

# Towards a new notion of subordination in Italian Labour Law?

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1. The crisis of hetero-direction as the distinctive characteristic of subordination. 2. The plurality of notions of subordination. 3. From hetero-direction to hetero-organization. 4. The provisions governing hetero-organized work introduced by the Job Act. 5. The absence of “co-determination” of coordination obligations with the client’s organization as the distinctive feature of “hetero-organization”. 6. What rights for subordinate work are applicable to hetero-organized work? 7. The availability of the provisions governing hetero-organized work by collective bargaining. 8. Has the hetero-organization been invested with a new distinctive character of subordination?

## Abstract

The essay investigates the systematic effects produced by art. 2, Legislative Decree n. 81/2015, providing for the application of subordinate employment law to a specific category of self-employee: that one “hetero-organized” by the client. The new legal notion of “hetero-organized” collaboration is largely similar to that of “coordinated” collaboration ex art. 409 of the Civil Procedure Code, but the former is distinguished by the latter because the spatial-time constraints the collaborator has to respect are unilaterally stated by the client according with its (rigid) organization and not co-determined by the self-employee. According with the Author this reform is producing in Italian Labor Law the effect to extend not only the subjective field of applicability of subordinate employment law, but even the same objective notion of subordination “by addiction”.

**Keywords:** Employment law; subordination; hetero-direction; hetero-organization; coordinate collaboration.

## 1. The crisis of hetero-direction as the distinctive characteristic of subordination.

Employment law is characterised by a “binary”<sup>1</sup> system which distinguishes between the categories of subordinate work and self-employment. This bipartition delimits, or rather has traditionally delimited, the scope of application (or conversely, exclusion from) the

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<sup>1</sup> Freedland M., Kountouris N., *The legal construction of personal work relations*, Oxford, 2011; Perulli A., *Subordinate, autonomous and economically dependent work: A comparative analysis of selected European Countries*, in Casale G. *the employment relationship. A comparative overview*, Oxford university Press, 2011, 151; Perulli A., *Lavoro autonomo e dipendenza economica*, in *Rivista Giuridica del Lavoro*, 2003, 323; Fudge J., Tucker E., Vosko L.F., *Lavoro subordinato o lavoratore autonomo una ricognizione della rilevanza giuridica della distinzione in Canada*, in *Diritto delle Relazioni Industriali*, 2004, 613; Supiot A., *Lavoro subordinato e lavoro autonomo*, in *Diritto delle Relazioni Industriali*, 2000, 217.

protections established in employment law. These concepts were originally designed and intended solely for the benefit of workers in a situation of employment<sup>2</sup>. The subordinate worker is considered worthy of a legal framework that departs from the “bourgeois” private law of a relationship between equals to rebalance the asymmetry of power or democratic deficit<sup>3</sup> existing in favour of the employer. This imbalance stems on one hand from a state of contractual weakness in a market with conditions of (structural or dynamic) monopsony on the labour demand side<sup>4</sup> and information asymmetry to the disadvantage of the worker<sup>5</sup>, and on the other hand from the primary need of the worker to find a job in order to have a source of income that can ensure decent living conditions for himself and his family<sup>6</sup>.

In contrast to this situation, the autonomous worker, although providing exclusively or at least predominantly a personal service, is active on his own in the market for goods and services, in which he continually establishes contractual relationships with a number of customers and clients and, precisely for this reason, does not suffer the subjection due to occupational blackmail that subordinate workers are exposed to.

On a technical-legal level, the distinctive element of the subordinate employment relationship compared to self-employment has been recognised in the Italian legal system in terms of the so-called “hetero-direction” to which a worker is subject, i.e. the power of the employer to unilaterally and continuously dictate and alter the methods of execution and space-time conditions of the work<sup>7</sup>.

Article 2094 of the Italian Civil Code of 1942, according to which the subordinate worker undertakes to perform his intellectual or manual work “... *in the employment of and subject to the direction of the entrepreneur*”, has been interpreted by the most legal theory as a sort of hendiadys, also recognising “technical” dimension in the employment relationship which actually ends up coinciding with subjection to hetero-direction.

There has been no deviation from this interpretation of the notion of subordination as articulated in Article 2094 of the Italian Civil Code, nor has more recent case law orientation attempted to relativize it by contextualisation in relation to the type of activity performed by the employee, his or her functional role within the firm’s organizational structure, or the characteristics of the firm itself. This situation has led to the development of so-called “attenuated subordination”, i.e. subordination characterised by attenuated or even just

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<sup>2</sup> Deakin S., *Interpretare i contratti di lavoro: giudici, datori di lavoro, lavoratori*, in *Diritto delle Relazioni Industriali*, 2004, 3, 592.

<sup>3</sup> Davidov G., *Who is a worker*, in *Industrial Law Journal*, 2005, 34, 63.

<sup>4</sup> Manning A., *Monopsony in motion. Imperfect competition in labour markets*, Princeton University Press, 2003, 3.; Boal W.M., Ransom M.R., *Monopsony in the labour market*, in *Journal of Economic Literature*, 1997, 86; Ichino P., *Il contratto di lavoro*, Giuffrè, 2000, 15, 29 e 52; Perulli A., (1), 227; Razzolini O., *The need to go beyond the contract: “economic” and “bureaucratic” dependence in personal work relations*, in *Comparative Labor Law and Policy*, 2010, 267.

<sup>5</sup> Williborn L., *Individual employment rights and the standard economic objection; theory and empiricism*, in *Nebraska Law Review*, 1988, 101.

<sup>6</sup> Stiglitz J., *Democratic development as the fruits of labor*, in <http://www.irra.uiuc.edu/>; Kaufman B.E., *Labor's inequality of bargaining power: myth or reality?*, in *Journal of Labor Research*, 1991, 151; Garofalo M.G., *Unità e pluralità del lavoro nel sistema costituzionale*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 2008, 36 ss.; Romagnoli U., *Arriva un bastimento carico di “A”*, in AA. VV., *Politiche di flessibilità e mutamenti di diritto del lavoro*, D’Antona M.(ed.), Napoli, 1990, 31.

<sup>7</sup> Freedland M., Kountouris N., (1), 161; Supiot A., (1), 218; Perulli A., (1), 151; Alleva P., *Per una vera riforma del lavoro a progetto*, in Ghezzi G., *Il lavoro tra progresso e mercificazione*, Ediesse, 2004, 334; Ghera E., *La subordinazione e i rapporti atipici nel diritto italiano*, in Carabelli U., Veneziani B. (eds), *Du travail salarié au travail indépendant: permanences et mutations*, Cacucci, 2003, 50.

potential constraints of hetero-direction, in cases where the worker occupies a senior position in the company hierarchy in which he/she is required to exercise autonomous powers of decision-making and organization in the company and to supervise the work of other employees (the case of company managers or executives<sup>8</sup>); or cases in which the employee is required to perform an ideational or creative activity (for example, journalists, programme directors, advertisers, marketing experts, banking operators in financial markets<sup>9</sup>), or work that is performed mainly outside company premises at the premises of a client (for example, medical and scientific detailers, wholesale sales staff<sup>10</sup>).

With the waning of Western countries' Fordist and Taylorist production systems and the transition to a "post-industrial", mainly service-based economy, hetero-direction has progressively lost its capacity to distinguish between subordinate work and autonomous work<sup>11</sup>. The two concepts have been phenomenologically contaminated, because often the new processes of service creation and provision no longer require a power of technical supervision that regularly and continuously oversees the methods of execution of an employee's work, instead affording them wide margins of operational autonomy. "Control" is mainly exercised not at the moment of execution, but at the time of final verification of the result and quality of the employee's performance<sup>12</sup>. The current production process requires cognitive, creative and conceptual contributions, which are not suited to the imposition of specific, predetermined methods of execution. On the contrary, it is the company that needs to gain information from its employees and to adapt and plan the organization of its production process around them<sup>13</sup>. Compared to the past, companies have less need to exercise authoritative powers and have become less hierarchical, leading to the adoption of "vertically disintegrated"<sup>14</sup> and "flat" organizational formulas in which work is performed in teams and on a project basis<sup>15</sup>.

At the same time, exposure to global competition and the need to adapt very quickly to changes in markets has led companies to abandon permanent internal organization in favour

<sup>8</sup> See Cass., Sez. Lav., 15 May 2012, n. 7517, in *Giustizia Civile*, 2013, 5-6, I, 1098; Cass., Sez. Lav., 23 July 2004, n. 13872, in *Giustizia Civile Massimario*, 2004, 7-8 Cass., Sez. Lav., 14 April 1994, n. 3497, in *Giustizia Civile Massimario*, 1994, 488; Cass., Sez. Lav., 16 June 2003, n. 9640 in *Giustizia Civile Massimario*, 2003, 6.

<sup>9</sup> See Cass., Sez. Lav., 9 September 2008, n. 22882, in *Diritto & Giustizia* 2008; Cass., Sez. Lav., 29 July 2004, n. 14427 in *Orientamenti della giurisprudenza del lavoro*, 2004, I, 557; Cass., Sez. Lav., 6 May 1999, n. 4558 in *Giustizia Civile Massimario*, 1999, 1030.

<sup>10</sup> See Cass., Sez. Lav., 21 April 2005, n. 8307 in *Foro it.*, 2006, 9, I, 2451; Cass., Sez. Lav., 1 June 2004, n. 1057 in *Orientamenti della giurisprudenza del lavoro*, 2004, I, 326 Cass., Sez. Lav., 6 July 2001, n. 9167 in *Giustizia Civile Massimario*, 2001, 1133; Cass., Sez. Lav., 25 June 2013, n. 15922 in *Giustizia Civile Massimario*, 2013; Cass., Sez. Lav., 24 May 2013, n. 12909 in *Diritto & Giustizia*, 27 May 2013; Cass., Sez. Lav., 8 January 1993, n. 84 in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 1993, II, 552.

<sup>11</sup> Supiot A., (1), 219.

<sup>12</sup> Borzaga M., *Lavorare per progetti*, 2012, Cedam, 16 ss.; Davies P., *Lavoro subordinato e lavoro autonomo*, in *Diritto delle Relazioni Industriali*, 2000, 208; Fabbri T., *Il lavoro a progetto tra regolazione giuridica e regolazione organizzativa*, in *Diritto delle Relazioni Industriali*, 2007, 3.

<sup>13</sup> Bologna S., Fumagalli A.(eds.), *Il lavoro autonomo di seconda generazione. Scenari del postfordismo in Italia*, Feltrinelli, 1997; De Luca Tamajo R., *Dal lavoro parasubordinato al lavoro "a progetto"*, in WP C.S.D.E.L. Massimo D'Antona, n. 25/2003, 4; Ghera E., (7), 66 ss.; Liso F., *Lavori atipici e nuovi percorsi del diritto del lavoro*, in Carabelli U., Veneziani B. (eds.), *Du travail salarié au travail indépendant: permanences et mutations*, Cacucci, 2003, 98 ss.; Ferraro G., *Dal lavoro subordinato al lavoro autonomo*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 1998, 432.

<sup>14</sup> Collins H., *Independent contractors and the challenge of vertical disintegration to employment protection laws*, in *Oxford Journal of legal studies*, 1990, 353.

<sup>15</sup> Borzaga M., (12), 18; Neri M., *Organizzazione e regolazione della relazione di lavoro a progetto*, in Pallini M. (ed.), *Il lavoro a progetto in Italia e in Europa*, Il Mulino, 2006, 215.

of extremely flexible organizational models, based on contractual networks<sup>16</sup>, which are capable of meeting all the requirements of the corporate production process in a self-sufficient manner: the result is massive recourse to outsourcing and a 'buy' instead of 'make' approach, i.e. the purchase of outsourced services through service contracts. Service-based business organization favours light net-like forms, which result in the downsizing of personnel and the squeezing of fixed costs. Labour-intensive industrial and manufacturing production processes in which the Fordist organizational logic is still effective and efficient, are inexorably attracted to locations in emerging countries in Eastern Europe, Asia and Latin America, where the cost of labour and environmental limitations are significantly lower than in Western European countries<sup>17</sup>.

Technological development, in particular computerisation and the variety and ultra-practicability of communication, data transmission and even remote-control systems, have made it technically possible and facilitated the adoption of these organizational formulas.

In this situation, subordinate work has taken on new methods of execution and resulted in unimaginable margins of organizational autonomy for the employee: flexible working hours, the option of working off the company premises, and wide margins of decision-making powers, including with regard to the *an* and *quomodo* of the professional services to be provided to the company. In this respect, subordinate work has also been profoundly burdened with responsibility, as it has been required to take on a significant portion of the entrepreneurial risk<sup>18</sup>, with a significant portion of remuneration linked to bonuses which are conditional on the achievement of individual or company performance targets.

This has certainly not resulted in the wholesale disappearance of the hetero-direction within business organizations, but the concept is certainly not as clear and easily discernible as in the Fordist organizations of the last century, and the areas in which it is necessary have been reduced in order to achieve the result that companies expect.

At the same time, in tandem with company's reduced need to exercise ongoing hetero-directional powers, there has been an expansion in the possibilities, both technical and organizational, of resorting to collaboration in the form of self-employment (i.e. not hetero-directed) to meet requirements that are permanently integrated into the company's production process.

Autonomous work is no longer only used for services that are outside or on the margins of this process, but also to obtain services and professional skills that are indispensable core components of the production process, intimately integrated with the services of other operators in the same process, whether they are subordinate workers, autonomous workers, or mechanised and computerized tools.

However, faced with this revolution in the world of the production of goods and services, Italian case law has remained firmly anchored in the concept of hetero-direction as a necessary (and sufficient) requirement to classify a relationship as subordinate, with respect

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<sup>16</sup> Corazza L., "Contractual Integration" e rapporti di lavoro, Cedam, 2004, 51.

<sup>17</sup> Carinci M.T., *Le delocalizzazioni produttive in Italia: problemi di diritto del lavoro*, in *WP C.S.D.L.E. Massimo D'Antona*, n. 44/2006.

<sup>18</sup> Davidov G., (3), 62 ss.; Carabelli U., *Organizzazione del lavoro e professionalità e professionalità: una riflessione sul contratto di lavoro e post-taylorismo*, in *WP C.S.D.L.E. Massimo D'Antona*, 5/2003.

to which the other indicators are merely “subsidiary”<sup>19</sup>. In fact, during the ‘90s, contrary to the evolution of case law in other European countries, the Italian Supreme Court applied the notion of subordination with even a greater formalistic rigour<sup>20</sup>. This trend in case law established narrower boundaries of the notion of subordination in our legal system compared to the other main European countries, with a consequently more restricted scope of application of the relevant regime of legal protection.

An authoritative part of Italian legal theory has attempted to propose a different reading of the juridical notion of “subordination” enucleated by Article 2094 of the Italian Civil Code through the thesis of so-called “*doppia alienità*” (‘double alienity’), which was authoritatively advanced in Italy by Umberto Romagnoli<sup>21</sup>, Luigi Mengoni<sup>22</sup>, and then resumed, albeit with a different emphasis, by Massimo Roccella<sup>23</sup> and Mario Napoli<sup>24</sup>. This approach appears to be very consistent with the work of Rolf Wank<sup>25</sup> in the German discussion of the issue. The current provisions of Article 2094 of the Italian Civil Code would already allow their interpreter to escape the requirement for hetero-direction and recognise a relationship of subordinate employment whenever the work is performed within a production organization created and generally governed by the client, and the result produced by the work is economically and financially attributable only to the client, which therefore is entitled to decide whether and under what conditions it is used within its organization or whether it is sold on the market. According to some authors, this is precisely the interpretation of the notion of legal subordination referred to in Article 2094 of the Italian Civil Code adopted by the Constitutional Court in judgment n. 30 of 1996<sup>26</sup>, the author of which was Mengoni.

According to this line of reasoning, which has not been accepted in case law and which remained a minority view even in the Italian debates in legal theory, in Article 2094 of the Italian Civil Code, dependence and hetero-direction do not constitute an hendiadys: while the former constitutes the essential element, the latter is only an identifying element of subordination, a way of being in which the latter is normally, but not necessarily, expressed. “Dependence” understood as organic and continuous integration into the company, and “direction”, understood not as hetero-direction of the work performed, but as the power to

<sup>19</sup> See Cass. Sez. Lav. 7 June 1988, n. 4150, App. Perugia, 28 January 2013, n. 277, in *Guida al diritto* 2012, 13, 67; Trib. Milan, 16 January 2012, n. 128, in *Guida al diritto*, 2012, 13, 67; App. Florence, 21 November 2011, n. 1190, in <http://dejure.giuffre.it>.

<sup>20</sup> Nogler L., *Ancora su tipo e rapporto del lavoro subordinato nell'impresa*, in *Argomenti di Diritto del Lavoro*, 2002, 136 ss.

<sup>21</sup> Romagnoli U., *La prestazione di lavoro nel contratto di società*, Giuffrè, 1967, 188.

<sup>22</sup> Mengoni L., *La questione della subordinazione in due trattazioni recenti*, in *Rivista Italiana di Diritto del Lavoro*, 1986, 17.

<sup>23</sup> Roccella M., *Lavoro subordinato e lavoro autonomo, oggi*, in *WP C.S.D.L.E. Massimo D'Antona*, n. 65/2008, 32 ss.; Roccella M., *Lavoro subordinato e lavoro autonomo: le tendenze in Europa e in Italia*, rapporto per la Commissione di indagine sul lavoro – CNEL, 2008, in <http://www.portalecnel.it>; Roccella M., *Spigolature in tema di subordinazione. Lo strano caso del signor B.*, in *Rivista Giuridica del Lavoro*, 2007, II, 131 ss.

<sup>24</sup> Napoli M., *Contratto e rapporto di lavoro, oggi*, in *Le ragioni del diritto Scritti in onore di L. Mengoni*, Giuffrè, 1995, III, 1057 ss.; Napoli M., *Questioni di diritto del lavoro (1992-1996)*, Utet, 1996, 40; Napoli M., *Autonomia individuale e autonomia collettiva nelle più recenti riforme*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 2004, 601.

<sup>25</sup> Wank R., *Germany, in Labour Law in Motion*, in *Bulletin of Comparative Labour Relation*, 2005, 19 ss.; Mückenberger U., Wank, Buchner H., *Ridefinire la nozione di subordinazione? Il dibattito in Germania*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 2000, 2, 339 ss.

<sup>26</sup> Corte Cost. 5 February 1996 n. 30, in *Riv. Crit. Dir. Lav.*, 1996, V, 3, 616; the same view is expressed by Cass. 9 October 2006 n. 21646, in *Rivista Giuridica del Lavoro*, 2007, II, 144; Cass. 16 January 2007 n. 820, in *Rivista Giuridica del Lavoro*, 2007, II, 654.



dynamically determine the overall organizational structure of the company, are in reality the real unavoidable elements of “subordination”.

## 2. The plurality of notions of subordination.

The trust placed by the theoretical and case law majority orientation in the capacity of hetero-direction as a qualifying element of the subordinate employment relationship was not undermined even by its express classification by the Italian legislator as a subordinate employment relationship in cases in which there is not, or it is certainly very difficult to find, the exercise of hetero-direction understood in its technical sense, as can be seen in the adoption of detailed orders regarding the timescales and manner of execution of work under the direct and constant control of the employer.

Law n. 877 of 18 December 1973, provides that a home worker (*lavoratore a domicilio*) must be considered as a subordinate employee in cases where “... [he or she] is required to comply with the contractor’s instructions on the manner of execution, characteristics and requirements of the work to be performed in the partial execution, completion, or entire production process for the products that constitute the client entrepreneur’s business” (Article 1, paragraph 2). As a sympathetic commentator has pointed out<sup>27</sup>, this notion goes beyond the boundaries of the traditional hetero-direction to encompass workers who, although not hetero-directed, provide their services “in their own homes or in premises available to them, even with the accessory help of cohabitant and dependent family members, but excluding salaried employment and apprentices, paid work on behalf of one or more entrepreneurs, using raw materials or accessories and equipment of their own or belonging to the entrepreneur, even if provided through third parties”.

The decisions of the courts have concurred that in the case of home workers, the notion of subordination can be identified in different (and broader) terms than those set out in Article 2094 of the Italian Civil Code, because this type of worker “... operates in a form of productive decentralisation, characterised by the fact that the work produced is significant not as a result (*opus*) but as ‘working energies’ (*operae*) used in a complementary or substitute manner to the work performed within the company and therefore, in this work, the subordination consists in the worker’s services being part of a company production cycle of which the worker – although operating externally and by providing his own means and equipment – becomes a supplementary element”<sup>28</sup>.

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<sup>27</sup> See Nogler L., *Lavoro a domicilio*, Giuffrè, 2000, 235 ss; Nogler L., *Sulla (difficilissima) distinzione tra lavoratore a domicilio e artigiano*, in *Rivista Italiana di Diritto del Lavoro*, 2000, II, 299 ss.; Pedrazzoli M., *Sulla cosiddetta indisponibilità del tipo lavoro subordinato: ricognizione e spunti critici*, in AA.VV., *Scritti in onore di Edoardo Ghera*, Cacucci, 2008, 861; Scognamiglio R., *La disponibilità del rapporto di lavoro subordinato*, in *Rivista Italiana di Diritto del Lavoro*, 2001, 101; Gaeta L., *Lavoro a distanza e subordinazione*, ESI, 1993, 109; Mariucci L., *Il lavoro decentrato*, Giuffrè, 1979, 61 and 97, according to whom the notion of outwork adopted by Italian Law take a faithful picture of the real “essence” of subordination; *contra* Ichino P., *Il contratto di lavoro*, vol. I, Giuffrè, 2000, 329 ss.; Gottardi D., *Lavoro a domicilio*, in *Digesto Discipline Privatistiche – sezione commerciale*, VIII, Utet, 1992, 182.

<sup>28</sup> Cass., Sez. Lav., 5 May 1989 n. 2109, in *Informazione Previdenziale*, 1989, 1543; the same leaning is expressed by Cass., Sez. Lav., 19 November 1996 n. 10104, in *Massimario di giurisprudenza del lavoro*, 1997, 360; Cass. Civ. Sez. I, 16 June 2000 n. 8221, in *Giustizia Civile Massimario* 2000, 1317; Cass., Sez. Lav., 11 May 2002 n. 6803, in *Giustizia Civile Massimario*, 2002, 821.

The Italian legislator has also developed a purely “quantitative” notion of subordination for professional sports work. Law n. 91 of 23 March 1981 provides that the employment relationship of an athlete be deemed to be subordinate work if the athlete dedicates more than eight hours per week, or five days per month, or thirty days per year<sup>29</sup>. In this case also, the legislator has used a special notion of subordination, which devalues the element of hetero-direction and instead attributes decisive importance to the continuity and duration of the temporal commitment to the client<sup>30</sup>.

This indefatigable confidence in hetero-direction as a qualifying element of subordination does not seem to have been put in jeopardy even by the provisions governing “smart working” recently introduced by Law n. 81 of 22 May 2017.

The law specifically clarifies that smart working is not a new type of contract, but a way of performing subordinate work by virtue of an agreement between the parties, an agreement that may be fixed-term or permanent, but in the latter case always rescindable by one of the parties. By such an agreement, the parties have contractually established their own “hetero-direction” of the relationship, since they can agree that it will take place “*only partly within the company premises and with the sole time constraints being the maximum hours permitted by law and collective bargaining*” and “*without a fixed workplace during periods of work performed outside the company premises*”, but proving for the “*possibility of using technological tools to perform the work*”.

Although this form of work may fall within the scope of the Framework Agreement of 16 July 2002 on teleworking signed by ETUC, UNICE/UEAPME and CEEPE<sup>31</sup>, it is clearly distinct from the notion of teleworking as transposed in Italian order by law Inter-confederal Agreement of 9 June 2004 signed by the most representative employers’ associations<sup>32</sup> and trade unions<sup>33</sup>. According to this Italian agreement, the teleworker performs his work at a distance, but at a time and place (usually his domicile) pre-established with the employer. Conversely, in a smart working agreement, the parties can also leave the times and places of work totally undetermined, with the worker undertaking to perform certain duties within deadlines, but leaving the times and places of work to the worker’s free choice and organization. The subject matter of a smart working agreement is precisely the power of hetero-direction, or at least the most significant ways in which it is exercised by the employer by unilaterally dictating the time, place and manner in which the work is performed.

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<sup>29</sup> Article 3 of Law 91 of 1981 provides that: “The performance of the athlete for consideration is the subject matter of an employment contract governed by the rules contained in this law. However, it is the subject matter of an autonomous work contract when at least one of the following requirements is fulfilled: a) the activity is performed at a single sporting event or several events connected to each other over a short period of time; b) the athlete is not contractually bound as regards frequency of preparation or training sessions; c) the service that is the subject matter of the contract, although continuous, does not exceed eight hours per week, five days per month, or thirty days per year.”

<sup>30</sup> See Pedrazzoli M., *Sulla cosiddetta indisponibilità del tipo lavoro subordinato: ricognizione e spunti critici*, in AA.VV., *Scritti in onore di Edoardo Ghera*, Cacucci, 2008, 861; Scognamiglio R., *La disponibilità del rapporto di lavoro subordinato*, in *Rivista Italiana di Diritto del Lavoro*, 2001, I, 102; Di Francesco M., *Lavoro sportivo e subordinazione*, in *Massimario di giurisprudenza del lavoro*, 2013, 570 ss.; Cantamessa L., Riccio G.M., Sciancalepore M.(eds.), *Lineamenti di diritto sportivo*, Giuffrè, 2008, 154.

<sup>31</sup> So Tirabochi M., *Il lavoro agile tra legge e contrattazione collettiva: la tortuosa via italiana verso la modernizzazione del diritto del lavoro*, in *WP CSDLE “Massimo D’Antona”*, n. 335/2017, 6.

<sup>32</sup> Confindustria, Confartigianato, Confesercenti, Cna, Confapi, Confservizi, Abi, Agci, Ania, Apl, Casartigiani, Cia, Clai, Coldiretti, Confagricoltura, Confcooperative, Confcommercio, Confinterim, Legacoop, Unci.

<sup>33</sup> Cgil, Cisl, Uil.

It appears to me that currently, Italian legal theory has not sufficiently reflected on or investigated the systematic effects of the introduction into the legal system of a set of rules that renders the power of hetero-direction fully available to the parties without its total abdication by the employer (albeit temporarily), altering the contractual characteristics of subordinate work pursuant to Article 2094 of the Italian Civil Code. It seems to me that the law recognition that a relationship in which parties have agreed to eliminate or at least substantially compress power of hetero-direction in technical sense can be classed as subordinate work, can only mark hetero-direction decline as an exclusive distinguishing element of “subordination”.

### 3. From hetero-direction to hetero-organization.

In reality, the Italian legislator is attempting to broaden the scope of application of the protections afforded to the subordinate work contract to include borderline cases that are not subject to the power of hetero-direction, but instead by an objective condition of the “organizational” dependence of the worker, which very often results in a condition of dependence that is also “economic”.

These attempts have developed since the “Biagi Law” of 2013, which refrained from modifying the notion of subordination established in the Civil Code, but altered the notion of coordinated and continuous collaboration as established in Article 409 of the Code of Civil Procedure and introduced by Law n. 533 of 11 August 1973, which includes “relationships of collaboration that take the form of continuous and coordinated work, mainly personal, even if not of a subordinate nature”<sup>34</sup>.

Italian legal theory and case law have always held that this provision does not establish a new legal type, but at most a sub-type of autonomous work, characterised, with respect to the typical social case of the independent professional, only by the coordinated and continuous methods by which their professional services are provided to a client company<sup>35</sup>. However, it has been correctly pointed out that in the Italian legal system, although coordinated and continuous collaboration has not been elevated to the status of contract type, the express provision for it in the law has played a very important systematic role given that “the recognition of the configurability and relevance of this intermediate category of relationships, which do not involve either the provision of subordinate work or the provision of autonomous work as provided for and regulated by Article 2222 et seq. of the Italian Civil Code, has put a “brake” on the expansive trend (not necessarily in employment law) of the notion of subordination”<sup>36</sup>.

In the European debate, there has undoubtedly been a convergence around the phenomenological traits that characterise economically dependent autonomous work. These can be identified as a) the personal nature of the service, b) the absence of a direct relationship between the service provider and the market for goods and services, c) the

<sup>34</sup> See Santoro Passarelli G., *Il lavoro “parasubordinato”*, Milano, 1979, 10.

<sup>35</sup> Ballestrero M.V., *L’ambigua nozione di lavoro parasubordinato*, in *Lavoro e Diritto*, 1987, 41 ss.; Napoli M., *I rapporti di collaborazione coordinata e continuativa*, in *Occupazione rappresentatività conflitto*, Torino, 1992, 29; Proia G., *Metodo tipologico, contratto di lavoro subordinato e categorie definitorie*, in *Argomenti di Diritto del Lavoro*, 2002, 100.

<sup>36</sup> Proia G., *ibid*, 103.



exclusivity or absolute prevalence of remuneration over the service provider's other sources of income from work, d) the service provided being an organic part of the company's production process, with a consequent need for coordination with the provider, and e) the continuity of the service<sup>37</sup>.

This is the 'identikit' of workers who today work exclusively or at least predominantly for a company, and that professional activity constitutes the exclusive or main source of their income. They are also continuously and organically part of the production process of the client company and collaborate with the company's organization in the production of goods and services that are the exclusive property of the company, which is the only entity entitled to sell them on the final market, a market with which the workers have no contact.

The absence of a relationship between the service provider and the market is perhaps the characteristic that most distinguishes this type from the position of the "pure" autonomous worker, i.e. a professional, specialist technician, consultant or craftsman who not only has a variety of clients, but, above all, is able to sell a good or service independently to each of these clients and offer and resell essentially the same good or service to other clients or to potential customers or consumers in the market. They therefore do not need to use, coordinate, or be part of the organization of the client company in order to provide the service that their professional activity produces. From this standpoint, the absence of a direct relationship between the service provider and the market cannot be considered an effectively distinct element, but is intimately connected, and to some extent is a direct consequence, on the one hand of the need for coordination with the business organization to which the provider is subject and, on the other hand, to the permanent nature of the service. Both of these circumstances keep the service provider away from any direct and ongoing dealings with the market, and therefore from any up-to-date knowledge of the alternative possibilities that the market offers, making the service provider the victim of an information asymmetry compared to the company. These circumstances also raise the transition costs of the service provider in any transition from one client to another, because the need for coordination with a specific external business organization and the ongoing nature of the relationship bind the provider, while at the same time inducing him by inertia to develop a professional specialisation that he cannot easily sell on the market to other clients. This requires the service provider to bear a cost in terms of investment in his professional retraining and adaptation to the demands and requirements of a new client<sup>38</sup>.

This condition is well encapsulated in the UK law definition of the contractual relationship of the worker, according to which it is to be understood as any contract "whether express or implied and (if it is express) whether oral or in writing, 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>39</sup>.

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<sup>37</sup> Perulli A., (1), 175; Perulli A., (1), 230 ss.; Razzolini O., (4), 300.

<sup>38</sup> Davidov G., *The reports of my death are greatly exaggerated: "employee" as a viable (though overly-used) legal concept*, in Davidov G., Langille B. (eds.), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Oxford, 2006, 139 ss.; Razzolini O., (4), 268.

<sup>39</sup> Art. 54 *National minimum wage act* 1998, see on [www.opsi.gov.uk/acts/acts1998/80039-g.htm#54](http://www.opsi.gov.uk/acts/acts1998/80039-g.htm#54) ; on the evolution of the concept of worker in the most recent UK case law see Freedland M., Prassl J., *Employees, workers and the 'sharing economy' Changing practices and changing concepts in The United Kingdom*, in *Spanish Labour Law and Employment Relations Journal*, 2017, Vol. 6, n. 1-2, 19.

However, this definition, although evocative in order to identify a social typology, is still unsatisfactory and not sufficiently exhaustive to provide in and of itself a clear technical-legal typification of the economically dependent worker. In fact, this definition uses categories of professional and commercial activity and their beneficiaries (clients or consumers) that in the British, as in the Italian system, can only provide a basis for distinction by approximation, of a typological nature rather than a conceptual approach on the basis of clear legal categories<sup>40</sup>. While there is no doubt that every legal concept suffers from an inevitable margin of indeterminateness when practically applied, and that this a problem that jurists are condemned to confront perpetually, the problem becomes much more complex and ungovernable when the indeterminateness emerges to undermine the reliability of the legal notion at the theoretical-conceptual level. In order to be considered as such, a legal category must be designed in a way as to accurately identify, at least conceptually, its common character or characters in a way that includes all the legal relationships or situations in which it occurs, and excludes all the others in which it does not.

The Italian legislator has sought to offer adequate legal protection to those workers who are not subject to hetero-direction in the technical sense, but rather to stringent organizational constraints, by venturing down a path that is original in the international context, but nevertheless impervious to its complex (and unclear) systematic implications. It has abstained from introducing a *tertium genus* between subordinate work and autonomous work, and instead has dissected the case of autonomous work, establishing that when such work is performed the forms of coordinated and continuous collaboration provided for in Article 409 of the Code of Civil Procedure, but in the presence of particularly restrictive methods of execution of the organizational autonomy of the autonomous worker, it enjoys the same legal protection regime as established for subordinate work, albeit without ever going as far (at least formally) as to classify this type of workers as subordinate *tout court*.

As previously mentioned, this approach was originally adopted in the so-called “Biagi law” (Articles 61 et seq. of Legislative Decree No. 276 of 10 September 2003) which provided that personal working activity, although not hetero-directed, could be performed in a continuous and coordinated way with a business organization only in the form of “*lavoro a progetto*” (project-work). This project-work is performed pursuant to fixed-term contract, the term of which is determined by the achievement of a final “result” which the worker has to offer the client “in coordination with the client’s organization and regardless of the time taken to perform the work activity” (Article 61).

Article 69 of Legislative Decree No. 276 of 2003 provided that “coordinated and continuous collaboration relationships established without the identification of a specific project pursuant to Article 61, paragraph 1, shall be considered subordinate work relationships of indefinite duration from the date on which the relationship is established”. In response to theoretical doubts as to the scope of this rule if it were only procedural, by introducing a presumption that could be overcome by the employer by offering evidence in court of the absence of hetero-direction, or instead substantive proof, leaving no room for evidence to the contrary, the so called “Fornero Reform” (Law No. 92 of 28 June 2012) subsequently intervened decisively in support of the latter interpretation, clarifying that “the identification of a specific project is an *essential element for the validity of the relationship of coordinated*

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<sup>40</sup> Freedland M., Kountouris N., (1), 277.

*and continuous collaboration*, the absence of which results in the establishment of subordinate work of indefinite duration”. Thus, there was no longer any doubt that the finalisation of the project had become a constitutive element of the type and, in accordance with this, relationships of coordinated and continuous collaboration, although not hetero-directed, must be modelled in order to avoid being attracted by the contractual type of subordinate work.

The case of project-work typified by Legislative Decree No. 276 of 2003, as amended by Law 92/2012, did not coincide at all with that of coordinated and continuous autonomous work pursuant to Article. 409 of the Code of Civil Procedure. Between the two there was a *species a genus* relationship; the former was included in the latter, but it was a case with much more limited borders as they included only those working activities that, although conditioned, in terms of time and the manner of execution, by the requirements of coordination with the organization of the company’s production cycle, have the obligation to achieve a “result”, understood as a good or service completed and endowed with its own “otherness” compared to the mere act of the worker engaged to produce or provide it. Therefore, those mainly personal work services that were coordinated with the production cycle or with the organization of the service as a normal and constant factor of the activity of an external company were excluded, and were therefore subject to the same legal discipline as subordinate work.

Following protest by the entrepreneurial world and the numerous criticisms of academic commentators of the difficulty, both conceptually and practically, of identifying with certainty the work “project” functionally associated with a “result” corresponding to the requirements of Legislative Decree No. 276/2003, as amended by the Reform of 2012, the Renzi Government, by Legislative Decree No. 81 of 15 June 2015, one of the implementing decrees of the so-called “Job Act”, repealed the entire provision governing project-work (Article 52).

#### **4. The provisions governing hetero-organized work introduced by the Job Act.**

Legislative Decree 81/2015 introduced a new concept of “hetero-organized” work, providing that “*As of 1 January 2016, the provisions governing subordinate work shall also apply to collaborative relationships that take the form of exclusively personal, continuous work, the execution methods of which are organized by the client, including in terms of the timescales and the place of work?*” (Article 2, paragraph 1).

Essentially, the regulatory technique adopted is in continuity with that of project-work: there is no direct intervention on the notion of subordination, instead provision is made for the application of the rules governing subordinate work as a kind of sanction where the performance of autonomous work is subject to stringent spatial and temporal coordination restrictions with the entrepreneurial organization of the client, without reaching the point of being hetero-directed by the client<sup>41</sup>. There can be no doubt, however, that the practical effect of the reform is to extend the subjective scope of application of the legal protection

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<sup>41</sup> See Treu T., *In tema di jobs act. Il riordino dei tipi contrattuali*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 2015, 164.

previously intended only for subordinate work, identifying a wider area of need that includes those workers who provide in their personal services under conditions of “hetero-organization”.

Somewhat surprisingly, given the expectations (or fears) that had arisen at the time of the entry into force of this reform, the impact on the productive world and in case law has not been at all disruptive. On the contrary, the Labour Courts almost appear to have totally ignored it. This was also due to a widespread view among commentators who took a minimalist and reassuring view of the amendment, which held that the cases of coordinated and continuous collaboration that could be included within the terms of hetero-organized work would be very small or even non-existent, since the concept actually coincided with that of the hetero-direction although textually formulated in terms other than those used by Article 2094 of the Italian Civil Code<sup>42</sup>.

More than three years after its entry into force, the provision was suddenly and forcefully plucked from obscurity by the Court of Appeal of Turin, which placed it at the centre of the grounds of a recent ruling (No. 26 of 4 February 2019<sup>43</sup>) by which it overturned the judgment at first instance<sup>44</sup> and awarded Foodora riders the minimum wage for employees, classing them as “hetero-organized” workers as provided in Article 2 of Legislative Decree No. 81/2015. It is not surprising that the ruling deals with the employment relationships of workers in the gig economy, since it was easy to predict that this would be the chosen terrain for the application of the provisions governing hetero-organized work. Moreover, this is also a much-discussed area in the international debate given that, despite the still small numbers of workers concerned, it raised questions as to the nature of the relationship and the type of

<sup>42</sup> See Tosi P., *L'art. 2, comma 1, d. lgs. n. 81/15: una norma apparente?*, in *Argomenti di Diritto del Lavoro*, 1117; Pisani C., *Eterorganizzazione ed eterodirezione: c'è davvero differenza tra l'art. 2, d.lgs. n. 81/2015 e l'art. 2094 cod.civ.*, in *Guida al Lavoro*, 2015, 48, 63.

<sup>43</sup> See Carabelli U., Spinelli C., *La Corte d'Appello di Torino ribalta il verdetto di primo grado: riders sono collaboratori etero-organizzati*, *Rivista Giuridica del Lavoro*, 2019, I, 95; De Luca Tamajo R., *La sentenza della Corte d'Appello Torino sul caso Foodora. Ai confini tra autonomia e subordinazione*, *Lavoro Diritti Europa*, 2019, n. 1, 1; Tullini P., *Le collaborazioni etero-organizzate dei riders: quali tutele applicabili?*, *ibidem*, 11; Novella M., *Il rider non è lavoratore subordinato, ma è tutelato come se lo fosse*, in *Labour Law Issues*, 2019, 1, 90.

<sup>44</sup> Tribunal of Turin, 5 July 2018, n. 778, in *Lavoro nella Giurisprudenza*, 2018, 7, 721, and in in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 2018, II, 371 ss. which held that: “The employment relationship between the parties was characterised by the fact that the applicants were not obliged to perform the work and the employer was not obliged to receive it ... This characteristic of the employment relationship between the parties can be considered in itself decisive in order to exclude the submission of the applicants to the managerial and organizational power of the employer because it is clear that if the employer cannot require the employee to perform the work, he cannot even exercise managerial and organizational power ... Article 2 of Legislative Decree 81/2015 has no content that is capable of producing new legal effects in terms of the rules applicable to the different types of employment relationships. The law in fact provides that the provisions governing a subordinate employment relationship are applied when the methods of execution of the service are organized by the client, including with respect to the time and place of work: it is therefore necessary that the worker is always subject to the managerial and organizational power of the employer and it is not sufficient that this power is expressed only at the time and place of work, because it must also govern the time and place of performance of the work. ... the provision is therefore even narrower in scope than Article 2094 of the Italian Civil Code”. The same leaning is agreed by Trib. Milano, 10 September 2018, n. 1853 in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, II, 2019, 3. See the comments on these rulings of Biasi M., *Il Tribunale di Torino e la qualificazione dei “riders” di Foodora*, in *Argomenti di Diritto del Lavoro*, 2018, 1227; Del Conte M., Razzolini O., *La “gig economy” alla prova del giudice: la difficile reinterpretazione della fattispecie e degli indici denotativi*, in *Giornale di Diritto del Lavoro e Relazioni Industriali*, 2018, 159, 673; Cavallini G., *Riders: sulla qualificazione Milano segue Torino, ma qualcosa si muove fuori dalle aule di giustizia*, in *Sintesi*, 2018, 4; Spinelli C., *Riders: anche il Tribunale di Milano esclude il vincolo di subordinazione nel rapporto lavorativo*, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, II, 2019, 3; Tullini P., *Prime riflessioni dopo la sentenza di Torino sul caso “Foodora”*, in *Lavoro, Diritti, Europa*, 2018, n. 1; Ichino P., *Subordinazione, autonomia e protezione del lavoro nella gig-economy*, in *Rivista Italiana di Diritto del Lavoro*, 2018, II, 294.

protection to be applied to economically dependent workers and tested the reliability of the systematic and practical solutions proposed.

The ruling of the Court of Appeal of Turin held that after the entry into force of Article 2 of Legislative Decree no. 81/2015, “... *collaboration can be classed as hetero-organized when an actually functional integration of the worker into the productive organization of the client is evident, so that the work performed ends up being structurally linked to it (the organization) and stands as something that goes beyond the simple coordination provided for in Article 409, No. 3 of the Code of Civil Procedure, since here it is the client that determines the methods of the working activity performed by the collaborator ... in this case there is: - the exercise of the hierarchical-disciplinary-managerial power that characterises the subordinate work relationship pursuant to Article 2094 of the Italian Civil Code (in which the employee is in all cases required to obey); - the productive hetero-organization of the client, which has the characteristics indicated above (and comes within the provisions of Article 2 of Legislative Decree No. 81 /2005), and - the coordinated collaboration pursuant to Article 409, No. 3, of the Code of Civil Procedure, in which it is the collaborator who, while coordinating with the client, autonomously organises his own work activity (in this case the coordination methods are defined by mutual consent, and those concerning the execution of the service autonomously)*” (page 21 of the ruling).

In terms of effects, the Court then pointed out that “... *the provision states only that as of 1 January 2016, the rules governing the employment relationship apply to (existing) hetero-organized relationships of autonomous collaboration which, however, continue to maintain their nature. This means that the hetero-organized worker remains technically, “autonomous” but in every other aspect, and in particular in relation to safety and hygiene, direct and deferred remuneration (and therefore professional classification), time limits, holidays and social security, the relationship is regulated in the same way. This applies without prejudice to the negotiating structure established by the parties at the time they concluded the contract with an extension of the protections established for employment relationships. Therefore, within these limits, the appellants’ application for recognition of their right to receive the remuneration of employees, but only in respect of the days and hours actually worked, must be granted*” (page 23 of the ruling).

The decision has now been appealed to the Supreme Court and there is trepidation as to how the Court will rule.

## **5. The absence of “co-determination” of coordination obligations with the client’s organization as the distinctive feature of “hetero-organization”.**

The main questions raised by the ruling of the Court of Turin concern aspects that have already been identified by the academic interpreters as crucial: a) the criteria for distinguishing between hetero-organization and coordination, and b) which provisions governing subordinate work can and must be applied to hetero-organized work.

With regard to the former aspect, the Court appears to have highlighted a distinctive element that was subsequently introduced by Law No. 81 of 2017, which, together with the regulation of smart working described above, added a paragraph to Article 409 of the Code of Civil Procedure in order to facilitate its distinction from hetero-organized work. This new paragraph in Article 409 of the Code of Civil Procedure states that “*Collaboration is defined as coordinated when, in accordance with the coordination methods agreed upon by the parties, the collaborator organises his or her work autonomously*”. Such an amendment to Article 409 of the Italian Code



of Civil Procedure, in fact, leads to a recognition of the distinction between coordinated work and hetero-organized work in the “co-determination” of organizational constraints, including space-time constraints, which in the first case the worker is obliged to observe in order to usefully integrate his or her services into the productive organization of the client. When, on the other hand, such co-determination is absent and such constraints are objectively and unchangeably dictated by the client’s organization, the collaboration must be classed as hetero-organized and be subject to the application of the provisions on subordinate work in accordance with Article 2 of Legislative Decree n. 81/2015. The worker is necessarily required to adapt the performance of his or her services, but in the formal sense such constraints are those of a coordinated collaborator. The consensual pre-determination of such constraints would be the sufficient condition to class the relationship in terms of coordinated and continuous collaboration and, consequently, to preclude the applicability of the provisions of Article 2 of Legislative Decree n. 81/2015. The worker, while still being an autonomous worker, would enjoy full autonomy in the method of execution of his or her personal service, albeit in compliance with spatial and temporal constraints of coordination, which are co-decided and negotiated with the client in this last case. On contrary, in the case of “hetero-organization” these constraints are unilaterally dictated by the client because the structural rigidities of its organization of production.

This element of the “co-determination” of coordination constraints can well play a crucial and distinctive role if it is interpreted not according to a formal meaning that is limited to requiring that such constraints be indicated in the contract and accepted by the collaborator at the time of the conclusion of the contract, but according to a “substantive” negotiation and acceptance that require an investigation of whether within the client’s organization of production there are indeed areas of possible genuine co-determination by the collaborator and client of the space-time obligations of the work, and whether different methods of coordination are actually agreed with other collaborators<sup>45</sup>. Therefore, there can be no question of co-determination in a case in which the collaborator, although not hetero-directed in the performance of his service, is simply called upon to adhere to “standard” contracts that govern procedures for coordination with the client’s productive organization that are structurally essential to its functioning and, for this reason, are in fact unchangeable in negotiations with each collaborator.

The case of platform workers in the gig economy seems to conform to these characteristics, i.e. there are areas of autonomy in the execution of the work obligation in deciding whether, when, how much and where to work, but this autonomy can be exercised only in compliance with and within terms dictated unilaterally by the client’s organization, which functionally respond only to the client’s needs, according to precise procedures for the execution of individual services which are also unilaterally dictated by the client. New information technologies can instantaneously communicate remotely with a myriad of interlocutors, obtaining and selecting a multitude of data exchanged with them and governing a complex organization in a completely automated way through strict regulation governed by algorithms, now make it not only possible, but even easy, to grant such spaces of

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<sup>45</sup> See Perulli A., *Il Jobs Act del lavoro autonomo e agile: come cambiano i concetti di subordinazione e autonomia nel diritto del lavoro*, in *WP CSDLE Massimo D’Antona*, n. 341/2017, 20.

autonomy to employees without an appreciable risk of no governability or dysfunctionality of the production process for goods or, much more often, for services.

The typical case is that of home delivery riders, a phenomenon which appears to be the tip of an iceberg of a way of working, the current extent of which it is difficult to measure and above all is impossible to predict in terms of future developments. Although these collaborators are contractually free to choose whether to work, which shifts to cover, and in which areas of the city, they can exercise this freedom only in relative terms, in accordance with both the strict space-time constraints dictated by the platform, the rules of operation of which were unilaterally decided by the client company which invented and manages it, and the conditions of provision of the service and accrual and quantification of the fee, which always dictated unilaterally by this company<sup>46</sup>. The detection of such an organization, which in fact does not allow any genuine co-determination of the methods of coordination, led the Court of Appeal of Turin to class Foodora riders as “hetero-organized” workers pursuant to Article 2 of Legislative Decree n. 81/2015 and accordingly to apply to them the legislation governing subordinate work.

## 6. What rights for subordinate work are applicable to hetero-organized work?

The Turin Court of Appeal did not find that the legal regulations governing employment were fully applicable to hetero-organized work, but in a manner of self-restraint, it held that only the provisions directly governing the reciprocity of the exchange of working time for pay were applicable. In order to justify this interpretative solution, the Court stressed that “...the rules governing the employment relationship apply to (existing) hetero-organized relationships of autonomous collaboration, which nevertheless continue to maintain their nature. This means that the hetero-organized worker remains technically, “autonomous” but in every other aspect, and in particular in relation to safety and hygiene, direct and deferred remuneration (and therefore professional classification), time limits, holidays and social security, the relationship is regulated in the same way. This applies without prejudice to the negotiating structure established by the parties at the time they concluded the contract with an extension of the protections established for employment relationships. Therefore, within these limits, the appellants’

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<sup>46</sup> In the case of the Foodora riders decided by the Court of Appeal of Turin, the judgment held that the contract can be classed as “coordinated and continuous collaboration” pursuant to Article 409 of the Code of Civil Procedure, requiring them to possess a bicycle and have the use of a smartphone, while the company, in return for the payment of a € 50 deposit, loaned them safety devices (helmet, shirt, jacket and lights) and equipment for transporting food (a carrier attachment and box). The relationship was managed through the “Shyftplan” multimedia platform and a smartphone application (initially “Urban Ninja” and then “Hurrier”), for which Foodora provided usage instructions. The company published the “slots” each week on Shyftplan, indicating the number of riders needed to cover each shift. Once the availability had been confirmed, the manager of the “fleet” confirmed the assignment of the shift to individual riders through Shyftplan. After receiving the confirmation of the shift, the worker is required to be at one of the pre-defined departure zones at the start of the shift, activate the Hurrier application by entering his or her credentials (username and password) to log in, and start the geolocation (GPS). The rider then receives an order notification on the app, indicating of the address of the restaurant. Once the order is accepted, the rider is required go to the restaurant on his or her bicycle, receive the products, check correspondence with the order, and communicate the successful verification through the relevant command on the app. According to the provisions of the contract, each rider was able to indicate their availability for the various slots according to their personal needs, but they were not obliged to do so. However, once a candidate for a delivery, the worker undertook to make the delivery within 30 minutes of the time indicated for the collection of food, subject to the imposition of a penalty charge of € 15. The fee was set at € 5.60, before tax and social security deductions for each hour.

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*application for recognition of their right to receive the remuneration of employees, but only in respect of the days and hours actually worked, must be granted*<sup>47</sup> (page 23 of the judgment).

The Court therefore rejected the riders' claims that, by virtue of the applicability of the rules on employment, they should convert their fixed-term contracts into contracts of indefinite duration, apply protection against unjustified dismissal, and order the client to pay the remuneration to which they would have been entitled if they had worked full-time as employees.

It may be because the grounds of the judgment on this point, although of great importance, are very laconic, but frankly it is not possible to understand why the Court believed that it could make such a selection among the employment protections afforded applicable to hetero-organized work, when the rule unconditionally provides that it applies to "*the regulation of the employment relationship*", without introducing any limitation, not even of compatibility with autonomous work contracts. It certainly cannot be concluded that the rules governing the termination of the contract or the application of the duration are outside the scope of the "relationship".

The emphasis in the judgment that riders have "*... the right to obtain payment as employees but only in respect of the days and hours actually worked*" gives rise to a suspicion that the Court established this limitation on the applicable rules governing employment out of fear that full application would lead to an excessive consequence, both in terms of the protection afforded to workers and in terms of the burden on the company, i.e. the granting of the application for recognition of the entitlements of full-time employees. This fear is in fact unjustified as the Court could have (and should have) rejected the application, recognising only the minimum wage due for the hours effectively worked by the riders in the past by the virtue of the principle of mutuality of employment obligations<sup>47</sup>. It was by no means necessary to produce this reasonable effect in terms of remuneration by the application of the rules on subordinate work, claiming, without any textual or systematic pretext, that the ongoing autonomous work nature of the relationship precluded the application of some of the central features of those rules.

On contrary, the judicial recognition of subordinate work legal regime applicability to the hetero-organized relationship should rise the right (and the obligation) of the rider to continue to work in the future as full time employee at the dependence of the same client, unless he or she is going to reach with that client an agreement in order to regulate their relationship as a (flexible) part-time or a job on call employee observing the formal and substantive requirements stated by law for this special types of employment contracts.

Some voices among academics had already pointed out that the extension of the provisions governing subordinate work to "hetero-organized" work as established without limitations and conditions in Article 2, paragraph 1 of Legislative Decree n. 81/2015 concerns not only all the regulatory aspects of the contractual relationship, but also the social security and insurance aspects, making it subject to the ordinary INPS social welfare regime and including it among the beneficiaries of the income support measures established by

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<sup>47</sup> Cass., Sez. Lav., 23 July 2008, n. 20316, in *Giustizia Civile*, 2009, 12, I, 2723; Tribunale of Florence, 3 April 1989, in *Rivista Italiana di Diritto del Lavoro*, 1989, II, 782.

Legislative Decree n. 22/2015, as well as the outplacement contract to benefit from placement services and training offered by public and private agencies<sup>48</sup>.

The situation appears to be attributable to that inertial resistance to change that induces case law to “normalise” the scope of the legislator’s reforms in this area, mould them by way of interpretation into as much continuity as possible with the consolidated legal regime already in place. In the past, although the legislator had expressly classed home workers as subordinate workers, case law adopted a sort of (badly interpreted) typological-functional approach maintaining that the provisions governing subordinate work apply to home workers to a “variable” extent, in view of the growing need for protection of this professional category, all the more so because of the limitation of his or her autonomy in the relationship with the client enterprise<sup>49</sup>. For example, case law has held that the protection against dismissal for subordinate work<sup>50</sup>, or the mobility allowance<sup>51</sup>, also applies to homeworkers only if they work on behalf of the client on a continuous basis and with a daily commitment comparable to that of an ordinary full-time employment relationship.

## 7. The availability of the provisions governing hetero-organized work by collective bargaining.

The new provisions introduced into the Italian legal system by Article 2 of Legislative Decree n. 81/2015 are of note in a further aspect which is original in international terms. The provisions are subject to the willingness of the social partners to negotiate.

In fact, Article 2, paragraph 2 excludes from application of the provisions governing subordinate employment “*those collaborations for which the collective agreements concluded by the trade union confederations that are comparatively more representative at the national level establish specific rules governing economic and regulatory treatment on the basis of the specific production and organizational needs of the relevant sector*”. Although such an agreement can be concluded at any level of negotiation, including at company level, the subjective requirement of the social partners entitled to enter into it is particularly selective: they are exclusively the “*trade union confederations that are comparatively more representative at national level*”.

The effects are felt in respect of all the workers employed within the scope of the agreement, regardless of their membership of such confederal organizations, in which case they perform an authorisation function<sup>52</sup> similar to the many other cases in which the law gives them the power to derogate from legal limits, even though until now there has never been a situation in which such powers could go as far as to deprive workers of all applicable

<sup>48</sup> See Andreoni A., *La nuova disciplina per i collaboratori etero-organizzati: prime osservazioni*, in *Rivista di Diritto della Sicurezza Sociale*, 2015, 4, 738.

<sup>49</sup> Nogler L., *Metodo e casistica nella qualificazione dei rapporti di lavoro*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 1991, 142 ss.; Nogler L., *Sulla (difficilissima) distinzione tra lavoratore a domicilio e artigiano*, in *Rivista Italiana di Diritto del Lavoro*, 2000, II, 299.; Mariucci L., (27), 100.

<sup>50</sup> See Cass., Sez. Lav. 17 March 1983 n. 1570, in *Rivista Giuridica del Lavoro e della Previdenza*, 1983, II, 449; Cass., Sez. Lav., 22 January 1987 n. 615, in *Riv. Giur. Lav.*, 1987, II, 64; Cass., Sez. Lav., 2 February 1989 n. 628, in *Informazione Previd.* 1989, 945; Cass., Sez. Lav., 21 October 2010 n. 21625, in *Guida al diritto*, 2010, 47, 72.

<sup>51</sup> See Cass. SS.UU., 12 March 2001, n. 106, in *Diritto del Lavoro*, 2001, II, 406; Cass., Sez. Lav., 23 March 2002 n. 4192, in *Giustizia Civile Massimario* 2002, 507.

<sup>52</sup> See D’Antona M., *Il quarto comma della Costituzione, oggi*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 1998, 676.

legal provisions in the absence of the trade union agreement. So, the legislator entrusts the most representative social partners at the national level with the role of ‘gate keeper’ for the access of hetero-organized workers to the most protective legal measures which the legal system traditionally addressed to subordinate work<sup>53</sup>.

Some collective agreements have been concluded for this purpose in sectors in which the use of hetero-organized workers is most intensive and critical: call centre services, platform workers, etc.<sup>54</sup>.

These contracts are distinguished by the reasonableness with which they have been able to combine appropriate protection measures for these workers compared with those which would naturally apply to them as coordinated autonomous workers and in the fact of company requirements of competitiveness and sustainability of labour costs.

## **8. Has the hetero-organization been invested with a new distinctive character of subordination?**

Legislative Decree n. 81/2015 has undoubtedly produced the systemic effect of repositioning the boundary between the scope of application of the legal regime for the protection of subordinate work and that of autonomous work on the line of distinction between hetero-organized work, which is included in the former category, and the coordinated and continuous work referred to in Article 409 No. 3 of the Code of Civil Procedure, which is included in the latter one.

As has been seen, the category of hetero-organized work stands on that of coordinated and continuous collaboration as provided for in Article 409 n. 3 of the Italian Code of Civil Procedure<sup>55</sup>. In fact, in order to class a working relationship as hetero-organized work, all the characteristics that are typical of coordinated and continuous collaboration are required: the absence of hetero-direction, the personal nature of the service and its continuity and “coordination” with the productive organization of the client. The two types are therefore juxtaposed in a relationship of moderation; the notion of coordinated and continuous collaboration is more extensive and includes within it that of hetero-organization. All hetero-organized jobs can be traced back to the case provided for in Article 409 of the Italian Code of Civil Procedure, while not all the coordinated collaborations are also necessarily hetero-organized in the forms and according to the methods laid down in Article 2 of Legislative Decree n. 81/2015.

Although hetero-organized work must be formally classed as a subtype of autonomous work, it must share the conclusion that, on the systematic level, hetero-organization is nothing more than a new form of arranging “subordination” in today’s production systems<sup>56</sup>. “Subordination”, on the other hand, is nothing more than a “descriptive formula” with which

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<sup>53</sup> On the role trade unions could play in representation of gig workers see: Romagnoli U., *Se l'amore per la specie fa perdere di vista il genere (a proposito del caso Foodora)*, *Diritti Lavori Mercati*, 2018, 193.

<sup>54</sup> See the collective agreement signed on 8 May 2019 by Laconsegna limited company, on the employer side, and CGIL, UIL e CISL, on trade unions side, referred by Novella M., (43), 89.

<sup>55</sup> See Razzolini O., *La nuova disciplina delle collaborazioni organizzate dal committente*, in *WP C.S.D.E.L. Massimo D'Antona*, n. 266/2015, 3.

<sup>56</sup> This opinion is expressed by Mariucci L., *Stereotipi, circolarità e discontinuità nel diritto del lavoro*, in *LD*, 2015, 214.



an attempt has been made to conceptualise details of the experience of methods of performance of the work in historical organization models<sup>57</sup>. The conceptual abstraction of this experiential data would have theoretically allowed the same formula as Article 2094 of the Italian Civil Code to evolve in line with the new forms of organization of production and to adapt to them through case law interpretation. On the other hand, the company organizational transformations that have taken place since the original statement of these formulas in the Civil Code, have led to a modification of the form, but certainly not to an overcoming of the power imbalances between private individuals and the conditions of dependence that have inspired the classifying categories that are designed to select the areas of application of legal protections for those who obtain their main source of income from their work<sup>58</sup>.

As has been noted, news of a death of “subordination” is “largely exaggerated”<sup>59</sup> or at least premature; instead, it has become necessary to subject it to a maintenance operation that preserves its original axiological function, which is to select situations of contractual imbalance in labour relations that justify a regime of compensatory protections in favour of the weaker party<sup>60</sup>. This process of “updating” the notion of subordination in the face of the radical transformations of the processes and organizational solutions of the production of goods and services in other European countries was, albeit timidly, undertaken by the case law through a more inclusive reworking of the notion itself<sup>61</sup>. In Italy, on the other hand, the orthodox case law orientation towards perfect concurrence between subordination and hetero-direction has remained almost unchanged.

The Court of Justice also, in seeking to identify, for the purposes of applying Articles 45 and 101 of the TFEU, the characteristic features of subordinate work, has gradually shifted its emphasis from the exercise of management powers by the employer to the disadvantaged position in which the employee finds himself in relation to both the market and the power to organise the process of producing the final goods and services to which his or her personal services contributes. The Luxembourg Court finally expressed the view that “... 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, 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>62</sup>.

The Italian legislator, faced with the delay of our case law in embarking on a path of evolutionary interpretation of the notion of subordination, has decided to intervene with positive rules to “facilitate” the process of re-conceptualising the various types of contracts while continuing to use old distinctive features to define the scope of application of legal

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<sup>57</sup> D’Antona M., *Limiti costituzionali alla disponibilità del tipo contrattuale nel diritto del lavoro*, in *Argomenti di Diritto del Lavoro*, 1995, 70.

<sup>58</sup> Davidov G., (3), 17.

<sup>59</sup> Davidov G., (3), 17.

<sup>60</sup> Deakin S., (2), 76; Davidov G., *The Status of Uber Drivers: A Purposive Approach*, in *Spanish Labour Law and Employment Relations Journal*, 2017, Vol. 6, n. 1-2, 10.

<sup>61</sup> Kountouris N. (2011), *The employment relationship: a comparative analysis of national judicial approach*, in Casale G., *The Employment relationship. A comparative overview*, Oxford Hart Publishing, 2011, 51; Razzolini O. (4), 288; Pallini M., *Il lavoro economicamente dipendente*, Cedam, 2013, 23.

<sup>62</sup> CJEU 4 December 2014, – C 413/13, *FNV Kunsten Informatie en Media c. Regno di Olanda*, in *Rivista Italiana di Diritto del Lavoro*, 2015, II, 566; see also in the same sense, CJEU, 14 December 2006 – C 217/05, *Confederación Española de Empresarios de Estaciones de Servicio*, ECLI:EU:C:2006:784, paragraphs 43 and 44.

protections<sup>63</sup>. The reform did not follow the main path of restating the characteristics of pre-existing types or subtypes of contractual labour relations (subordinate, coordinated, autonomous) which, as seen, continue to be almost unchanged in the textual formulations of the rules of classification, but preferred to reposition the boundaries of the legal protections associated with these types in the light of a particular *de facto* condition of weakness in which workers find themselves. Article 2 of Legislative Decree n. 81/2015 does not affect the negotiating structure of the collaboration pursuant to Article 409 of the Code of Civil Procedure, but provides for the application of a particularly protective regime where a situation exists that imbalances the position of the parties beyond a point deemed acceptable: when the client imposes unilaterally space-time restrictions on the work of the employee.

But if “the classification by law of a contractual type is because the effect it produces”<sup>64</sup>, this protection technique seems to me producing - if not in form, certainly in substance - an extension (indirect and by addition) of the same notion of subordination. It can also be said that subordinate work in the strict sense continues to be identified only with hetero-directed work<sup>65</sup>, but if hetero-organized work is subjected for all purposes and in all respects to the same discipline, the result produced on a practical level coincides with that which could have been pursued by violating the sacredness of Article 2094 of the Italian Civil Code and reformulating it by valuing the nature of the “dependence” over that of “direction”, to append it to hetero-organized work relationships<sup>66</sup>.

The decisive word on this point lies with the Supreme Court, which is called upon to take a decision of crucial importance for Italian labour law.

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<sup>63</sup> Nogler L., *La subordinazione nel d. lgs. n. 81 del 2015: alla ricerca dell'«autorità del punto di vista giuridico»*, in WP C.S.D.E.L. Massimo D'Antona, n. 267/2015, 18.

<sup>64</sup> Irti N., *L'età della decodificazione*, Giuffrè, 1979, 89.

<sup>65</sup> Perulli A., *Costanti e varianti in tema di subordinazione e autonomia*, in *Lavoro e Diritto*, 275; Perulli A., *Il lavoro autonomo, le collaborazioni coordinate e le prestazioni organizzate dal committente*, in WP C.S.D.E.L. Massimo D'Antona, n. 272/2015, 13.

<sup>66</sup> Ghera E., *Sulle collaborazioni coordinate e continuative*, in *Massimario di giurisprudenza del lavoro, Colloqui giuridici sul lavoro*, 2015, 50; Nogler L. (63), 17; Razzolini O., (55), 5.

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