. Land Baden-Württemberg, ECLI:EU:C:1986:284 (1986).

22. *See* MINISTERO DEL LAVORO E DELLE POLITICHE SOCIAL, *Circolare R.0000017* (Nov. 19, 2020), https://www.lavoro.gov.it/documenti-e-norme/normative/Documents/2020/Circolare-17-del-19112020-tutele-lavoro-ciclofattorini.pdf.

23. Corte Cost., 5 febbraio 1996, n. 30 (It.) (the reasoning is very fact-specific).

24. Simone D'Ascola, *Platform Work and 'Double Alienness, in* THE FUTURE OF WORK: LABOUR LAW AND LABOUR MARKET REGULATION IN THE DIGITAL ERA (Adalberto Perulli & Tiziano Treu eds., 2020), 307.

25. Luca Nogler, *Rethinking the* Lawrie-Blum *Doctrine of Subordination: A Critical Analysis Prompted by Recent Developments in Italian Employment Law*, 26 INT'L J. COMP. LAB. L.& INDUS. RELS. 83, 90 (2010).

watertight. It is tempting to believe that the inspiration for reviving the notion of "double alienness" is again the Spanish judgment, where "*ajenidad*" is understood as integration into an organization run by another party.

D. MANAGEMENT BY ALGORITHMS AND THE TECHNOLOGICAL TRANSFORMATION OF COMMAND-AND-CONTROL PREROGATIVES

The final section of the ruling provides an important route into understanding new models of data-driven management and reinforced surveillance. All orders were allocated by means of an algorithm, which was tasked with assessing the rider's location and distance from both the restaurant and the final customer, in order to make the delivery as fast and efficient as possible. The same algorithm governed booking the shifts, with the worker's priority depending on his accrued rating. These facts led the judge to conclude that the performance was organized by the principal, so that a fictitious autonomy disguised a genuine employment relationship.[26] On closer inspection, digital methods of remote surveillance are even tighter than traditional managerial supervision because they offer more detail, are more efficient, and have broader scope.[27]

The worker's discretion was constrained by the limited access to available slots and, even more, by the fact that he had to reach a given location and have a certain level of phone battery charge. The way in which orders were allocated among available riders forced the worker to be present in a specific location near the restaurant. And the choice to cancel an accepted slot was sanctioned by downgrading the worker in the internal ranking. As a result, his freedom was far from real, while the managerial prerogatives were robust. Not only does the judicial examination expose the nonexistence of flexibility, but it also highlights that the worker was continuously available for long hours without being compensated.

The judge also finds that the adverse consequences of noncompliance represented a system of unorthodox disciplinary sanctions, as they ended up punishing a performance that was not in line with the expected result, thus preventing a rider from working under better conditions. In short, the exercise of choice chokes off future choice. The most serious sanction, "de-platforming" (i.e., exclusion from the system) was challenged on the grounds that it was discriminatory and retaliatory. The demands Mr. Tuttolomondo made during his participation in a TV show triggered a harsh reaction by the local manager, who delayed the reactivation of his account. This "unusual"

---

26. The same argument is used in the Cour de cassation [Cass.] [supreme court for judicial matters] soc., Apr. 3, 2020, No. 374 (Fr.).

27. *See* Antonio Aloisi & Elena Gramano, *Artificial Intelligence Is Watching You at Work: Digital Surveillance, Employee Monitoring, and Regulatory Issues in the EU Context*, 41 COMP. LAB. L. & POL'Y J. 101, 127 (2019).

dismissal, which could be considered a novel form of "ban-opticon,"[28] was communicated orally and must therefore be considered null and void.

FINAL REMARKS: A LANDMARK JUDGMENT WITH MINOR IMPERFECTIONS IN A PIVOTAL MOMENT

2020 has been an unforgettable year because of the pandemic, which severely affected everyone's life. It was pivotal for the fate of platform work in Italy, too. In January, the Supreme Court applied employment protection to a group of Foodora riders. In late December, a court in Bologna ruled that the algorithm used by Deliveroo was indirectly discriminatory.[29] The significance of the judgment at hand lies in its recognition that the relationship between a platform and a rider fits the model of subordinate employment as a round peg fits solidly in its round hole. In addition, the judgment explores in depth the functioning of algorithms that are used to run a company in an efficient but inflexible manner.

While the judge's elastic interpretation of the notion of subordination is laudable, one weakness of the ruling is perhaps the attempt to rely on two different concepts of subordination: the adaptable version, partially based on the "attenuated" variant of control power, and the model of "double alienness". Furthermore, in presenting an updated interpretation of the concept of subordination, the tribunal seems to suggest that several versions exist, taking their forms in accordance with successive "industrial revolutions." This is not entirely correct. The legal notion of employment is in a sense *technologically* neutral, as it has been designed by the legislator to encompass as many situations as possible, regardless of the technical panorama.

Case law has already developed an adaptable notion of the paired concepts of control and subordination, one that varies with the technical nature of the performance.[30] In short, while the employer's power is indicated in the relevant article of the Italian civil code with a wide-ranging formula ("being dependent on and under the direction of the employer"), the actual way in which this prerogative is exercised is not statutorily defined and has been shaped by interpretation and practice. What changes, therefore, is not the idea of control but the panoply of options to exert it. Case law admits that

---

28. Kevin D. Haggerty, *Tear Down the Walls: On Demolishing the Panopticon*, *in* THEORIZING SURVEILLANCE: THE PANOPTICON AND BEYOND 23, 26 (David Lyon ed., 2006).

29. Trib. Bologna, Sez. Lavoro, 31 dicembre 2020, n. 2949. For a preliminary analysis, see M. V. Ballestrero, *Ancora sui rider. La cecità discriminatoria della piattaforma*, LABOR, https://www.rivistalabor.it/ancora-sui-rider-la-cecita-discriminatoria-della-piattaforma/ (last visited Mar. 5, 2021).

30. *See e.g.*, Cass., 29 novembre 2007, n. 24903 (It.); Cass. 11 maggio 2005, n. 9894 (It.); Cass. 6 lugio 2001, n. 9167; Cass. 22 febbraio 2006, n. 3858 (It.).

workers can have considerable autonomy in the implementation of the allocated task—autonomy granted by a particular mode of decentralized organization—yet still be classified as employees subject to "upstream" managerial power.

The merits of this judgment, however, exceed its imperfections. To classify the activity performed by platform workers, rather than focusing on external elements such as discontinuity and flexibility, the judge assesses how digital tools such as algorithms complement or substitute for managers in an organization unilaterally arranged by the platform.[31] What is also particularly interesting is the complex jigsaw of arguments used by the Palermo tribunal, compounded by the detailed reconstruction of the claimant's working conditions, representing a blueprint on how to address a misclassification claim.

31. Valerio De Stefano, *Platform Work and Labour Protection. Flexibility Is Not Enough*, REGULATING FOR GLOBALIZATION: TRADE, LAB. & EU L. PERSPECTIVES (May 23, 2018), http://regulatingforglobalization.com/2018/05/23/platform-work-labour-protection-flexibility-not-enough/.