Italian Labour Law e-Journal
Issue 1, Vol. 12 (2019)
ISSN 1561-8048
https://doi.org/10.6092/issn.1561-8048/9697

# Subordination at Risk (of "Autonomisation"): Evidences and Solutions from Three European Countries

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**Abstract**

The essay, focusing on the Labour Law and Policy systems of Italy, Germany and Spain, as presented and analyzed respectively by Pallini, Biasi, Waas and Gomez Munoz in this Issue, highlights a trend of progressive "autonomisation" of work. Not only in terms of increasing relevance of self-employment but also as profound change in the very structure of the employment (subordinated) relationship. In alternative to hetero-direction as link between work and Labour Law, the A. suggests to use the (immaterial) integration of the "autonomized" worker into the foreign organization as function. Although facing a common challenge, the legislative and policy answers has not been univocal in those countries, ranging from the adoption of the notion of coordinated/hetero-organized work, in Italy, to an up-to-date definition of employee in Germany, to a purposeful redirection of employment towards self-employment and entrepreneurship in Spain. Despite the differences in the solutions adopted, also in the light of the increasing relevance of digital and smart work, legislators are indulging if not favoring "autonomisation" also in the view of transforming precarious employment into sound self-employment and entrepreneurship.

**Keywords**: attenuated subordination; hetero-direction; personal dependence; "autonomisation"; typological method; integration; double alienity; coordination; economic dependence; hetero-organization; smart and digital work; self-employment; entrepreneurship; solo entrepreneur; social security schemes and relieves.

## 1. Subordination at Risk (of Autonomisation): An Introduction and a Proposal.

In a growing number of organizations, even those less open to the so-called "attenuated subordination" (Pallini), work is performed with(in) an increasing degree of autonomy i.e. without the exercise of managerial prerogatives in terms of continuous specification of modalities and control on working time. Such a trend has been undoubtedly favored if not

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accelerated by technological progress, which has allowed also the development of work performed outside (telework) or without (platform work) a physical working place. On the other hand, as the smart work experience in Italy shows (see Pallini), it could be a shared interest of both parties of the employment relationship that work is performed outside employer's premises. In fact, the latter can profit from the physical absence of the employee as for reducing spaces, while workers can improve their work-life balance.

The different way in which work is performed and managerial prerogatives are exercised obviously requires a new approach by the labor lawyer to performance appraisal (assessment). Not only and probably not so much with reference to the respect of the traditional criteria of physical and timely presence (tendentially irrelevant within "autonomized" work, above all if performed outside or without a workplace). Rather, in terms of achievement of an individual or collective goal, designed by the employer, that although contributing to the accomplishment of the mission of the organization as a whole, does not coincide with it. Therefore, unlike autonomous work, the "autonomized" worker does not bear the entrepreneurial risk, which is borne by the organizer as somebody profiting or enduring the losses of the relevant organization.

From a juridical point of view, a further and crucial consequence of the "autonomisation" process is the questioning of the typological method as effective qualifying tool of the work relationship as subordinated. At least as long as the main feature of the latter is to be found in hetero-direction, understood, in a sort of vicious circle, as subordination (accompanied, in the majority of case-homework excluded-by the availability in presence) of the worker to the direction power of the employer. Or, as it happens in Germany, as personal dependence (*persönliche Abhängigkeit*) of the former under the latter.

The same complementary indicators of subordination, among which working time is probably the most relevant, are at risk of not fitting anymore their heuristic purpose, if "autonomized" work is at stake. The same conclusion can be drawn as far as the integration (*Eingliederung*) within foreign organization is concerned if the latter is understood as material entity and, as for the former, the physical element is emphasized. If, on the contrary, organization is seen as *function* and the immaterial element of integration is emphasized, then the very notion of integration into a foreign organization could still be relevant and effective (see below on it).

Paradoxically, the "autonomisation" of work performed within the employment contract, puts the employment relationship at the same risk run by self-employment: as false self-employment is at stake when a formally autonomous work is performed in a subordinated manner, false employment can derive from a formally subordinated work lacking of hetero-direction. With the not negligible difference that the formal subordinate nature of the relationship is, however, essential to access labor law protection.

If in the event of false self-employment, the worker has an interest in claiming for the substantial subordinate nature of the relationship, obviously this is not the case as for the false employment.

However, in the medium term, the "autonomisation" of work performed within the framework of an employment contract, could allow the employer to offer lawfully to the "autonomised" worker a self-employment contract, as such deprived of the protection

guaranteed by Labour Law that should be needed also by the "autonomized" worker, as such not self-employed.

Actually, the difference between self-employment and "autonomized" work has not to be found within the modalities in which work is performed, but in the fact that the latter contributes to the accomplishment of the mission of the organization in which it is integrated. By consequence, as already mentioned in the above, the "autonomized" worker does not bear the entrepreneurial risk. Such a difference shows that, making the entitlement to Labour Law protection conditional upon the presence of subordination, at least if understood as hetero-direction, the effectiveness of Labour Law is put at risk of not applying to "autonomized" work performed by non-self-employed.

It is clear to me that typifying "autonomized" work is everything but easy. What is at stake is the proposal of an alternative to hetero-direction or personal dependency as qualifying condition of entitlement to Labor Law protection, as they both remain confirmed by the majority doctrine and case law within the national legal order (see Biasi, Pallini, Waas).

The most reasonable solution would be undoubtedly to deprive hetero-direction of the exclusivity as condition of entitlement, advocating rather for its substitution, in case of "autonomized" work, with the notion of (immaterial) integration within the organization (as function) in the view of contributing to the accomplishment of the mission as designed by the organizer, who bears its risk.

Such an approach, differentiates itself from the so-called double alienity theory (see Pallini) since the worker is everything but foreign to the organization. On the contrary, he or she is a fundamental part of it, being in any case accountable for his or her own performance in terms of individual or collective (in case of teamwork) achievement of which he or she cannot be deprived (being responsible) and, therefore which could not be regarded as alien to him or her.

Such an approach also differentiates itself from the notion of *Fremdnützigkeit* (see Waas on it) i.e. work performed exclusively and primarily to the advantage of a third party, in the sense that the employee, unlike the self-employed, is not free to determine the goal of the performance to his or her own risk. In fact, to the "autonomized" worker, within the framework of his or her performance a high degree of self-determination is recognized.

Finally, yet importantly, if adopted, such an approach could make the notion of economic dependency superfluous as for the entitlement to Labour Law protection, since the personal condition of the worker becomes irrelevant if he or she is integrated within the organization as illustrated in the above.

As Menegatti convincingly advocates in this Issue, the Court of Justice of the EU seems to follow the same trajectory.

## 2. Evidences and Solutions from Germany and Italy.

Among the three legal orders analyzed in this Issue, the German one seems having moved, although tentatively, a step forward in the just mentioned direction, calling into question the exclusive role traditionally recognized to the subordination to employer's instructions, which presupposes the physical presence of the worker within the undertaking.

As Waas underlines, some authors recognize that the legislator, in issuing the §611a BGB, has faced "the great difficulty of having to grasp a diversified world of work by fixing a statutory definition of the employment relationship. Some are of the opinion that in its search for criteria, the legislator had used familiar but sufficiently abstract terms. In this regard, it is above all argued that the criteria are sufficiently flexible. The digital employment relationship is characterised by the fact that the employee can work from any location. There is no commitment with regard to the place and time of the provision of services. The contents of the work performance are often result-oriented. Moreover, there is an overall lack of control. In order to capture this, the legislator had given clear hints as section 611a(1) sentence 1[1] could also be read as follows: "An employment contract is present if the obligated person is bound by instructions or in another way externally determined and thus personally dependent". In other words, some authors are hopeful because the legislator has explicitly mentioned the feature of external determination ("determined by a third party") and thus has referred to a criterion which is potentially wider than the "classical" subservience to instructions issued by another.".

On the contrary, the Italian Legislator, already in 1973, when it took the decision to include within the personal scope of application of the newly introduced employment court procedure also autonomous coordinated and continuous cooperation relationships (Article 409 Civil Procedure Code), has emphasized the singularity of subordination, already commonly understood as hetero-direction. Thus, it has preferred to envisage the presence of an "attenuated autonomy" in case of coordination of work with(in) a foreign organization, rather than either admitting the possibility of "autonomisation" in the framework of an employment contract or introducing a *tertium genus* such as coordinated work (hence neither subordinate nor autonomous).

The option in favor of the singularity of subordination (hetero-direction), has found its confirmation also in the legislative intervention of 2003 (Legislative Decree n. 276), by which the legislator has introduced project work (see on it Pallini) as a further, more stringent variety of the autonomous coordinated and continuous cooperation relationship. To project work, the legislator has recognized some of the protective measures typical of employment. The same could be said about collaborations "consisting of exclusively personal and continuous performances the modalities of execution are organized by the client", mentioned more than typified by the legislator in Article 2(1) Legislative Decree n. 81 of 2015. To them, as explicitly provided by the legislator, the employment legislation shall apply.

As properly highlighted by Biasi and Pallini, the problem, under scrutiny by the case law with reference to Foodora riders, is that one of the recognition in full to hetero-organized workers of the employment legislation as per legislator will. Such a hesitation derives from the fact that from that full application an extension of the notion of subordination from hetero-direction to hetero-organization will follow.

Without prejudice of the fact that hetero-organization, at least as described by the legislator in terms of client setting of the working place and time, hardly coincides with "autonomized" work (see, for instance, smart work to be performed without that setting). It seems to me that the application of employment legislation confirms, on the one hand, the

[1] „(..) im Dienste eines anderen zur Leistung weisungsgebundener, *fremdbestimmter* Arbeit in persönlicher Abhängigkeit (..)".

singularity of subordination, on the other, its increasing inadequacy to serve as the one and only link between work and labor law provisions.

In any case, always with reference to the Italian legal order, since years the legislator has extended some protective provisions of Labour Law to self-employment (coordinated or not), as for instance, those on pregnancy, parental leaves and, more recently, on employment services, copyright and unemployment benefits (Act n. 81 of 2017). Not to mention the social security schemes for self-employed, already introduced in the middle Nineties.

## 3. Spain: Concluding Remark.

Indeed, as it emerges from the analysis of the Spanish legal order carried out by Gómez Muñoz, the fact is that, on the background the necessity to protect a new generation of autonomous workers stands out. They are providers of finished services-something that differentiates them from the "autonomized" workers, who, on the contrary, contributes with their performance to the mission of the undertaking-for whom the organization of just one client may constitute the only market frame of their activity.

Such labor market policy option in favor of a decent autonomous work of new generation, adequately guaranteed and stimulated by social security schemes and relieves (Gómez Muñoz), as alternative to subordinate work of a precarious and unprofitable kind, is also supported by the conviction that the shift from the employment (or false self-employment) status towards true autonomy will stimulate self-entrepreneurship. It will produce positive consequences not only for the service provider/entrepreneur, in terms of improvement of his or her economic and social condition, but also on the labor market, as direct outcome of the transformation of the solo entrepreneur into employer. In the hopes that the latter, as former precarious worker would guarantee his or her employees fair and just working conditions.