

# 'Time Is Running Out'

## The Yodel Order and Its Implications for Platform Work in the EU

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1. Introduction. 2. The Yodel's business model and its internal organisation: too good to be true? 3. Access denied! Who is a 'worker' for the purposes of EU social law? 4. Beyond formalism, exposing notional freedom: the way forward.

### Abstract

This commentary examines case C-692/19, an order in response to a request for a preliminary ruling regarding the scope of application of working time protection, handed down by the Court of Justice of the European Union (CJEU) in April 2020.

A courier working for a shipping company filed a claim before a UK employment tribunal demanding reclassification as a 'worker' with access to the national legislation implementing Directive 2003/88/EC on working time. The tribunal decided to refer the question to the CJEU.

At first glance, some elements of the order may give us the impression that EU working time protection does not cover workers who may find themselves in a situation of (bogus) self-employment, including those in the platform economy. However, this is not the case. The order is based on a specific set of facts that are in line with the CJEU's established jurisprudential practices on the concept of worker, according to which workers formally classified as self-employed under the contract or the national law are excluded from the scope of the Working Time Directive only if they enjoy genuine, not nominal organisational autonomy.

This analysis is organised as follows. After some introductory remarks, part 2 summarises the arguments of the remitting court and reviews the business model of the delivery company. Part 3 critically discusses some passages of the order. It also examines the notion of 'worker' as shaped by the CJEU, highlights strengths and shortcomings of this interpretive attitude, and summarises the proposals to overcome the weaknesses of an under-inclusive and potentially ineffective application of EU law. After appraising the widespread practices in the platform economy and the most recent regulatory developments, part 4 demystifies the issue of organisational flexibility, which is often understood in a unidirectional way, to the advantage of business. This analysis concludes by advocating for a purposive adaption of existing legal categories, beyond the formalistic approach adopted by the referring court in this case.

**Keywords:** Working time; Concept of 'worker'; Platform work; Self-employment; Gig-economy; Substitution clauses.

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## 1. Introduction.

At the end of April, the Court of Justice of the European Union (CJEU) – with the order C-692/19 *B v Yodel Delivery Network Ltd* – ruled on a case, which concerns the legal fate of platform work in the European Union (EU).<sup>1</sup> The news went almost unnoticed, as it was inevitably overshadowed by the Covid-19 pandemic and its nefarious effects on the labour market.<sup>2</sup> Broadly speaking, the issue revolves around the ‘qualifying dilemma’ of the professional relationship between a courier and a shipping company. More specifically, the order examines the personal scope of application of the EU Working Time Directive (Directive 2003/88).<sup>3</sup> Consequently, this order allows commentators to reflect once again on the adequacy of EU social law and, more importantly, on its ability to accommodate the profound paradigm shifts that are reshaping contemporary work relationships.

The purpose of this article is to critically analyse the order issued in response to a question referred by a British tribunal. The case is worth exploring, as it represents one of the few judicial stances of the CJEU about a company that adopts the increasingly popular ‘horizontal’<sup>4</sup> business model in the logistics and delivery sector<sup>5</sup>, a scheme that has grown exponentially in parallel with the rapid emergence of digital platforms. Some rather ambiguous passages of the order immediately spurred enthusiastic interpretation as if the CJEU had abruptly given its green light to the liquid model of platform work.<sup>6</sup> An in-depth analysis, however, shows that the Court’s attitude is far from ground-breaking, all the more so since the order does not endorse the distortions resulting from unaccountable contractual templates that leverage legal loopholes and overly rigid interpretations of the notion of ‘worker’. In fact, the order clearly restates a consolidated judicial trend, which – if applied

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<sup>1</sup> CJEU, Case C-692/19, *B v Yodel Delivery Network Ltd* [2020] [ECLI:EU:C:2020:288](#). This commentary largely reflects and expands on the contents of a note written by Jeremias Adams-Prassl, Antonio Aloisi, Valerio De Stefano and Nicola Kountouris and published in the *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 3/2020. I am grateful to Nastazja Potocka-Sionek and Amina Adwan for providing great discussion and feedback.

<sup>2</sup> For a systematic overview of socioeconomic measures adopted to support businesses, workers and families, see the special issue of the *Italian Labour Law e-Journal*, *Covid-19 and Labour Law. A Global Review*. The order has been cited in two cases in Spain and Italy, taking a consistently pragmatic approach. See Tribunal Supremo, Sala de lo Social, 23 September 2020, No. 4746/2019; Tribunale di Palermo, 24 November 2020, No. 3570.

<sup>3</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time. Due to space constraints, it is not possible to analyse in detail the directive. See Adnett N. E., Hardy S., *Reviewing the Working Time Directive: Rationale, Implementation and Case Law*, in *Industrial Relations Journal*, vol. 32, 2001, 114; Kenner J., *Uber Drivers Are ‘Workers’ – The Expanding Scope of the ‘Worker’ Concept in the UK’s Gig Economy* in Kenner J., Florczak I., Otto M. (eds.), *Precarious Work. The Challenge for Labour Law in Europe*, Edward Elgar Publishing, Cheltenham, 2019, 197; Bogg A., *The Regulation of Working Time in Europe*, in Bogg A, Costello C., Davies A.C.L. (eds.), *Research Handbook on EU Labor Law*, Edward Elgar Publishing, Cheltenham, 2016, 267; Nowak T., *The Turbulent Life of the Working Time Directive*, in *Maastricht Journal of European and Comparative Law*, vol. 25, n. 1, 2018, 118; Ales E., Popma J., *Occupational Health and Safety and Working Time*, in T. Jaspers, F. Pennings, S. Peters (eds.), in *European Labour Law*, Intersentia, Cambridge, 2019, 431. For a thorough analysis on the contested terrain of working time in the gig economy, see Inversi C., *Exploring the Concept of Regulatory Space: Employment and Working Time Regulation in the Gig-Economy*, PhD dissertation, University of Manchester, 2019.

<sup>4</sup> Modern platform operators are described as unparalleled organisations situated between hierarchies and markets or, even better, as transcending these two orthodox options, which results in the disintegration of the employing entity and the pulverisation of employment-related obligations. See Adams-Prassl J., *Humans as a Service: The Promise and Perils of Work in the Gig Economy*, Oxford University Press, Oxford, 2018.

<sup>5</sup> CJEU, Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain* [2017] [ECLI:EU:C:2017:981](#).

<sup>6</sup> Romera J., Semprún A., *Europa niega la relación laboral a los repartidores de plataformas digitales*, in *ElEconomistas.es*, 2020, available at: <https://bit.ly/2B0TzsP>, accessed 11 Nov. 2020.

extensively – could ensure access to labour protection for many non-standard workers, who are unfairly denied basic safeguards because of a too formalistic application of EU law.

In short, the reference for a preliminary ruling concerns the total or partial resistance of the European Directive 2003/88 to the adoption of substitution clauses and, to a certain extent, hyperflexible arrangements organised on an ‘if and when’ basis. Moreover, the order focuses on the problematic relationship between the initial moment and the execution phase of the employment relationship, which is continuous yet inconstant.<sup>7</sup> These aspects are even more topical in times of unorthodox contractual templates. That is why the scholarly community considers this order as a potential model of the CJEU’s position towards several dominant features that are spreading from the platform economy context to larger segments of the labour market.

However, the acknowledgement of legal value of this order should dampen the most fervent reactions. In fact, it is an order and not a ruling (the CJEU’s reply can take the form of a reasoned order when it is possible to refer to the previous case law or when the issue is easy to resolve). One should not overestimate its ability to set a leading precedent. Furthermore, the ruling has limited relevance, since it is deeply influenced by the underlying facts as well as by the actual organisational model, which – if ascertained in court – would represent a rare exception in the ‘on-demand’ landscape. Finally, the legal background of the United Kingdom’s labour law is characterised by significant peculiarities that cannot be found in other jurisdictions, not to mention the uncertainty surrounding the process of the country’s exit from the EU legal order.

After these introductory remarks, this note is divided into three main sections. Part 2 analyses the arguments of the remitting court, summarises its main contents, and describes the operational model under investigation. Part 3 critically discusses certain passages of the order and offers some criticisms of the reasoning, notably as regards its failure to go beyond pure contractual formalism focused on external elements. This section also reflects on the notion of ‘worker’ as shaped by the CJEU and reviews the initiatives that have been developed thus far to overcome the weaknesses of scarcely protective approaches. Part 4 appraises the widespread practices in the diverse segments of platform work and the most recent regulatory developments in the context of the European Pillar of Social Rights (EPSR). While this order restates a consolidated CJEU’s posture that could ensure protection for a large group of non-standard workers, this interpretative attitude may prove to be scarcely effective in the future. Therefore, this article concludes by advocating for a gradual adaption of the current legal categories for the purposes of applying EU law.

## 2. The Yodel’s business model and its internal organisation: too good to be true?

The claim was filed by a neighbourhood parcel delivery courier (‘B’) that had been working for the Yodel delivery company since 2017. The service agreement expressly stated that couriers were hired as ‘self-employed’ persons. After a training session on the operation of the handheld delivery device, workers made deliveries using their own equipment and

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<sup>7</sup> Pacella G., *La nozione euro-unitaria di lavoratore dipendente alla prova della gig-economy: si pronuncia la Corte di Giustizia europea*, in *Labour Law & Issues*, vol. 6, n. 1, 2020, 16.

mobile phones to interact with the delivery company and customers. Couriers had the possibility of appointing a subcontractor or a substitute for the whole or part of the service provided while remaining liable for any acts or omissions thereof. The company reserved the power of vetoing any substitute that did not meet the professional requirements (in terms of skills and qualification) laid out in the main contract. Furthermore, a non-exclusive clause allowed delivery couriers to make deliveries on behalf of other companies and third parties, including Yodel's direct competitors, without any restriction to parallel engagements.

More importantly, the workers were free to set a maximum number of orders that they would complete in a period of time and to refuse delivery requests. Likewise, the company was not required to use the services of the rider. The agreement provided for a fixed payment for any given delivery, varying according to the place of delivery. As far as working hours were concerned, it was the couriers themselves who established the schedule, the arrangement of deliveries as well as the route to complete the orders within a time window ranging from 7.30 in the morning to 9 at night, from Monday to Saturday. At a closer look, these contractual conditions allowed a supposedly wide margin of flexibility, which is apparently unusual when compared to the most popular model implemented in the last mile logistics sector.<sup>8</sup> Regrettably, though, little is known about the operation of the internal staffing and scheduling software or the consequences for non-compliance with internal rules.

Mr. 'B' filed a claim to be reclassified as a 'worker for the purposes of Directive 2003/88' (Para 14 of the order).

It should be noted that the 'worker' category is an intermediate classification in the United Kingdom<sup>9</sup>, introduced in order to improve the protection of those who do not fulfil the definition of 'employee'. 'Workers' are those working under 'any other contract ... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'.<sup>10</sup> This 'hybrid' category allows access to the minimum pay regime, working time regulations (and, therefore, to the rules regarding rest and paid leave), anti-discrimination safeguards and protection for 'whistleblowing' (i.e. reporting wrongdoing in the workplace).<sup>11</sup> The reference for a preliminary ruling under Article 267 TFEU<sup>12</sup> submitted by the Watford Employment

<sup>8</sup> Woodcock J., Graham M., *The Gig Economy: A Critical Introduction*. Polity, Cambridge, 2019.

<sup>9</sup> Kenner, nt. (3) (explaining that "[w]orker" is an intermediate category in UK law in between an "employee", who is obliged to work for an employer when required in accordance with her/his contract, and has the greatest level of employment protection, and an independent contractor, who works autonomously").

<sup>10</sup> Section 230(3) (b) Employment Rights Act (ERA) 1996. In UK law, the category includes both persons under a contract of employment and persons who personally perform any work or service under any other contract, excluding those carried out in a professional or business capacity. The term 'worker' is also used in Section 296 (1)(b) Trade Union and Labour Relations (Consolidation) Act 1992, with a slightly different meaning, for the purposes of collective labour rights. See Atkinson J., Dhorajiwala H., *IWGB v RooFoods: Status, Rights and Substitution*, in *Industrial Law Journal*, vol. 48, n. 2, 2019, 278. See also Countouris N., *The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, vol. 47, n. 2, 2018, 219 (discussing the inevitable and undesirable fragmentation deriving from the term worker 'in terms of clarity and coherence of national labour law systems and their less than integrated relationship with EU law').

<sup>11</sup> Aloisi A., *'A Worker is a Worker is a Worker': Collective Bargaining and Platform Work, the Case of Deliveroo Couriers*, in *International Labor Rights Case Law*, vol. 5, n. 1, 2019, 36. See also <https://www.gov.uk/employment-status/worker>.

<sup>12</sup> This system is designed to ensure the uniform interpretation of EU law by all Member States. See CJEU, Joined cases C-297/88 and C-197/89, *Massam Dzodzi v Belgian State* [1990] ECLI:EU:C:1990:360, Para 38.

Tribunal is to be read in light of this peculiar component of UK labour law. However, the referring court provides a questionable reading of the concept of ‘worker’<sup>13</sup>, a status which in its view ‘presupposes that the person concerned undertakes to do or perform personally any work or services’ and is ‘incompatible with that person’s right to provide services to several customers simultaneously’ (Para 16).

Moreover, according to the Court’s description of the main proceeding, the UK judge goes so far as to argue that ‘the fact that the couriers [...] have the possibility of subcontracting the task entrusted to them precludes [...] their classification as a “worker”’ (Para 17). Plus, signing the non-exclusive commitment in favour of the Yodel company is in itself sufficient to classify the courier as a self-employed independent contractor (Para 18), an interpretation that is not confirmed in UK legal scholarship and case law.<sup>14</sup> In *Pimlico Plumbers*, the UK Supreme Court stated that a comparable substitution clause, drafted in a highly problematic way, could not defeat worker status, in part because the profile of the substitute was restricted under the relevant contract, thus impairing the right to substitution.<sup>15</sup> Likewise, such a label can be easily defeated by the CJEU, which usually disregards national classifications and contractual statuses. Among other things, the idea that Yodel’s couriers can in no way be considered subordinate workers affects many passages of the reasoning of the CJEU, as it is shown below.

Based upon these contentious premises, the Watford Employment Tribunal remits several preliminary questions to the CJEU regarding the compatibility of the provisions of domestic law with EU law. The tribunal demands whether the EU Working Time Directive precludes a narrow scope of application at the domestic level based on the notion of ‘personal work’ and whether the use of subcontractors or substitutes could prevent a courier from falling within the scope of the abovementioned Directive at all or only during the period of replacement. It also highlights notable specific elements, such as the courier did not actually use a substitute, he was engaged on a ‘when needed’ basis, and he did not work for competing companies, although the contract included this possibility. The tribunal also asks whether these realities could have affected the determination of worker status. Besides, should Mr. ‘B’ be classified as a ‘worker’, the referring court ‘wishes to obtain guidance as to the method for calculating the working time’ (par. 19) in light of the discontinuous nature of the arrangement which also allows multiple concomitant clients. Lastly, the Watford Employment Tribunal asks for clarification on the calculation of working time when workers can self-organise the execution of their tasks to a certain extent.

It is also important to address a pivotal issue affecting the merit of the court decision, from a procedural standpoint. According to Article 99 of the Rules of Procedure of the Court of Justice, ‘the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case law or where the answer to the question referred admits of no

<sup>13</sup> Adams-Prassl J., *Pimlico Plumbers, Uber Drivers, Cycle Couriers, and Court Translators: Who Is a Worker?* in *Law Quarterly Review*, vol. 133, n. 3, 2017, 366 ff.

<sup>14</sup> On the issue of the ‘mutuality of obligation,’ see Bogg A., *Taken for a Ride: Worker in the Gig Economy*, in *Law Quarterly Review*, n. 135, 2019, 219 ff.; Cabrelli D., *Uber e il concetto giuridico di ‘worker’: la prospettiva britannica (nota a UK Employment Tribunal, Central London, England, United Kingdom, 26 ottobre 2016, n. 2202551/2015)*, in *Diritto delle relazioni industriali*, vol. 27, n. 2, 2017, 575 ff.; Collins H., *A Review of The Concept of The Employer by Dr Jeremias Prassl*, November 10, 2015, available at: <https://bit.ly/2Lp6PcG>, accessed 11 Nov. 2020.

<sup>15</sup> Supreme Court of the United Kingdom, *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29, Para 32. See also Supreme Court of the United Kingdom, *Autoclenz v Belcher* [2011] UKSC 41.

reasonable doubt’ (par. 21).<sup>16</sup> Therefore, the CJEU preferred to issue an order rather than a ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU). At the outset, there is no illusion that this order is a herald of sensational developments in EU social law. As stressed above, the CJEU does not go beyond the settled case law, nor does it claim that platform workers are self-employed persons. At the same time, criticising this order is essential, as it offers some flawed arguments that are often weaponised at different levels to justify the erosion of protections for non-standard workers.

### 3. Access denied! Who is a ‘worker’ for the purposes of EU social law?

The Court of Justice rephrases the preliminary questions raised by the British judge as follows: is ‘Directive 2003/88 [to] be interpreted as precluding a person, engaged by his putative employer under a services agreement stipulating that he is a self-employed independent contractor, from being classified as a “worker” for the purposes of that directive, where that person is afforded discretion: to use subcontractors or substitutes to perform the service which he has undertaken to provide; to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks; to provide his services to any third party, including direct competitors of the putative employer, and to fix his own hours of “work” within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer’ (Para 23)?

Before offering an overview of the current *acquis* in terms of the personal scope of application of EU employment protection legislation, it is worth recalling that the directive in question remains silent on the meaning of the term ‘worker’.<sup>17</sup> Nonetheless, the CJEU has already ruled on that concept. There is, indeed, considerable settled case law that has led to the definition of an independent concept of ‘worker’ which is referred to in the order at Para 26<sup>18</sup> and is a concept that should not be entirely conflated with the classic notion of ‘employee’ at national level.<sup>19</sup>

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<sup>16</sup> Art. 99 of the Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012. CJEU, Joined cases C-428/06 to C-434/06, *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others* [2008] [ECLI:EU:C:2008:488](#), Para 42.

<sup>17</sup> Menegatti E., *Taking EU Labor Law beyond the Employment Contract: The Role Played by the European Court of Justice*, in *European Labour Law Journal*, vol. 11, n. 1, 2020, 26; Sagan A., *The classification as ‘worker’ under EU law*, in *European Labour Law Journal*, 2019, vol. 10, n. 4, 353 ff. See also Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time.

<sup>18</sup> CJEU, Case C-147/17, *Sindicatul Familia Constanța and Others v Direcția Generală de Asistență Socială și Protecția Copilului Constanța* [2018] [ECLI:EU:C:2018:926](#); Para 41 states that ‘[f]or the purpose of applying Directive 2003/88, the concept of “worker” may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law. It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’.

<sup>19</sup> See Countouris N., *Uses and Misuses of ‘Mutuality of Obligations’ and the Autonomy of Labour Law*, in Bogg A., Costello C., Davies ACL, Adams-Prassl J. (eds.), *The Autonomy of Labour Law*, Hart Publishing, Oxford, 2015.

EU social law does not include intermediate categories, such as that of the ‘worker’ referred to in the request for a preliminary ruling.<sup>20</sup> Moreover, in light of the paramount principle of the prevalence of substance over form (the so-called primacy of reality doctrine), the re-classification completed by the domestic court must be based on objective criteria and must involve an overall assessment of all the factors and circumstances characterising the relationship between the parties (Para 28).<sup>21</sup> Besides, the Court hastens to confirm that ‘the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’.<sup>22</sup> Intriguingly, though, in the CJEU’s case law, the test of ‘direction’ may also refer to tenuous elements of control and subordination (namely, subjection to the employer’s organisational, monitoring and disciplinary prerogatives).<sup>23</sup>

Understandably, these are not static indicators to determine an employment relationship, and over the years the Court has developed a wide-ranging analysis that varies according to the sector (i.e. *ratione materiae*).<sup>24</sup> In addition, as is well known, even if a person is classified as a ‘self-employed worker’ under national law, it is not precluded that a ‘person [is] classified as an employee within the meaning of EU law if his independence is merely notional, thereby

<sup>20</sup> The CJEU’s approach is consistent with the binary divide between ‘employment’ (implying the existence of a hierarchical relationship) and the residual category of self-employment (defined *a contrario* as the lack of subordination). As a result, a distinction is made between the workers to whom employment protection is guaranteed *en bloc* (a category sometimes identified by a very low threshold for identifying the existence of control and subordination) and genuinely self-employed workers. See CJEU, Case C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] [ECLI:EU:C:2004:18](#) stating that ‘the authors of the Treaty did not intend that the term ‘worker’ [...] should include independent providers of services who are not in a relationship of subordination with the person who receives the services’ (Para 68).

<sup>21</sup> Case C-147/17, *Sindicatul Familia Constanța and Others v Direcția Generală de Asistență Socială și Protecția Copilului Constanța* [2018] [ECLI:EU:C:2018:926](#), Para 42. In line with the recommendations of ILO R198 – Employment Relationship Recommendation, 2006 (n. 198). See De Stefano V., *L’ambito di applicazione soggettivo degli International Labour Standards dell’OIL*, in *Lavoro e Diritto*, n. 3, 2019, 429

<sup>22</sup> CJEU, Case C-66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] [ECLI:EU:C:1986:284](#), Para 17. These factors have been developed to define, in an extensive way, the scope of the fundamental freedom of movement of workers. See Février V., *The Concept of ‘Worker’ in the Free Movement of Workers and the Social Policy Directives: Perspectives from the Case Law of the Court of Justice*, in *European Labour Law Journal*, online first, 2020; Hatzopoulos V., *The Collaborative Economy and EU Law*, Hart Publishing, Oxford, 2018, 148 ff.; Van Peijpe T., *EU Limits for the Personal Scope of Employment Law*, in *European Labour Law Journal*, 2012, vol. 3, n. 1, 35 ff.

<sup>23</sup> The CJEU remains committed to long-standing case law on the subject. CJEU, Case C-232/09, *Dita Danosa v LKB Liziņšs SLA* [2010] [ECLI:EU:C:2010:674](#). The Court observed that ‘even though Ms Danosa enjoyed a margin of discretion in the performance of her duties, she had to report on her management to the supervisory board and to cooperate with that board’ (Para 49). See also CJEU, Case C-47/14, *Holterman Ferbo Exploitatie BV and Others v F.L.F. Spies von Bullesheim* [2015] [ECLI:EU:C:2015:574](#). See Nogler L., *The Concept of ‘Subordination’*, Università degli Studi di Trento, Trento, 2009. Some scholars have gone so far as to equate the criterion defined by EU case law with the Italian criterion of ‘hetero-organisation’. See Giubboni S., *Per una voce sullo status di lavoratore subordinato nel diritto dell’Unione europea*, in *Rivista del Diritto della Sicurezza Sociale*, n. 2, 2018, 207 ff.; Pallini M., *Towards a New Notion of Subordination in Italian Labour Law?*, in *Italian Labour Law e-Journal*, vol. 12, n. 1, 2019, 1. For a review of recent Italian case law on the subject, see Carinci F., *L’art. 2 del d.lgs. n. 81/2015 a un primo vaglio della Suprema Corte: Cass. 24.1. 2020, n. 1663*, in *WP C.S.D.L.E. ‘Massimo D’Antona’*, IT, no. 414, 2020, 1; Perulli A., *Il diritto del lavoro ‘oltre la subordinazione’: le collaborazioni etero-organizzate e le tutele minime per i riders autonomi*, in *WP C.S.D.L.E. ‘Massimo D’Antona’*, IT, No. 410, 2020, 1 ff.; Santoro Passarelli G., *Sui lavoratori che operano mediante piattaforme anche digitali, sui riders e il ragionevole equilibrio della Cassazione 1663/2020*, in *WP C.S.D.L.E. ‘Massimo D’Antona’*, IT, No. 411, 2020, 1; Speciale V., *Un primo commento «a caldo»*, in *Lavoro Diritti Europa*, n. 1, 2020, 2.

<sup>24</sup> Giubboni S., *Being a Worker in EU Law*, in *European Labour Law Journal*, vol. 9, n. 3, 2018, 1.

disguising an employment relationship'.<sup>25</sup> These passages reproduce the *Allonby* and *FNV Kunsten* judgements.<sup>26</sup> National courts are tasked with carrying out this classification operation. However, the margin of appreciation of the domestic courts is not excessive, as they are called upon to consider the criteria developed over time by the CJEU. As it has been stated in relation to a part-time work case, an unlimited discretionary power exercised by the national courts would ultimately deprive the general principles of EU law and the relevant regulatory instruments of their effectiveness by 'jeopardis[ing] the achievement of the objectives pursued by a directive'.<sup>27</sup>

In the Yodel order, the Court reviews specific cases in which a worker – though contracted as a self-employed person under national law and for tax, administrative or organisational reasons – acts under the direction of an employer as regards the choice of time, place and content of his work, without assuming the employer's business risk but rather being integrated into the company for the duration of the employment relationship, forming an economic unit with it.<sup>28</sup>

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<sup>25</sup> CJEU, Case C 413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] [ECLI:EU:C:2014:2411](#), Para 35, and CJEU, Case C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] [ECLI:EU:C:2004:18](#), Para 71. The CJEU defines 'false self-employed workers' as those 'service providers in a situation comparable to that of employees' (*FNV Kunsten*, Para 31). The same reasoning could be extended to many workers who offer their services through a digital platform. In this regard, the recent ruling in the Uber case plays a crucial role, although it does not expressly deal with labour law issues (CJEU, Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain* [2017] [ECLI:EU:C:2017:981](#)). The Court has found that Uber operates as a transport service provider rather than a mere technological intermediary between clients and independent service providers (it is with this formula that the platform indicates its drivers). The Court stated that 'Uber exercises decisive influence over 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' (Para 39). In such a situation, it can be concluded that Uber drivers – the reasoning could be extended to those workers whose activity is organised by an online platform – operate only as 'an auxiliary within the principal's undertaking' and, therefore, to put it in the words of the *FNV Kunsten*'s judgement, are not able to 'determine independently his own conduct on the market, but is entirely dependent on [their] principal' (Para 33). They can, therefore, be regarded as 'integral part of that employer's undertaking, so forming an economic unit with that undertaking' (Para 36). See De Stefano V., Aloisi A., *Fundamental Labour Rights, Platform Work and Human Rights Protection of Non-Standard Workers*, in Bellace J. R., Ter Haar B. (Eds.), *Labour, Business and Human Rights Law*, Edward Elgar Publishing, Cheltenham 2019, 359 ff.; Countouris N., De Stefano V., *New Trade Union Strategies for New Forms of Employment*, ETUC, Brussels, 2019.

<sup>26</sup> Much has been written about the unintended consequences of this ruling as well as on the pitfalls of the 'false self-employed' category. See De Stefano V., Aloisi A., nt. (25); Arena A., *La Labor Antitrust Exemption al vaglio della Corte di Giustizia: quale contrattazione collettiva per i lavoratori c.d. falsi autonomi?*, in *Diritti Lavori Mercati*, vol. 1, 2016, 144 ff.; Delfino M., *Statutory Minimum Wage and Subordination. FNV Kunsten Informatie Judgement and Beyond* in Łaga M., Bellomo S., Gundt N., Miranda Boto J.M. (eds.), *Labour Law and Social rights in Europe: the Jurisprudence of the International Courts*, Gdańsk University Press, Gdańsk, 2018, 41 ff.; Grosheide E., ter Haar B., *Employee-Like Worker: Competitive Entrepreneur or Submissive Employee? Reflections on ECJ, C-413/13, FNV Kunsten Informatie* in Łaga M., Bellomo S., Gundt N., Miranda Boto JM (eds.), *Labour Law and Social Rights in Europe: the Jurisprudence of the International Courts*, Gdańsk, 2018, 21.

<sup>27</sup> CJEU, Case C 393/10, *Dermot Patrick O'Brien v Ministry of Justice, formerly Department for Constitutional Affairs* [2012] [ECLI:EU:C:2012:110](#), Paras 34 and 35. A clear representation of this principle can be found in a judgement on temporary work, CJEU, Case C-216/15, *Betriebsrat der Rubrandklinik gGmbH v Rubrandklinik gGmbH* [2016] [ECLI:EU:C:2016:883](#). It is not a coincidence that this purposive interpretation was developed in two cases involving vulnerable and non-standard forms of employment.

<sup>28</sup> CJEU, Case C 413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] [ECLI:EU:C:2014:2411](#), Para 36 and case law cited therein. As stated in Para 33, 'a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market,



This collection of jurisprudence is used to reinforce the CJEU's prerogative to 'surpass' the domestic classification in case it does not reflect accurately the factual reality of the performance execution. As the Court clarifies, 'more leeway in terms of choice of the type of work and tasks to be executed, of the manner in which that work or those tasks are to be performed, and of the time and place of work, and more freedom in the recruitment of his own staff'<sup>29</sup> are the 'features' typically associated with the self-employment category (Para 32).<sup>30</sup> Obviously, the analysis should not focus merely on the nominal existence of such autonomy but rather on its actual latitude. This is the task entrusted to the referring court, which is called upon to base its judgement on specific circumstances in a holistic way and in continuity with the interpretative guidance refined over the years. Consistently, the CJEU also recommends ascertaining the existence of a possible employment relationship between B and Yodel.

Having recalled these well-established jurisprudential practices, the Court rapidly examines the factual conditions of the case at stake. After all, these rather uncritical passages reproduce the representation of the facts made by the UK tribunal. Although the remitting court has acknowledged that the courier B had a wide margin of autonomy vis-à-vis the putative employer on paper, according to the Court, it is important to determine that this independence is not merely 'notional'.<sup>31</sup>

At this stage, the Court seems to assess the substance of the case in question. It goes so far as to validate the domestic court's reading that the courier had a right to refuse orders and to independently determine the maximum number of deliveries to be completed within a said period of time. Similarly, it is 'certified' that the absence of an exclusivity clause guaranteed the worker the possibility of offering services to multiple third parties 'in parallel and simultaneously'. Surprisingly, after admitting that the service is provided during specific time slots allotted, the CJEU states that 'such a requirement is *inherent* to the very nature of that service since compliance with those time slots appears essential in order to ensure the proper performance of that service' (Para 42, emphasis added). In light of these objectionable considerations, the Court prudently acknowledges, on the one hand, that the courier's autonomy 'does not appear to be' fictitious or nominal and, on the other hand, that he is not engaged in a subordinate employment relationship with the delivery company (Para 43).

Nonetheless, this adhesion to the external elements illustrated by the referring court appears inaccurate, or at least premature. Indeed, as stressed by the CJEU itself, the outcome of this investigation does not depend on the letter of the contract or the national system for attributing labour protection, all the more so when the relevant worker did not benefit from several clauses leaning towards the existence of an independent relationship with the client. Indeed, a narrow interpretation of the entirely domestic concept of 'personal work' risks excluding several groups of non-standard workers from the scope of application of EU

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but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking'.

<sup>29</sup> CJEU, Case C 270/13, *Iraklis Haralambidis v Calogero Casilli* [2014] [ECLI:EU:C:2014:2185](#), Para 33.

<sup>30</sup> Re the absence of subordination, for example: CJEU, Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] [ECLI:EU:C:2001:616](#), Paras 34 and 70.

<sup>31</sup> Aloisi A., 'With Great Power Comes Virtual Freedom'. *A Review of the First Italian Case Holding That (Food-Delivery) Platform Workers Are Not Employees*, in *Comparative Labor Law & Policy Journal, Dispatches*, 2018, available at: <https://ssrn.com/abstract=3260669>, accessed 11 Nov. 2020. See also Risak M., Dullinger T., *The Concept of 'Worker' in EU Law: Status Quo and Potential for Change*, ETUI Research Paper, no. 140, 2018.

labour law. On a more positive note, the Court does not underestimate the fact that the term ‘worker’ has acquired an autonomous connotation for the purposes of applying EU law.<sup>32</sup>

Finally, the Court concludes that the EU Directive 2003/88 ‘must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a “worker” [...], where that person is afforded discretion to use subcontractors or substitutes [...]; to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks; to provide his services to any third party, [...], and to fix his own hours of “work” within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer’. This preclusion, however, is valid only if the autonomy is not fictitious and it is not possible to ascertain the existence of a relationship of subordination between the parties (Para 45).

The business model at Yodel is fully in line with many working arrangements in the platform economy.<sup>33</sup> Thus, some elements of the order have been misinterpreted to contend that gig-economy workers, at least those last-mile couriers providing services within a business model comparable to that one implemented at Yodel, have been classified as self-employed workers by the CJEU. This is entirely wrong. The order almost redundantly confirms that the Working Time Directive does not apply to a worker who is a genuinely self-employed person. Then, in a circular manner, it refers the critical assessment of the professional status to the domestic court, urging to ‘tak[e] account of all the relevant factors relating to B and to the economic activity which he carries on, [...], in the light of the criteria laid down in the [settled] case-law’ (Para 44). Consequently, the order cannot be interpreted as a green light for qualifying platform workers as self-employed persons.

Delving deeper into the substance of the manifold issues triggered or exacerbated by the rise of platform work would far exceed the scope of this commentary. Nevertheless, there is a non-negligible weakness in the reasoned order. Indeed, the order appears too focused on the formal description of the relationship presented by the remitting court to the point of omitting an investigation into the most problematic elements of the case. There is no question, for example, regarding the responsibility of the courier who subcontracts his services or about the ‘implicit’ sanctions in the event that calls are actually rejected or, lastly, about the practical impossibility of using the subcontracting and non-exclusivity regime in the context of tasks that do not allow easy multi-tasking.

Notwithstanding the silence surrounding these decisive aspects, the Court indulges in a questionable viewpoint. The lack of flexibility in the choice of time slots is ‘inherent’ to the internal organisation of the company (par. 42). It is not clear to what extent a purely organisational issue can be read as natural or inevitable, nor is it apparent the reason for this completely spurious assessment by the Court, proposed after so much insistence on the principle of the non-availability of the legal regime. Furthermore, it is surprising that the

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<sup>32</sup> Countouris N., *The Concept of ‘Worker’ in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, vol. 47, n. 2, 2018, 192 ff.; CJEU, Case C-428/09, *Union syndicale Solidaires Isère v Premier ministre and Others* [2010] ECLI:EU:C:2010:612, Para 29 and CJEU, Case C-316/13, *Gérard Fenoll v Centre d’aide par le travail “La Jouvene” and Association de parents et d’amis de personnes handicapées mentales (APEI) d’Avignon* [2015] ECLI:EU:C:2015:200, Para 29.

<sup>33</sup> Buendia R., *The Court of Justice of the European Union’s Order on B v Yodel Delivery Network*, Dispatch No. 24 – United Kingdom, 2020, available at: <https://cllpj.law.illinois.edu/dispatches>, accessed 11 Nov. 2020.

Court recalls a standard argument invoked by advocates of the ‘exceptionalism’ allowed to platform operators. They often claim that their businesses cannot adhere to the rules of labour law ‘by default’, as this would entail the unsustainability of the model and the loss of flexibility for workers.<sup>34</sup> The argument of ‘inevitability of noncompliance’, which has been refuted by those operators who have adopted less liquid organisational solutions<sup>35</sup>, is not relevant from a legal point of view unless the CJEU wants to yield to a paternalism that tolerates a competitive advantage gained through the capricious, partial application of labour and social security regulation.<sup>36</sup> To tell the truth, the passage also sounds inconsistent with the attempt to demonstrate the existence of an ample margin of manoeuvre for the courier.

Broadening this perspective, many digital platforms and other economic actors include standard ‘membership agreements’ and boilerplate clauses that provide margins of flexibility and purport to establish a self-employment relationship that often remains on paper. Increasingly, these formulas expressly allow the possibility of using substitutes, rejecting calls or orders, and even freely organising one’s own working time to minimise the legal risk that the provider is reclassified as an employee. These agreements do not neutralise the principles of non-availability of the legal regime and primacy of facts. In many EU countries, such as Spain<sup>37</sup>, France<sup>38</sup>, Italy<sup>39</sup> and the United Kingdom<sup>40</sup>, the courts and tribunals disregarded such clauses whenever they did not reflect the actual unfolding of the work performance or even when the managerial prerogative of the putative employer was fully exercised during the contractual relationship, despite the ‘terms and conditions’ to which workers adhere.

In many cases, the impracticability of the allegedly unfettered substitution clauses emerged both for the reasons of the feasibility of replacement and because of the restrictions they introduce, for example, with respect to the conditionality pertaining to the professional profile of the substitute. More importantly, without transparency, predictability and human oversight over the opaque algorithms that organise and evaluate work performances, it is not possible to exclude that workers who choose flexible plans will not end up penalised by digital systems in the allocation of shifts and orders, as many surveys and reports have revealed.<sup>41</sup> Much more emphasis should be put on mapping and understanding the

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<sup>34</sup> Sachs B., *Enough with the Flexibility Trope*, in *On Labor*, 15 May, 2018, available at: <https://onlabor.org/enough-with-the-flexibility-trope/>, accessed 11 Nov. 2020.

<sup>35</sup> Josephs J., *Just Eat to Stop Using Gig Economy Workers*, in *BBC news* 2020, available at: <https://bbc.in/32oWaay>, accessed 11 Nov. 2020.

<sup>36</sup> Aloisi A., De Stefano V., *Regulation and the Future of Work: The Employment Relationship as an Innovation Facilitator*, in *International Labour Review*, vol. 159, n. 1, 2020, 47 ff.; Lane M., *Regulating Platform Work in the Digital Age, Going Digital Toolkit Policy Note*, No. 1, 2020, available at: <https://bit.ly/3l1EXL9>, accessed 11 Nov. 2020.

<sup>37</sup> Tribunal Supremo, Sala de lo Social, 23 September 2020, No. 4746/2019. Juzgado de lo Social de Madrid, S. 19, 22 July 2019, No. 2952/2019.

<sup>38</sup> Cour de Cassation, Chambre sociale, 4 March 2020, No. 374.

<sup>39</sup> Tribunale di Palermo, 24 November 2020. No. 3570.

<sup>40</sup> Labour Court of Appeal, 19 December 2018, No. A2/2017/3467. Regrettably, the personal work requirement has also been recently read in a highly formalistic way. See Bogg A., nt. (14).

<sup>41</sup> Ivanova M., Bronowicka J., Kocher E., Degner A., *The App as a Boss? Control and Autonomy in Application-Based Management in Arbeit, Grenze, Fluss, Work in Progress interdisziplinärer Arbeitsforschung*, No. 2, 2018; Wood A. J., Graham M., Lehdonvirta V., Hjorth I., *Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy in Work, Employment and Society*, vol. 33, n. 1, 2019, 56 ff. In *Sorry We Missed You* (2019), Ken Loach depicts the inhumane situation of a worker ‘onboarded’ with a parcel delivery company on a zero-hour contract, still under the thumb of the manager, who dictates routes, shifts and targets. See also CEPS, EFTHEIA, HIVA-KU Leuven (2019), *Study to Gather Evidence on the Working Conditions of Platform Workers*, VT/2018/032 Final

transformation, or even the ‘genetic variation’, of the ways in which employers exercise their hierarchical powers that now affect a very wide range of workers, spilling beyond the realm of employment.<sup>42</sup> This pressing challenge should be also embraced by domestic and supranational courts. Worryingly, the scarce knowledge of the perilous system of organisation, appraisal, incentivisation and punishment impairs the judicial analysis.<sup>43</sup>

In a similar vein, we should also be wary of accepting the possibility of barely usable contractual clauses denying access to basic employment protective legislation. When control is exercised by means of digital tools, such as algorithms, geolocation devices or rating systems outsourced to users and clients, neither the existence of substitution clauses nor the flexibility of the worker in deciding whether and when to provide the service may exclude the possibility of the latter being reclassified as an employee, precisely because the principal is able to dictate instructions by means of technological instruments and sophisticated nudges.<sup>44</sup> Standardised contractual terms should not alter the judicial review on the existence of an employment relationship, where the factual circumstances indicate a situation which is not in line with the one represented in the agreement, as rightly pointed out by the CJEU.

#### 4. Beyond formalism, exposing notional freedom: the way forward.

Despite its limitations, contrary to what could be inferred from a cursory reading, the Yodel order does not stipulate that working time regulation does not apply to workers who are falsely classified as self-employed, including those who are organised through online platforms insidiously interfering in the work performance. Nor does the order represent an unrestrained judicial blessing of improper or fraudulent contractual classification, as it often occurs in the manifold segments of the ‘omnipotent’ gig-economy. Stepping back, it should be noted that the moderate interpretive choice of CJEU does not fall outside the path traced over the years when it comes to defining the personal scope of application of the main employment-related instruments of the EU law.

In a moment where a large part of the workforce on a global scale is confronted with the high instability of labour-related issues, working time has taken centre stage due to the disruption of the classical coordinates of time, space and action.<sup>45</sup> On the one hand, there has been a contraction in the number of hours worked due to the application of short-time work schemes to address lockdown’s closures. On the other, an uncontrolled and subtle expansion in working time is witnessed due to the massive adoption of ‘work from home’

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Report (‘The algorithm, ratings and rewards systems [...] undermine the formal autonomy of the platform worker regarding the decision to work or not’).

<sup>42</sup> Calo R., Rosenblat A., *The Taking Economy: Uber, Information and Power*, in *Columbia Law Review*, vol. 117, 2017, 1623 ff.; Calo R., Rosenblat A., *The Taking Economy: Uber, Information and Power*, in *Columbia Law Review*, vol. 117, 2017, 1623 ff.

<sup>43</sup> De Stefano V., *A More Comprehensive Approach to Platform-Work Litigation, Regulating for Globalization*, 2018a, available at: <https://bit.ly/2zHE74c>, accessed 11 Nov. 2020.; Cefaliello A., *Health and Safety and AI*, presented at the ‘Rethinking Labour Law in the Digitalisation Era’ conference, Brussels, 15-16 October, 2020, available at: <https://bit.ly/328cLQ4>, accessed 11 Nov. 2020.

<sup>44</sup> Woodcock J., *The Algorithmic Panopticon at Deliveroo: Measurement, Precarity, and the Illusion of Control*, in *Ephemeria*, Online first, 2020, accessed 11 Nov. 2020; De Stefano V., nt. (43).

<sup>45</sup> For an in-depth review of the issues, see Bavaro V., *Un itinerario sui tempi del lavoro*, in *Rivista giuridica del lavoro e della previdenza sociale*, vol. 60, n. 2, 2009, 213 ff.

patterns that have led to the acceleration of the process of blurring the boundaries between the private and professional spheres.<sup>46</sup> These arrangements are seldom ‘agile’, given the restrictions imposed, the non-voluntary nature of the emergency arrangements and the difficulty in keeping a sustainable work-life balance, especially for those with additional caring duties.

For this reason, the relevance of the legal framework regulating working time has returned to the forefront and will certainly remain so over the next months, as it will be necessary to experiment with organisational formulas capable of balancing the protection of public health and safety, flexible arrangements, decent and proportionate wages and business continuity. Therefore, it is urgent to regain confidence with working time regulation, especially at a time when the mirage of organisational elasticity has revealed its unidirectional nature, to the advantage only of businesses, both in traditional sectors and in the most innovative segments of the labour market.<sup>47</sup> Bedazzled by the official technology narratives, few people have realised that the promise of enhanced productivity and improved work quality, afforded by ‘elastic’ models, remains a prophecy that unfortunately takes time to come true. This is also due to the absence of a corporate culture that overcomes ‘presenteeism’ by adopting schemes that reward trust, responsibility and results. At the same time, new technologies, which were expected to create an emancipating new reality, are often used to deepen hierarchy and control, despite the efforts to limit the unrestrained adoption of automated decision-making processes.<sup>48</sup> It will be up to the rule makers and the social partners to open a bargaining season on these practices.<sup>49</sup>

The challenges posed by platform work far outweigh the small but still growing size of the gig-economy sector. On the one hand, the seductive model combining ‘organised irresponsibility’<sup>50</sup> and precarious employment could be replicated in other areas of the labour market.<sup>51</sup> On the other hand, the state of exception granted to self-proclaimed disruptors risks morphing into a blank proxy for self-regulation (and deregulation) processes that disavow the existing system, nullifying any attempt to offer adaptable solutions that accommodate the needs of a constantly changing world of work. Given the broad scope of the questions referred, while not renouncing the strengths of the interpretative arsenal developed in the last decades, the CJEU seems to adopt a ‘wait and see’ approach, relinquishing the role as a key player in the debate on the alleged ineffectiveness of the

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<sup>46</sup> These issues have been further exacerbated by the Covid-19 outbreak. See also Ales E., *Subordination at Risk (of ‘Autonomisation’): Evidences and Solutions from Three European Countries*, in *Italian Labour Law e-Journal*, vol. 12, n. 1, 2019, 65 ff.; Szejna M., Boudalaoui-Buresi Z., *The Scope of EU Labour Law*, Publication for the Committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020.

<sup>47</sup> De Stefano V., *Platform Work and Labour Protection. Flexibility Is Not Enough, Regulating for Globalization*, 2018b, available at: <https://bit.ly/2TdoBDV>, accessed 11 Nov. 2020.

<sup>48</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

<sup>49</sup> Armaroli I., Dagnino E., *A Seat at the Table: Negotiating Data Processing in the Workplace* in *Comparative Labour Law & Policy Journal. Special Issue: Automation, Artificial Intelligence & Labour Law*, vol. 41, n. 1, 2019, 173 ff.

<sup>50</sup> Aloisi A., *Hierarchies without Firms? Vertical Disintegration, Personal Outsourcing and the Nature of the Platform*, in *Quaderni Giorgio Rota*, 2020, available at: <https://ssrn.com/abstract=3124389>, accessed 11 Nov. 2020; Collins H., nt. (14).

<sup>51</sup> Stone K.V.W., *Flexibilization, Globalization and Privatization: The Three Challenges to Labor Rights in Our Time*, in *Osgoode Hall Law Journal*, vol. 44, n. 1, 2005, 77 ff.; Dubal V.B., *The Time Politics of Home-Based Digital Piecework*, in *The Future of Work in the Age of Automation and AI c4ejournal*, 2020, accessed 11 Nov. 2020.

interpretation of existing categories.<sup>52</sup> In the previous paragraphs, an attempt was made to justify this stance, indicating the lack of innovation in the questions referred to and the peculiarities of the case at stake (or even their rather formalistic presentation thereof).

This cautious attitude has, however, found an unintentional ally in the EU institutions. In 2019, they adopted a Directive on transparent and predictable working conditions<sup>53</sup>, which has reached a seemingly modest compromise as regards its personal scope of application. Some protective provisions indeed have a social reference point in second-generation forms of atypical employment<sup>54</sup>, including the limitation to the use and duration of casual and on-call contracts, the prohibition of unnecessary exclusivity clauses, the possible rebuttable presumption of the existence of an employment relationship with a guaranteed number of paid hours based on the hours worked in a previous reference period or other equivalent measures against abusive practices (Article 11).<sup>55</sup> Moreover, in the case of work patterns that are ‘entirely or mostly unpredictable’, the directive provides that workers must be informed about the organisation and the number of guaranteed paid hours. Workers have a right to information on how they will be paid for the additional hours worked, when exactly their assignments will start and within what timeframe a call can be cancelled (Art. 4). These provisions design an availability timeframe outside of which workers can refuse to show up without adverse consequences and inside which they must be compensated if previously agreed slots are revoked. Although this regulatory tool was aimed at providing an answer to the unresolved issues of non-standard, discontinuous, precarious and vulnerable work, the results are not entirely convincing.

The scope of the Directive will undoubtedly be a source of conflict, since its provisions ‘apply to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice’ (Article 1).<sup>56</sup> This nuanced formula, which reflects the difficulty of reaching consensus around a more autonomous, pan-European and inclusive definition of ‘worker’, almost basically combines respect for the autonomy of the Member States in defining the concept of worker with the expansive force of the case law of the CJEU.<sup>57</sup> This opportunity for constructive dialogue between the courts should not be wasted in view of the laudable purposes of the new directive. The most

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<sup>52</sup> Šadl U., *Does the Court of Justice Make Law in Small Steps? (Circumstantial) Evidence from the Free Movement of Persons Jurisprudence*, paper presented at the EUI Faculty Seminar, 2020.

<sup>53</sup> 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.

<sup>54</sup> Lo Faro A., *Core and Contingent Work: A Theoretical Framework* in Ales E., Deinert O., Kenner J. (eds.), *Core and Contingent Work in the European Union: A Comparative Analysis*, Hart Publishing, Oxford, 2017, 7 ff.

<sup>55</sup> Bednarowicz B., *Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union*, in *Industrial Law Journal*, n. 48, 2019, 604 ff.

<sup>56</sup> Recital 8 states that ‘provided that they fulfil those criteria [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’, while ‘[g]enuinely self-employed persons should not fall within the scope of this Directive since they do not fulfil those criteria’.

<sup>57</sup> The same formula is used in the Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers. See Chierigato E., *A Work-Life Balance for All: Assessing the Inclusiveness of EU Directive 2019/1158*, in *International Journal of Comparative Labour Law and Industrial Relations*, vol. 36, n. 1, 2020, 59 ff. See also Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union COM/2020/682 final.

vulnerable workers represent the ideal target group that could most benefit from the new provisions offering accountability and programmability. To claim otherwise is to do the EPSR (and the workers who benefit from its protection) a disservice.<sup>58</sup>

Many advanced business models often stand out for their contractual creativity aimed at sidestepping employment and social security rules. At a closer look, the qualification of worker is often denied not so much because of the insufficient flexibility of the category, which in fact allows for the full exercise of the employers' prerogative and thus creates an elastic system, but rather for the desire to avoid the contribution and tax costs deriving from this classification.<sup>59</sup> In the long run, this downward spiral threatens to disrupt the social pact underlying our societies. In fact, over the years, we have witnessed the spread of deceitful, rigid, and pervasive forms of control that are not matched by the activation of counterweights defined by the legislator or collectively negotiated by social partners. It is imperative to contain this decoupling of hierarchical powers and protective obligation by legislative and interpretative means. In an incremental fashion<sup>60</sup>, the courts are called upon to undertake an in-depth study of the contours and implications of organisational systems enabled by algorithms and other technological devices. This 'deeply political exercise' can only be done by going beyond pure contractual formalism, which is focused on external and deceptive elements, to analyse new templates in their complexity.<sup>61</sup>

Undeniably, the delimitation of the areas of self-employment and subordination risks becoming increasingly complex and elusive due to a natural process of the hybridisation of the performances. (Employees are currently offered very flexible organisational solutions, while the self-employed ones remain trapped in forms of organisational or economic dependency that betrays the spirit of this model).<sup>62</sup> However, the employee status still represents the sole gateway to the protective ambit of labour law. Although many voices have been raised calling for the dissolution of the binary distinction between employment and self-employment, this system is anything but exclusive.<sup>63</sup> To avoid conflicts concerning the specific connotations of the categories, a broader construction of the subjective scope of protection could be developed<sup>64</sup>, without dissolving the very notion of employment.

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<sup>58</sup> European Pillar of Social Rights, [Chapter II: Fair working conditions](#), Fifth Principle ('Secure and adaptable employment'). See Rainone S., *The European Pillar of Social Rights – Tell Me Where You Come from and I Will Tell You Who You Are*, in *Perspectives on the European Pillar of Social Rights*, *Zbornik Znanstvenih Razprav*, LETNIK LXXX, 2020.

<sup>59</sup> Aloisi A., De Stefano V., nt. (36).

<sup>60</sup> Lenaerts K., *EU citizenship and the European Court of Justice's 'stone-by-stone' approach*, in *International Comparative Jurisprudence*, vol. 1., n. 1, 2015, 1 ff.

<sup>61</sup> Countouris N., De Stefano V., nt. (25), 19. For a comprehensive overview, see Tomassetti J., *Algorithmic Management, Employment, and the Self in Gig Work*, in Das Acevedo D. (eds.), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation*, Cambridge University Press, Cambridge, 2020, 123 ff.

<sup>62</sup> Del Punta R., *Un diritto per il lavoro 4.0*, in Cipriani A., Gramolati A., Mari G. (Eds.), *Il lavoro 4.0*, Firenze University Press, Firenze, 2018, 225 ff. It is also indisputable that the multifactor analysis devised by the national courts suffer from many weaknesses linked to unpredictability and fact dependency.

<sup>63</sup> Davidov G., *Setting Labour Law's Coverage: Between Universalism and Selectivity*, in *Oxford Journal of Legal Studies*, vol. 34, n. 3, 2014, 543 ff.; Fudge J., *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, in *Osgoode Hall Law Journal*, vol. 44, n. 4, 2006, 609 ff. Moreover, in several countries, protections have been extended to those workers who are genuinely self-employed. See Cherry M.A., Aloisi A., *'Dependent Contractors' in the Gig Economy – A Comparative Approach*, in *American University Law Review*, vol. 66, n. 3, 2017, 635 ff.

<sup>64</sup> Countouris N., De Stefano V., nt. (25), 65 (advocating for a new model of labour law as applicable to 'any person that is engaged by another to provide labour, unless that person is genuinely operating a business on

A modern and cohesive approach must lead to the definition of an evolved concept of ‘worker’ for the purposes of applying the social *acquis*<sup>65</sup> by ‘strengthening and clarifying (without necessarily expanding) the EU “worker” definition’.<sup>66</sup> There are several available tools, whether it is a directive amending the personal scope of EU secondary legislation or a more pragmatic role of the CJEU aimed at shaping a notion that can be further adapted interpretively in judicial fora. The EU institutions are expected to take up this challenge to avoid having an increasing number of workers unreasonably excluded from the scope of labour law protections. This should also serve to address the resurgence of resentment that risks jeopardising the process of harmonisation.<sup>67</sup>

In conclusion, arguing that the mere insertion of substitution clauses and flexible shifts is sufficient to prove the autonomous nature of the professional relationship, including when such contractual terms are clearly incongruent with the reality of the performance execution, would misrepresent the meaning of the order and, even more seriously, contradict the long-lasting case law of the CJEU on bogus self-employment. While the Court’s order is perfectly consistent with a line of interpretation based on the ‘binary divide’, regrettably, it does not go so far as to provide useful elements to update the classical analysis, which also many national courts are revising in the face of the emergence of algorithmic management and real-time surveillance. New forms of work may not meet the rigid national requirements or formalities defined by law or case law, as they purport to grant flexibility and agency. Hence, the Court must strive to adopt an expansive reading of the existing legal categories to safeguard social rights and ensure a level playing field for all economic operators.

It is also hoped that the EU institutions will revamp the social agenda for all non-standard workers, whose ‘essentiality’ is now before everyone’s eyes, especially amid the Covid-19 crisis.<sup>68</sup>

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her or his own account’). See also Freedland M., Countouris N., *Some Reflections on the ‘Personal Scope’ of Collective Labor Law*, in *Industrial Law Journal*, vol. 46, n. 1, 2017, 52 ff.

<sup>65</sup> Garben S., Kilpatrick C., Muir E., *Towards a European Pillar of Social Rights: Upgrading the EU Social Acquis*, in *College of Europe Policy Briefs*, n. 1, 2017.; Menegatti E., *The Evolving Concept of ‘Worker’ in EU law*, in *Italian Labour Law e-Journal*, vol. 12, n. 1, 2019, 71 ff.; Potocka-Sionek N., Aloisi A., *Festina Lente: the ILO and EU Agendas on the Digital Transformation of Work*, in *International Journal of Comparative Labour Law and Industrial Relations*, vol. 37, n. 1, 2021, available at SSRN: <https://ssrn.com/abstract=3694754>, accessed 11 Nov. 2020.

<sup>66</sup> Countouris N., De Stefano V., nt. (25), 16.

<sup>67</sup> Sciarra S., *Solidarity and Conflict*, Cambridge University Press, Cambridge, 2018.

<sup>68</sup> Mangan D., Gramano E., Kullmann M., *An unprecedented social solidarity stress test*, in *European Labour Law Journal*, vol. 11, n. 3, 2020, 247 ff.; Benner C., Mason S., Carré F., Tilly C., *Delivering Insecurity: E-commerce and the Future of Work in Food Retail*, UC Berkeley Labor Center and Working Partnerships USA, Berkeley, 2020.



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