Chapter 4
Is the Classification of Work Relationships Still a Relevant Issue for Social Security? An Italian Point of View in the Era of Platform Work

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I. Introduction

This chapter aims at analysing the connection between the classifications of work activities in labour law and the protective statute they enjoy in social security. After a period during which a "tailor-made" approach has prevailed, linking a specific protective statute to a certain typology (subordination and autonomy), as classified by the labour law legislator, the deconstruction of those typologies as well as of the undertaking organisation has, more recently, pushed the legislator to effect change. The new approach of the Italian legislator consists of an arbitrary application of a social protection statute (as a "package") according to a political assessment of the weaknesses of specific groups of workers ("social types"), taking into account the new forms of integration into the organisation of increasingly "deconstructed" undertakings. Paramount examples would be the issue of "hetero-organised" collaborations and that of riders.

II. The Classification of Work Relationships: The Beginning

From a historical perspective, Italian legislation was confronted with the challenge of classifying work for the first time when mandatory social insurance against work accidents (*Infortuni sul lavoro*) was introduced by Act No. 80 of 17 March 1898. This Act defined who should be covered as a "worker" (*operaio*) for social law purposes: This is anyone who "is employed" outside his or her premises, permanently or temporarily, with fixed or piecework remuneration or anyone in the same situation who supervises the work of others, even without participating in it, if his or her salary does not exceed a certain amount and the pay periods remain within the month. The definition is completed by a list of activities regarded as particularly dangerous, such as working in mines and on construction

sites, or other construction activities where more than five workers are employed. In general, the understanding of the term "operaio" referred to manual workers. However, the legislator did not provide any definition of employment, probably counting on the fact that the very notion of worker (*operaio*) was undisputed. It is worth noting that such a notion, at least for the purpose of Act No. 80, included *supervisors* and *apprentices*, paid or unpaid, who from a labour law perspective may not necessarily be regarded as workers (*operai*). By consequence, one has to stress that social security legislation uses a different, autonomous classification of workers covered by mandatory insurance for accidents at work, deviating from the one used for labour relations.

A second important turning point in the evolution of notions and classifications is represented by the introduction of the Mandatory Old Age and Invalidity Insurance[1] established immediately after WWI. It applied to male and female persons aged between 15 and 65 who work "in the employ" of a third party, as workers (*operai*), busboys (*garzoni*), apprentices, janitors (*inservienti*), assistants, shop assistants, supervisors and clerks (*impiegati*), in the private as well as in the public sector, home workers included. Interestingly, social insurance definitions did not replicate those provided for in the legislation on employment contracts in the private sector enacted two months earlier.[2] The latter had defined the *contract of employment in the private sector* as a contract under which a legal or physical person who runs a business, hires "at the service" of that business, usually on an open-ended basis, the professional activity of the other party for the purpose of "cooperation" as a staff member, with the exclusion of any manual work. The legislator refrained from providing any explanation of what was meant either by "in the employ" ("*alle dipendenze*") or by "at the service" ("*al servizio*"). Both expressions exclude, however, persons under contract working *independently*, although allowing *for some shades of dependency*. Furthermore, manual workers (*operai*) were covered by the mandatory old age and invalidity social insurance whereas they did not fall under the notion of contract of employment in the private sector. As a consequence, access to and protection by early social security legislation in Italy was provided in an autonomous way, not linked to labour law and its classifications.[3]

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1 Royal Lieutenant Decree-Law No. 603 of 21 April 1919.

2 Royal Lieutenant Decree-Law No. 112 of 9 February 1919.

3 Indeed, the labour law legislation of that time did ignore, on purpose, the conditions of the worker (operaio) in order to exclude any recognition of rights during a period in which the worker movement was still struggling to overturn the existing

The divide between social security law and labour law regarding the definition of the protected categories of workers in each field persisted over the Fascist period. In fact, Royal Decree-Law No. 1827 of 4 October 1935 (Article 37) recalled that mandatory old age and invalidity pension referred to people as "in the employ" ("*alle dipendenze*"), thus including *operai* as well as *impiegati*, excluding *impiegati* with income above a certain earnings level. At the same time, employment contract law still excluded manual workers.[4]

III. Subordination and Autonomy: A Political and Legal Issue

A third, decisive turning point in the evolution of notions and classifications is represented by the adoption, in the Civil Code of 1942, at the very sunset of the Fascist regime, of the notion of *subordination* that applies to all "collaborators" of the entrepreneur (Article 2094) at times seen as the head (*capo*) of the undertaking (Article 2086). Subordination eliminated any differences not only between workers (*operai*) and clerks (*impiegati*) but also in relation to managers (*dirigenti*), all gathered in Article 2095 as belonging to subordinated "collaborators", although of different categories (*categorie di prestatori di lavoro*) due to the hierarchical supremacy of the entrepreneur as employer. Even if subordination in the fascist Civil Code is more of a political than a legal notion,[5] the employer's managerial prerogatives are recognised explicitly by Article 2094 and 2104 (2) Civil Code. On the other hand, the subordination of managers who, at times, exercise those prerogatives on behalf of the entrepreneur as employer over the rest of "collaborators", seems to be justified in view of granting them some form of social security in terms of old age and inability pension in connection to having been "in the employ" of the undertaking. One can conclude that the notion of subordination has become the decisive classification

political order. On the contrary, in a clear Bismarckian approach, the social security legislator tried (in vain) to appease workers' protests by introducing old age and invalidity pensions on a mandatory basis. Cf. *Gaeta, Lorenzo*, Storia (illustrata) del Diritto del Lavoro Italiano, Turin: Giappichelli 2020, pp. 388 ff.; *Ales, Edoardo*, Die geistigen Grundlagen der Sozialgesetzgebung des Kanzlers Otto von Bismarck und das Entstehen des Sozialstaates in Italien, in: Eichenhofer, Eberhard (ed.), Bismarck, die Sozialversicherung und deren Zukunft, Berlin: Berlin Ver. A. Spitz 2000, pp. 55-74.

4 Royal Decree-Law No. 1825 of 13 November 1924.

5 *Gaeta, Lorenzo*, Storia (illustrata) del Diritto del Lavoro Italiano (fn. 3), p. 80 ff.

tool, both for labour law and social law purposes. Nevertheless, social law may pursue more comprehensive coverage strategies in an autonomous way, as has been the case for some liberal professions which already had their own categorical old-age protection schemes.[6]

At the beginning of the constitutional period (1948), the very notion of *hierarchical subordination* was questioned because of its negative political significance and progressively substituted with that of *technical subordination* – to be understood in terms of "hetero-direction" of the employer on his "collaborators". In the social security perspective, subordination as "hetero-direction", encompassing the entire workforce, easily matches the notion of "in the employ" of the entrepreneur, including any kind of work performed within the undertaking, to be understood as a physical structure organised and directed by the entrepreneur/employer. Integration through the subordination of "collaborators" in the undertaking as a hetero-organised structure excludes any form of autonomy inside it. From such a perspective, autonomy can be conceived only as a feature of any kind of work performed *without subordination to the entrepreneur* i.e. *without integration in the organisation of the undertaking* even if provided in favour of it. The provision of a service or of a workmanship (*opera*) is so defined by Article 2222 Civil Code and protected in a way that highlights the non-involvement of work in the organisation of the undertaking. The issue of protection of autonomous work (self-employment) is the product of a comprehensive approach to work as a *professional activity* (entrepreneurial included) typical of the corporatist view, as expressed in Article 2060 Civil Code, according to which "work is protected in all its *organisational and executive forms*, be it intellectual, technical or manual".

Although extrapolating the freedom to conduct a business (as recognised by Article 41), the same holistic approach to the protection of work has been adopted, at least theoretically,[7] by the 1948 Constitution in Article 35. Nevertheless, one could say that the labour law protection of "purely" autonomous work, i.e. work performed without any form of integration whatsoever in the undertaking, further to that already provided by the Civil Code (Articles 2223-2238), became an issue for the legislator only in 2017, when Act No. 81 was adopted (see below). One important point to be stressed is that, on the one hand, autonomous work may come in the

6 See below.

7 *Ales, Edoardo*, (The Right to) Work as Foundational Value: Italy and the Very Notion of a Constitutional Promise, in: Bellace, Janice/ter Haar, Beryl (eds.), Research Handbook on Labour, Business and Human Rights Law, Cheltenham: Edward Elgar 2019, pp. 34-49.

form of a registered intellectual profession (Articles 2229 ff. Civil Code), and is as such protected, as for social security, within the system of Professional Funds, while separated from the General Social Insurance System (*Assicurazione Generale Obbligatoria*). For instance, this was and still is the case for barristers and solicitors who, according to Act No. 406 of 13 April 1933, are mandatorily insured by *Cassa Forense*, originally a public law body that was, however, privatised in 1994 (Legislative Decree No. 509 of 30 June 1994), and has been run since then by a foundation under the control of the Ministry of Labour and Social Affairs. On the other hand, social protection had been extended to artisans and merchants, first under the limited scope of health insurance (respectively, Act No. 1533 of 29 December 1956, and Act No. 1397 of 27 November 1960), then under inability, old age and survivors insurance (respectively, Act No. 463 of 4 July 1959, and Act No. 613 of 22 July 1966).

The differences between the two groups are manifest, since persons in the second (artisans and merchants) are by definition (small) entrepreneurs, whereas in the first (barristers and solicitors), this is not necessarily the case. Nevertheless, both are required to contribute to their activity through personal work, which, in case of the latter, shall be prevalent (Article 2222 Civil Code). Mainly for this reason, more recently, the social security legislator has addressed artisans and merchants, too, as "autonomous workers" (Act No. 233 of 2 August 1990) with a view to distinguishing them from entrepreneurs falling outside the scope of social protection on the grounds that they "just" run a company. On the other hand, artisans and merchants are autonomous also in the sense that they organise their own activity and work, without being integrated into any alien organisation, at least as far as their personal work is concerned. Nowadays, the social security of artisans and merchant is managed by INPS through separate funds.

IV. Coordination: A New Star is Born

From the perspective of notions and classifications, specific consideration must be given to *sales agents or representatives* who operate under an *agency contract* as regulated by Article 1742 ff. Civil Code.[8] Although at least in view of the Civil Code, they do not belong to the "collaborators" of an entrepreneur (agency contracts do not fall within the scope of Book V of the

8 *Ghezzi, Giorgio*, Del contratto di agenzia, Bologna: Zanichelli 1970.

Civil Code dedicated to "Labour"), their activity has to be *coordinated* with that of the undertaking. For instance, the areas in which the sales agent is active are predefined within the contract and the proponent entrepreneur shall not assign another agent to them. Furthermore, the sales agents shall discharge their duties according to the instructions received and have to provide the proponent with all the information related to the market conditions of the assigned area as well as with any other information that may help in assessing the convenience of each business deal. The fact that sales agents and representatives find themselves *somewhere in the middle* between organisational integration and independence is confirmed by the circumstance that, since 1938, their activity has also been regulated by framework collective agreements (*accordi collettivi*), which, among other things, have introduced a first form of social security in relation to the guarantee of severance payments. In fact, the 1938 Agreement established a social security body (ENASARCO, which still exists as an integrative pension fund) which was transformed into a public body by Royal Decree No. 1305 of 6 June 1939, and which regained its private law status in 1997. As for their classification, Act No. 741 of 14 July 1959, which provided the just mentioned collective agreements with a temporary *erga omnes* effect, explicitly traced back the position of sales agents and representatives to a *coordinated and continuous collaboration* with the proponent undertaking.

Relationships of such kind caught on rapidly in the labour market also outside the realm of the agency contract. This is confirmed by the fact that, some years later, the legislator included in the scope of application of the new employment proceedings *coordinated and continuous collaboration other than that of the sales agents and representatives* (Act No. 533 of 11 August 1973 modifying Article 409 No. 3 Civil Procedure Code). Nevertheless, the legislator did not provide these groups immediately with any other form of protection, social security included. On top of that, it was specified that they did not fall under any subordination relationship (Article 409 No. 3 Civil Procedure Code) so that they could not be put on an equal footing with collaborators "in the employ" of the entrepreneur, being therefore excluded from the General Social Insurance System. On the other hand, as autonomous workers they could have been entitled to social security only if they fell within the scope of application of one of the specific schemes mentioned above, which was almost never the case. It is still highly disputed whether *coordinated and continuous collaboration* shall be regarded as an intermediate category between subordination and autonomy. For the time being, the conclusion is that workers in this category are self-employed persons of sorts (*collaborazioni autonome coordinate e continuative*).

The above situation did not help in tackling the already relevant problem of (mis)qualification of the work relationship, both from the employer's and the employee's side. For the former, it had and still has to do with an *escape from subordination* because of its heavy social security burden; for the latter, on the contrary, with a *run after subordination*, since outside it there was no (social) protection. The possibility to qualify a work relationship as "coordinated and continuous collaboration", *de facto* outside any social security scheme (and burden), accentuated the fraudulent contractual behaviour of a part of the employers, stimulating the doctrine and the case law to look for an intermediate classification of such collaborations as "para-subordinated"[9] – with the consequence that at least part of the labour law provisions could have applied to them.

From the social security perspective, with reference to pensions, the legislator in Act No. 335 of 8 August 1995[10] has adopted a decisive provision. In fact, Article 2(26) has extended the General Social Insurance System to any person who performs professionally, although not exclusively, an autonomous activity for which no registration by a professional board is required (as specified by Article 18(12), Decree-Law No. 98 of 6 July 2011). Truth be told, Article 2(26) also recalls the "coordinated and continuous collaborations". However, it does so with reference to a tax law provision that has been withdrawn in the meantime. Decisive is the idea that, as it happens with sales agents and representatives, autonomous work can be compatible with *a certain degree of coordination* if the modalities of the latter are co-determined by the parties in a kind of *co-organisation* of the activity. By specifying that, for the purpose of Article 409 No. 3 Civil Procedure Code, a collaboration is coordinated "when, in the respect of the modalities of coordination defined by consensus between the parties, the collaborator organises autonomously his or her activity", the legislator has confirmed, by Act No. 81 of 2017, the autonomous nature of those collaborations. By consequence, these collaborations fall within the scope of application of the so-called *Gestione Separata* of the General Social Insurance System, under specific conditions of entitlement to benefits that are financed from contributions, the rate of which now amounts to 34 percent of the annual income as defined for tax law purposes.

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9 *Santoro Passarelli, Giuseppe*, Il lavoro "parasubordinato", Roma: Franco Angeli 1979.

10 Cinelli Maurizio/Persiani Mattia (eds.), Commentario della riforma previdenziale: dalle leggi "Amato" alla finanziaria 1995, Milano: Giuffré 1995.

V. The Beginning of Ambiguity

1. The Extension of Subordinated Social Protection to Autonomous Work

From the late nineties, the legislator extended to female self-employed workers insured only by the *Gestione Separata* the provisions on maternity, family allowances and hospitalisation grant, increasing proportionally the contribution rate. In particular, according to Article 64 of Legislative Decree No. 151 of 26 March 2001, maternity provisions have to be applied according to the same principles as for subordinate work, although without requiring the abstention of the worker from her activity during the maternity leave as a condition to receive the maternity allowance (adoption and foster cases included).[11] This is a sign that, on the one hand, the integration into the organisation of the undertaking is not quite the same as in case of subordinate work, but also, on the other hand, that the legislator considers the need for protection of the coordinated collaborator to be the same as that of the subordinated one.

Once again, from the perspective of notions and classifications, it is important to stress that in 2015 the legislator referred straightforward to "coordinated and continuous collaborators" insured by the *Gestione Separata*, but not entitled to a pension and without a VAT number, as beneficiaries of a specific unemployment grant (DIS-COLL). DIS-COLL was introduced by Article 15 of Legislative Decree No. 22 of 4 March 2015, and it is paid in case of involuntary unemployment for a maximum of six months. Its amount is calculated based on the beneficiary's yearly income and corresponds to 75 percent of the monthly income if this falls below a minimum threshold fixed by the law. On the contrary, subordinated workers are entitled to NASPI, an unemployment benefit that is calculated based on the last wage. Both are of a typical social insurance nature.[12]

A further and highly controversial turning point as far as notions and classifications are concerned is represented by Article 2 (1) Legislative Decree No. 81 of 15 June 2015, as recently modified by Article 1 Act No. 128 of 2 November 2019. In its original version, Article 2 (1) provided for the application of the protective statute of subordinate work (one could argue both from a labour law and social security perspective) to "collaborations

11 *Ales, Edoardo*, Maternità e congedi parentali, in: Enciclopedia del Diritto, Annali, Vol. IX, Milano: Giuffré 2015, pp. 531-556.

12 *Renga, Simonetta*, Post fata resurgo: la rivincita del principio assicurativo nella tutela della disoccupazione, in: Lavoro e Diritto, 29 (2015) 1, p. 77.

that consist of exclusively personal and continuous work the execution modalities which are organised by the client, with particular reference to the time and place of work". The difference regarding subordination has to be found in the use of "organisation" instead of "direction" in order to describe the way in which the client relates to the collaborator: as a result, one could not define the former as an employer. Contrary to coordinated and continuous collaborations, the execution modalities of the performance are unilaterally organised by the client, excluding any negotiation with the "collaborators", which is a decisive element of the notion contained in Article 409 of No. 3 Civil Procedure Code. Scholars have named this "hetero-organisation", with a view to distinguishing it from "hetero-direction". They have also debated whether such a notion can be classified under subordination or autonomy.[13] In our view, however, one has to refer to the way in which the performance "collocates" with the structure of the client undertaking, and to the notion of "organised by the client". This has also to do with the understanding of the very notion of subordination. What is clear is the clash between "hetero-direction" as a typical feature of "traditional" subordination, and "hetero-organisation" as main character of what we can call an "autonomised subordination",[14] in which *neither hetero-direction power nor full autonomy is at stake*. As for the very notion of "hetero-organisation", an important point was represented by the prerogative of the client to determine unilaterally the time and the place of the performance.[15] However, such specification has been withdrawn by Article 1 Act 2 No. 128 of November 2019, whereby "exclusively" was also changed into "mostly" as far as the personal character of the performance is concerned.

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13 See, among others, *Nogler, Luca*, La subordinazione nel d.lgs. n. 81 del 2015: alla ricerca dell'"autorità del punto di vista giuridico", in: WP C.S.D.L.E. "Massimo D'Antona".IT, 267 (2015); *Perulli, Adalberto*, Il lavoro autonomo, le collaborazioni coordinate e le prestazioni organizzate dal committente, in: WP C.S.D.L.E. "Massimo D'Antona".IT, 272 (2015); *Santoro Passarelli, Giuseppe*, I rapporti di collaborazione organizzati dal committente e le collaborazioni continuative e coordinate *ex* art. 409 n. 3 c.p.c., in: WP C.S.D.L.E. "Massimo D'Antona".IT, 278 (2015); *Magnani, Mariella*, Autonomia, subordinazione, coordinazione nel d.lgs. n. 81/2015, in: WP C.S.D.L.E. "Massimo D'Antona".IT, 294 (2016).

14 *Ales, Edoardo*, Subordination at Risk (of "Autonomisation"): Evidences and Solutions from Three European Countries, in: Italian Labour Law e-Journal, 12 (2019) 1, p. 65.

15 *Magnani, Mariella*, I tempi e i luoghi del lavoro. L'uniformità non si addice al post-fordismo, in: WP C.S.D.L.E. "Massimo D'Antona".IT, 404 (2019).

2. "Hetero-Organisation": A New Challenge for Subordination

It is rather clear that, as far as notions and classifications are concerned, the very meaning of *hetero-organisation* has to be investigated.[16] This in order to understand whether there is a typological justification for the application of the protective statute of subordination to relationships that do not fall under the scope of "hetero-direction", being not integrated in the same way into the structure of the undertaking. In such a perspective, it has to be stressed that the Constitutional court has declared unlawful a legislative provision denying (for the purpose of both labour law and social security) the classification of subordinated to work relationships that actually showed the typical features thereof on the ground of its irrationality and self-contradictoriness.[17] In the same vein, one could argue that, even if made to the benefit of workers, the choice to apply the protective statue of subordination to "hetero-organised" relationships may be deemed unconstitutional as well. In fact, it imposes a *disproportionate burden* on the client who is not entitled to the managerial prerogatives he or she may enjoy as employer in terms of "hetero-direction".

A big chance to clarify the situation has been offered by the case of food delivery riders, contracted as coordinated and continuous collaborators, who have lodged claims before several Italian courts in order to be recognised as subordinated workers and to have access to the relevant protective statute. In parallel to the court proceedings, in a quite unfortunate timing, the legislator has classified riders as autonomous workers, by adopting a specific regulation (see below) that could have not been taken into account by the judges due to its nonretroactive effect. Deciding on the first claim brought to its knowledge, the *Cassazione*,[18] although aware of the stance taken by the legislator, upheld the judgement of the Court of Appeal of Turin, according to which the activity of riders must be classified as "hetero-organised" collaboration, thus falling within the scope of application of subordination according to Article 2 (1) Legislative Decree 81 of 2015. However, without a motivation worthy of the name, the *Cassazione*, confirming the conclusions of the Court of Appeal, did limit the application of the protective statute of subordinated work, excluding, among the others, the right to a wage and working time. Moreover, the *Cassazione* has

16 *Zoppoli, Antonello*, La collaborazione eterorganizzata: fattispecie e disciplina, in: WP C.S.D.L.E. "Massimo D'Antona".IT, 296 (2016).

17 Corte costituzionale, 23.03.1993, No. 121.

18 Cassazione, sez. lav., 24.01.2020, No. 1663.

deemed irrelevant any investigation of the very meaning of "hetero-organisation", on the assumption that, by recognizing the entitlement to the protective statute of subordination, Article 2 (1) constitutes a *remedial provision*. In the view of the *Cassazione*, the legislator does not intend to classify *a new typology of work relationship*, focusing, on the contrary, on the positive effects that the remedy will have on the worker. What remains obscure is how to figure out when a work relationship falls within the scope of Article 2 (1) without having any idea of the real meaning of "hetero-organisation". By abdicating its supreme interpretation role, the *Cassazione* puts that provision at risk of unconstitutionality for the reasons mentioned in the above.[19]

Finally, yet importantly, nothing is said about the social security aspects, neither by the legislator nor by the *Cassazione*. However, remaining consistent with the clear statement of the legislator, "hetero-organised" collaborators shall fall within the scope of application of the General Social Insurance System, in the *Fondo Pensioni Lavoratori Dipendenti* (FPLD). Against this background, one could conclude that "hetero-organisation" can be an option for entrepreneurs only if they have decided to bear anyhow the costs of subordination, renouncing, however, to the traditional understanding of the managerial prerogatives it entails and opting in favour of "autonomised subordination". From a classification point of view, "hetero-organised" collaborations are neither subordinated nor autonomous. However, the subordination protective status applies, social security included. The practical effects of such a solution are not yet perceivable.

VI. Platform Work and its Varieties

How does all this apply to platform work? Since 2017, the Italian legislator has intervened three times with reference to the possibility that work is performed through "technological instruments", platform included. This has happened once via the already mentioned Act No. 81 of 22 May 2017,[20] with reference to *smart working* (Article 18), and twice via Legis-

19 *Ales, Edoardo*, In favore dell'etero-organizzazione come "concetto" autonomo: timeo danos et remedia ferentes, in: Massimario di Giurisprudenza del Lavoro, 73 (2020) 2, p. 19.

20 *Perulli, Adalberto*, Il *Jobs Act* del lavoro autonomo e agile: come cambiano i concetti di subordinazione e autonomia nel diritto del lavoro, in: WP C.S.D.L.E. "Massimo D'Antona".IT, 341 (2017).

lative Decree No. 81 of 2015, as modified by Act No. 128 of 2019, in Article 2 (1) and Articles 47-*bis* ff., respectively, with reference to hetero-organised collaborations and autonomous work in the delivery sector.

1. *Smart Working (on Platform) as a Modality of Subordinate Work*

According to Article 18 of Act No. 81 of 2017, smart working (*lavoro agile*)[21] is a modality of execution of subordinate work, freely agreed between the parties, also organised by objectives, without predetermined working time and place, in which work is performed partly inside and partly outside the premises of the undertaking, in the absence of a stable work station. Nevertheless, work is understood to be smart also if performed regularly in a place chosen by the worker for his or her personal convenience within the limit of reasonableness (so-called hub). Maximum working hour limits as provided by the law or collective agreements shall be respected. The use of "technological instruments" is an option. Even if classified as subordinate work (Article 2094 ff. Civil Code), the legislator requires the parties specifying, within the written individual agreement:

- its nature, i.e. open-ended or fixed-term, and, as for the latter, its duration and termination notice period which, however, cannot be less than 30 days (90 in the case of workers with disabilities);
- how managerial prerogatives, with reference to control and disciplinary powers, are exercised when work is performed outside the premises of the undertaking;
- which instruments, if any, must be used by the worker;
- rest and disconnection periods, in cases where work is performed using "technological instruments".

Both open-ended and fixed-term agreements may be terminated for just cause. Equal treatment between smart workers and those working within the premises of the undertaking shall be guaranteed. The smart work agreement shall be communicated to the competent labour authorities. By introducing smart work, the legislator explicitly explains the goal, first, of improving the performance of subordinate workers through the establish-

21 *Spinelli, Carla*, Tecnologie digitali e lavoro agile, Bari: Cacucci 2018; *Tiraboschi, Michele*, Il lavoro agile tra legge e contrattazione collettiva: la tortuosa via italiana verso la modernizzazione del diritto del lavoro, in: WP C.S.D.L.E. "Massimo D'Antona".IT, 335 (2017); *Magnani, Mariella*, I tempi e i luoghi del lavoro. L'uniformità non si addice al post-fordismo (fn. 15).

ment of new forms of organisation, also by objectives, in the absence of direction and control, thus echoing "autonomised subordination". On the other hand, it aims at the improvement of the work-life balance, in particular by recognising a priority of smart work agreements signed with female workers within three years after the termination of maternity leaves, from a clear "adult worker model" view,[22] according to which care activity is a woman's job.

From a social security point of view, the fact that the legislator has classified smart work as a "modality of subordinate work" makes things very easy, above all if one smart work day has the same value as an ordinary working day as far as working time, wage and, therefore, contributions are concerned. However, due to the lack of control over performance, above all in cases where somebody is working off-line, the relationship shall be built on mutual trust that allows for an aggregation of the elements mentioned above. The adoption of an achievement-oriented approach to work organisation[23] may be of great help to support such a perspective.

2. *Platform Work as a Modality of Hetero-Organised Collaboration*

An explicit reference to platforms, not to be understood as the employer or the client, but only as the *technical tool* through which the modalities of work are defined (see below), is provided by Article 2 (1) Legislative Decree No. 81 of 2015, as modified by Act No. 124 of 2019. As already illustrated above, one could think about "hetero-organisation", to which the protective statute of subordination applies, in terms of "autonomised subordination", within the framework of an achievement-oriented approach to work organisation. In such a framework, it is not at all problematic to reconcile platform work with subordination that has abandoned the dog-

22 *Ales, Edoardo*, Geschlechterspezifische Rollenmodelle und ihre Überwindung: das Adult-Worker-Modell in der italienischen Gesetzgebung, in: Eigenverantwortung, private und öffentliche Solidarität – Rollenleitbilder im Familien- und Sozialrecht im europäischen Vergleich, Bundesministerium für Familie, Senioren, Frauen und Jugend, Forschungsreihe Band 3, Baden-Baden: Nomos 2008, pp. 195-211.

23 *Ales, Edoardo*, Is Performance Appraisal Compatible with the Employment Relationship? A Conclusive Plea in Favour of an Achievement-Oriented Approach to Work Organisation, in: Addabbo, Tindara/Curzi, Ylenia/Fabbri, Tommaso/Rymkevich, Olga/Senatori, Iacopo (eds.), Performance Appraisal in Modern Employment Relations. An Interdisciplinary Approach, London – New York – Shanghai: Palgrave Macmillan 2020, pp. 255-263.

ma of "hetero-direction", above all if the very notion of work organisation is an immaterial one.[24] Indeed, a problematic point is the transnational nature of "digital work", above all if the principle of territoriality continues to apply to labour law and social security, as is the case with the Court of Justice.[25] According to the Court, "in the absence of harmonisation or coordination measures at Union level in the field concerned, the Member States remain, in principle, free to set the criteria for defining the scope of application of their legislation, to the extent that those criteria are objective and non-discriminatory".[26] Quite surprisingly, the Court offers no reflection on the notion of the "objective and non-discriminatory nature", thus apodictically supporting the territoriality principle of labour law.[27] In fact, in the view of the Court, "EU law does not (…) prevent a Member State from providing that the legislation it has adopted be applicable only to workers employed by establishments located in its national territory." In the same way, "it is open to another Member State to rely on a different *linking factor* for the purposes of the application of its own national legislation."[28] It is evident that according to such an interpretation it will be difficult, even in case the "owner" of the platform is located in an EU Member State, to advocate for the application of the more favourable social security system. The consequence is to jeopardise the possibility for delocalised ("digital") workers to invoke the law of the country of origin of their "real" employer and to favour the flourishing of fictitious employers (platforms) in their country of establishment and vice versa.[29]

3. *Platform Work as a Modality of ("False") Autonomous Work*

As already highlighted, Act No. 128 of 2019 adds a Chapter V-*bis* to Legislative Decree No. 81 of 2015, with the very promising heading "Protection

24 *Ales, Edoardo*, Subordination at Risk (of "Autonomisation"): Evidences and Solutions from Three European Countries (fn. 14), p. 65.
25 CJEU of 18 July 2017, C-566/15, Erzberger, ECLI:EU:C:2017:562. See *Ales, Edoardo*, Adapting Labour Law to "Digital" Work Between Scholarly Interpretation, Case Law and Legislative Intervention", forthcoming essy in a book edited by Perulli, Adalberto and Treu, Tiziano.
26 CJEU of 18 July 2017, C-566/15, Erzberger, para. 36.
27 Ibid., para. 38.
28 Ibid., para. 37.
29 *Ales, Edoardo*, Adapting Labour Law to "Digital" Work (fn. 25).

of Work through Digital Platforms" (Articles 47-*bis* to 47-*octies*).[30] Quite surprisingly, however, Chapter V-*bis* does not apply to all forms of platform work, but only to "autonomous workers who carry out activities of goods delivery on behalf of others, in urban areas by bicycle or motor vehicles", the so-called riders (Article 47-*bis*). Of high interest, on the contrary, is how the legislator defines digital platforms as "the software used by the client (undertaking) for the delivery service, in order to fix the remuneration due to the rider and to determine the way in which the service is performed". Therefore, in the legislator's view, the platform is only an instrument that can be used in order to organise work, and is not regarded as the employer as such. This is a very important assumption, since it means that the physical or legal person owning the platform can be held responsible for the violation of any labour law and social security provision as a "normal" employer or client. Moreover, that person takes the risk that the self-learning algorithm will act unlawfully, outside any possible human control. With the algorithm being no legal person, it cannot be sanctioned as would happen to the real employer.

The contracts of the riders shall be in written form *ad probationem*, meaning the absence of the written form does not effect the nullity of the contract. In the absence of a written form, one may advocate the existence of a subordinate contract, as it is useful to prove the actual conditions applied to the relationship and, if applicable, the infringement of workers' rights. Riders shall receive adequate information on their rights and on health and safety regulations. Failure to comply with this information duty results in a violation of Legislative Decree No. 152 of 1997, implementing the Written Statement Directive.[31] Effective sanctions are provided in such a case[32] (Article 47-*ter*).

Riders shall receive remuneration (*compenso*) that, notwithstanding their classification as autonomous workers, can be determined by national

30 *Ales, Edoardo*, Oggetto, modalità di esecuzione e tutele del "nuovo" lavoro autonomo. Un primo commento, in: Massimario di Giurisprudenza del Lavoro, 72 (2019) 3, p. 719.

31 Directive 91/533/EEC. After 1 August 2022 Directive 2019/1152/EU of 20 June 2019, relating to Transparent and Predictable Working Conditions in the European Union.

32 According to Article 4 Legislative Decree No. 152 of 1997, the worker can contact the Provincial Labour Office so that the latter obliges the employer to provide the information required by the decree within fifteen days. If the employer does not comply with the order, the worker is entitled to an indemnity that cannot exceed the remuneration received in the last year and which must be determined based on the seriousness and duration of the violations and the behaviour of the parties.

collective agreements, signed by the comparatively more representative trade unions at national level. This is a very controversial point since it implies that in order to have their pay defined by collective bargaining riders shall be represented by already existing unions, usually focused on subordinate workers. The same reference to *contratti collettivi*, typical of subordinate work, instead of *accordi collettivi*, typical of autonomous work, confirms the ambiguity of the legislative intervention. Yet, by defining pay, collective agreements shall take into account the modalities of the provisions of service and the organisation of the client (undertaking). In the absence of collective agreements, workers cannot be paid by the piece (delivery) and shall have a minimum hourly wage taking into account that already set by collective agreements of similar sectors. Such a provision seems to be aimed at stimulating the conclusion of collective agreements that could introduce piecework payment in the light of the modalities of the provision of service and of the organisation of the undertaking.

In any case, workers shall be entitled to a supplementary indemnity, not less than 10 percent of the minimum hourly wage, for work performed at night or on holidays or in adverse weather conditions. The amount of the indemnity is fixed by collective agreements or, in their absence, by Decree of the Ministry of Labour (Art. 47-*quarter*). Wage setting through collective agreements risks to clash with the case law of the Court of Justice. In fact, as decided in *FNV*,[33] a collective labour agreement, containing minimum rates for self-employed persons who carry out for an employer the same activity as his employees, falls outside the scope of Article 101 TFEU (and therefore does not conflict with competition law) only where such workers are "false" self-employed persons, i.e. workers who are in the same situation as employees. Since the legislator has explicitly classified riders as "real" self-employed persons, the regulation or even the definition of criteria determining their remuneration by collective agreements is difficult to reconcile with what the Court has stated. One had to assume that the just mentioned ambiguous approach has been adopted on purpose in order to cast doubt on the "real" autonomous nature of riders and to avoid the clash with competition law. However, the classification of riders as autonomous workers seems to imply a non-rebuttable presumption such as to exclude that they could be also hired as subordinate (hetero-organised)

33 CJEU of 4 December 2014, C-413/13, FNV, ECLI:EU:C:2014:2411, para. 42. *Biasi, Marco*, Ripensando il rapporto tra il diritto della concorrenza e la contrattazione collettiva relativa al lavoro autonomo all'indomani della l. n. 81 del 2017, in: WP C.S.D.L.E. "Massimo D'Antona".IT, 358 (2018).

workers, thus eliminating the comparator needed in order to make the *FNV* doctrine applicable. Provisions regarding the remuneration of riders will apply from November 2020.

Antidiscrimination law and the guarantee for the worker's freedom and dignity, as provided by the subordinate protective statute shall apply to riders. This is a further sign of the ambiguity mentioned above, taking into account that, at least as far as antidiscrimination law is concerned, autonomous work has its own rules. The refusal to accept a delivery does not justify the exclusion of riders from the platform, nor does a reduction of delivery opportunities, which is, on the contrary, a clear signal of the autonomous nature of riders, since no subordinate worker can lawfully refuse a task that has been required by the employer (Article 47-*quinquies*).[34]

Riders shall be insured against work accidents and occupational diseases, which is not anymore a typical feature of subordinate work only. Contributions are fixed according to the risk rate of the performed activity with reference to the general minimum daily remuneration for Social Security and Assistance contribution (EUR 48.98 – INPS circular letter No. 9 of 29 January 2020), related to the days of actual activity. The physical or legal person using the platform is responsible for the issue of work accidents and occupational diseases legislation, as provided by Decree of the President of the Republic No. 1124 of 30 June 1965, as well as of the health and safety regulation, as provided by Legislative Decree No. 81 of 9 April 2008, (Article 47-*septies*). As far as social security is concerned, being classified as autonomous workers, riders perform "an autonomous activity for which no registration by a professional board is required", thus falling within the scope of application of the *Gestione Separata* (Article 2 (1) Act No. 335 of 1995). Nevertheless, one may wonder whether as "false" self-employed persons to whom a wage is paid as set by collective agreements, they should not fall within the scope of application of the General Social Insurance System, in the *Fondo Pensioni Lavoratori Dipendenti* (FPLD).

Although in a different way, compared to "hetero-organisation" protected as subordination, also in the case of riders, a further inconsistency is at stake between their formal classification and the protective statute that the legislator applies to them. In fact, that statute is closer to subordination than to autonomy. Indeed, formally classified as autonomous workers, riders seem to have been provided by the same legislator with all that is need-

34 In the same vein see CJEU of 22 April 2020, C-692/19, Yodel, ECLI:EU:C:2020:288, point 40.

ed to be reclassified by the Court of justice as "false" self-employed workers.

VII. Conclusion

"Hetero-organised" collaborators and riders are paramount examples of a clear trend towards the abandonment of a "tailor-made protective statute" based on (old-fashioned) labour law classifications of activities, such as subordinated or autonomous work. The current approach of the Italian legislator consists of an "arbitrary" application of labour law and social security protective statute (as a "package"), according to a political assessment of the weaknesses of specific groups of workers ("social types"), without taking into account the way in which they are integrated into the organisation of increasingly "deconstructed" undertakings. From such a "package" perspective, the financing of pensions remains linked to contributions either from wage or from annual income (for those classified as self-employed), within the framework of a (virtually) contribution-based system of calculation of benefits, still run on a pay-as-you-go basis because of its unspeakable financial imbalance. State pay-offs will be needed for many years to come in order to support pensions that might be reduced substantially in their amount, due to the abandonment of the retribution-based system of benefits calculation. However, considering the high contribution rate,[35] the possibility of success for complementary pension funds remains relatively low – unless the legislator decides to transform from option to duty the use of the *Trattamento di Fine Rapporto* (Employment Termination Grant) in order to finance occupation pension schemes.[36]

The conclusion can be that the labour law classification of the work relationship is still a relevant issue for social security although increasingly in a way that does not necessarily coincide with the way of assessing the needs of a certain category of workers in order to understand if new forms of protection should be introduced that are specifically designed for them in accordance with their degree of integration within the organisation of an undertaking. The "package" perspective, according to which the subordination protective status can be "attached" by the legislator to workers

35 Harmonised at 34 percent of wage/income both for subordinate and autonomous work insured by the Gestione Separata, of which two thirds are paid by the employer/client.

36 *Ales, Edoardo*, Il sistema pensionistico a 25 anni dalla riforma, in: Rivista Giuridica del Lavoro e della Previdenza Sociale, 70 (2020) 3, forthcoming.

whose performance does not necessarily recall the features of "hetero-direction" ("hetero-organisation", for instance), is a sweeping one that entails a contingent choice on the part of the legislator, who decides to protect one "politically sensitive" group (riders, for instance), whatever the configuration of their social needs. In this view, further to the absence of "hetero-direction", one major point of reflection can be the lack of an exclusive link to one unique employer that puts the worker in a "false-employee" or "employee-unlike" position, in contrast to the position of the "false self-employed" or the "employee-like" worker. Whether this can cause the emergence of an intermediate category of work between subordination and autonomy, in terms of coordination, is still a matter of debate. In any case, such a solution would require the "design" of specific social security schemes and the abandoning of the "package" approach.