Digitalisation at work: new challenges for Italian Labour Law*

Digitalización en el trabajo: nuevos retos en el Derecho Italiano del Trabajo

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Abstract: This paper explores the challenges digitalisation poses to the traditional concept of working time, emphasizing the need for an objective, transparent system to measure daily hours and uphold labor standards.
It also examines the evolving legal framework, with a focus on Italian legislation and case law, addressing the classification of workers employed through digital platforms and their employment rights.
Finally, the paper investigates digitalisation's impact on industrial relations, underscoring the critical role of employees and their representatives in mitigating opacity in data processing and the functioning of automated monitoring and decision-making systems within employment relationships.
Keywords: Digitalisation. Working time. Platform work. Industrial relations. EU law.

Resumen: Este artículo explora los desafíos que la digitalización plantea al concepto tradicional de tiempo de trabajo, haciendo hincapié en la necesidad de un sistema objetivo y transparente para medir las horas diarias y defender los estándares laborales.

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****Wrote Sec. 3.

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También examina el marco legal en evolución, con un enfoque en la legislación y la jurisprudencia italianas, abordando la clasificación de los trabajadores empleados a través de plataformas digitales y sus derechos laborales.
Finalmente, el artículo investiga el impacto de la digitalización en las relaciones laborales, subrayando el papel fundamental de los empleados y sus representantes en la mitigación de la opacidad en el procesamiento de datos y el funcionamiento de los sistemas automatizados de monitoreo y toma de decisiones dentro de las relaciones laborales.
Palabras clave: Digitalización, tiempo de trabajo, plataforma, relaciones industriales, Derecho de la UE.

SECTION 1: DIGITALISATION AND WORKING TIME

1. The uncertain determination of work time and personal time in digital work.

The identification of the boundaries between working time and personal time is increasingly blurred and complex in the light of technological progress that has involved the organisation of work[1].

All this entails the need to reinterpret the classic bipartition between 'working time' and 'rest period'[2].

In fact, the legislation solely differentiates between working time, defined as the period during which the worker is at work, at the employer's disposal and in the exercise of his activity or duties, and rest time, defined as any period that is not part of working time[3].

Recent technological developments and the consequent evolution of work organisation, however, have led to the need to rethink and redefine these concepts, particularly in view of the growing difficulties in qualifying certain situations in the light of the overcoming of the traditional spatio-temporal boundaries of the working activity, which entail application problems due to the difficulty of finding in concrete cases the following elements: the presence at work, the fact of being at the employer's disposal and the exercise of the work activity[4].

The process of digitisation of work, therefore, has increasingly allowed work to be performed remotely, resulting in an intensification and extension of working time[5].

While aiming, at least abstractly, to improve work-life balance, allowing for childcare, reducing commuting time and leading to increased work autonomy and better use of

[1] BELLOMO, Stefano, Forme di occupazione "digitale" e disciplina dell'orario di lavoro, *Federalismi*, n. 19, 2022, p. 168.

[2] On the subject of working time and rest time, see OCCHINO, Antonella, *Il tempo libero nel diritto del lavoro*, Torino, Giappichelli, 2010.

[3] Article 1, paragraph 1, lett. a) and b), Legislative Decree No. 66/2003 and article 2, No. 1 and 2, directive 2003/88/CE.

[4] MONACO, Maria Paola, *Aspetti dell'organizzazione dell'orario di lavoro nella normativa comunitaria di riferimento*, in *AA.VV., Orari e tempi di lavoro: le nuove regole, I saggi di NGL*, n. 6, 2005, p. 20.

[5] CALDERARA, Dario, La dis-connessione: evoluzioni e prospettive, *Massimario di Giurisprudenza del Lavoro*, n. 2, 2022, p. 261 ss.

working time[6], remote work can increase the pressure on workers to always be available or to work in their free time, resulting in isolation and a blurring of the boundaries between work and leisure[7]. The hyper-connectedness to which these workers are exposed often results in increased stress due to the difficulty of discerning between work and private life[8].

That said, the rise of agile working has certainly had a considerable impact on working conditions[9]. In particular, it has been found that for only one third of agile workers working during their free time represents a reorganisation of working time rather than an extension of the working day, while for the remaining two thirds it means working longer than expected[10].

The need to rethink and redefine the two concepts in light of the increasing difficulty of qualifying, among others, the worker's periods of availability[11] and on-call time[12] has led the Court of Justice of the European Union to pronounce on the notion of working time. The jurisprudence[13], through the flexible use of the constituent elements of this notion, (being at work, at the employer's disposal and in the exercise of his activity or duties[14], with the aim of guaranteeing the effectiveness of the principle pursued by the European regulations on the protection of workers' health and safety[15]), has also included in certain cases the so-called 'grey times'. In the Matzak judgment[16], the Court included within the concept of working time even those cases in which the employee is at the employer's disposal, even if at home, considering that the employee's availability to the employer means that such intermediate time in any case satisfies the latter's organisational interest[17], not allowing him to achieve the psychological relaxation of the normal rest period[18].

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[6] Eurofound, *Aumento del telelavoro: impatto sulle condizioni di lavoro e sulla regolamentazione, Sintesi*, 2022.

[7] Cf. Eurofound, *Working conditions: The rise in telework: Impact on working conditions and regulations*, Research Report, 2022.

[8] CATAUDELLA, Maria Cristina, Tempo di lavoro e tempo di disconnessione, *Massimario di Giurisprudenza del Lavoro*, n. 4, 2021, p. 854-855.

[9] Eurofound, *Working conditions: The rise in telework: Impact on working conditions and regulations*, Research Report, 2022, p. 61-62.

[10] Eurofound, *Workers want to telework but long working hours, isolation and inadequate equipment must be tackled*, Article, 6 September 2021.

[11] BERNARDINI, Paolo, La reperibilità del funzionario europeo al vaglio dei giudici di Lussemburgo, *Rivista Italiana di Diritto del Lavoro*, n. 4, 2011, p. 1241 ss.

[12] FERRARESI, Marco, Disponibilità e reperibilità del lavoratore: il tertium genus dell'orario di lavoro, *Rivista Italiana di Diritto del Lavoro*, n. 1, 2008, p. 93 ss.

[13] CJEU, 3 October 2000, Case C-303/98; CJEU, 9 September 2003, Case C-151/02; CJEU, 5 October 2004, Joined cases C-397/01 to C-403/01; CJEU, 1 December 2005., Case C-14/04; CJEU, 10 September 2015, Case C-266/14; CJEU, 21 February 2018, Case C-518/15.

[14] MAGAGNOLI, Silvia, Diritto alla disconnessione e tempi di lavoro, *Labour & Law Issues*, vol. 7, n. 2, 2021, p. 98-99.

[15] MAZZANTI, Caterina, I tempi intermedi nella nozione binaria di tempo di lavoro, *Argomenti di Diritto del Lavoro*, n. 2, 2019, p. 221 ss.

[16] CJEU, 21 February 2018, Case C-518/15.

[17] PUTATURO DONATI, Federico Maria, *Orario di lavoro, riposi e tempi sociali. Artt. 2107, 2108, 2109 cod. civ.*, in PESSI, Roberto (ed.), *Codice commentato del lavoro*, Torino, Utet, 2011, p. 528; BAVARO, Vincenzo, *Il tempo nel contratto di lavoro*, Bari, Cacucci, 2008, p. 225; GIULIANI, Alessandro, La nuova nozione di orario di lavoro nel d. lgs. n. 66/2003 e il "vecchio" criterio della "effettività", *Argomenti di Diritto del Lavoro*, 2003, p. 775.

[18] MAZZANTI, Caterina, I tempi intermedi nella nozione binaria di tempo di lavoro, *Argomenti di Diritto del Lavoro*, n. 2, 2019, p. 225.

Nowadays, the demarcation line between situations and temporal segments attributable to the concept of "working time" and those forms of fulfilling work obligations that fall outside of it has been effectively delineated by the case law of the Court of Justice, which has repeatedly clarified that the distinguishing criterion is found in the intensity of the constraints imposed on the worker during periods of readiness. This underscores that the national judge must assess whether the worker has been subjected to constraints so pervasive that they objectively and significantly impact the worker's ability to freely manage the scheduling of time when their professional services are not required.

Hence the conclusion that "a period of stand-by time according to a stand-by system, during which the worker is required only to be contactable by telephone and able to return to his or her workplace, if necessary, within a time limit of one hour, while being able to stay in service accommodation made available to him or her by his or her employer at that workplace, without being required to remain there, does not constitute, in its entirety, working time within the meaning of that provision, unless an overall assessment of all the facts of the case, including the consequences of that time limit and, if appropriate, the average frequency of activity during that period, establishes that the constraints imposed on that worker during that period are such as to affect, objectively and very significantly, the latter's ability freely to manage, during the same period, the time during which his or her professional services are not required and to devote that time to his or her own interest"[19].

The Court explicitly identifies today, therefore, the intensity of such constraints as the parameter on which the interpreter must focus for the purpose of distinguishing between working hours and rest periods. It is indeed the degree of pervasiveness of these constraints that allows for the qualification of certain time segments as either working hours or rest periods.

To facilitate this assessment, the Court of Justice outlines some "indicative markers" of intensity, that is, the parameters to be considered for an objective evaluation. Specifically, based on this reconstruction, the most recent judgments consider the significance of the following: the time period available to the worker to resume work from the moment the employer requests it; the frequency of tasks performed during the on-call period; and the 'non-negligible' duration of interventions carried out, which limit the possibility of freely managing one's time during the worker's inactive periods.

This possibility, which can be recognized as existing, was most recently emphasized by the Court in the judgment of November 11, 2021, C-214/20, *Dublin City Council*. Even when faced with the imposition of a very short response time, the worker can enjoy freedom of movement, retain the discretion to respond to calls or not, and is permitted to carry out another professional activity (in this case, that of a taxi driver) and devote a significant portion of the time when not engaged in duties as an on-call firefighter[20].

[19] CJEU, 9 March 2021, Case C-344/19, paragraph 66 of the reasoning.

[20] Paragraph 66 of the reasoning.

2. The need to establish an objective system for measuring the duration of daily working hours

Strictly connected to the determination of working times and personal times in digital work is the issue of how to measure working hours.

Owing to certain matters recently brought to the attention of the jurisprudence of the Court of Justice of the European Union, focus has been directed towards the measurement of working hours, particularly with the judgment *Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank*[21].

In particular, the Court of Justice deems it appropriate that, "in order to ensure the effectiveness of those rights provided for in Directive 2003/88 and of the fundamental right enshrined in article 31, paragraph 2, of the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured"[22]. This principle does not appear to be explicitly provided either in Article 31 of the Charter of Fundamental Rights, which in paragraph 2 guarantees every worker "the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave", nor in the 2003 Directive.

In light of the ECJ case law, the system for measuring working hours appears indispensable to ensure with absolute certainty that every worker enjoys daily and weekly rest periods, annual paid leave, and the right to a limitation of maximum working hours.

However, the time measurement tool must be objective, reliable, and accessible, and may fall under the general obligation for Member States and employers, as outlined in article 4, paragraph 1, and article 6, paragraph 1, of Directive 89/391, to establish an organization and the necessary means to protect workers' safety and health. This system permits worker representatives with health and safety functions, pursuant to Directive 89/391, to exercise their right to request the employer to take appropriate measures and to make proposals aimed at reducing any risk to workers and/or eliminating the causes of danger.

The innovative feature of this system is its ability to enable employers, workers, and inspection bodies to verify and demonstrate – in an impartial, reliable, and objective manner – the correct enjoyment of the rights provided by the Charter and the directive. In the absence of such a tool, the current recourse is to the means of proof admitted by the legal system[23], which, in the opinion of the Court of Justice, "do not enable the number of hours the worker worked each day and each week to be objectively and reliably established"[24].

According to the Court's jurisprudence, particular doubt should be cast on testimonial evidence due to the so-called *metus prestatoris*, or the position of subordination in which the worker finds themselves. This condition implies recognizing the worker as the

[21] CJEU, 14 May 2019, Case C-55/18. Previously in the case *Worten v. Autoridade para as Condições de Trabalho*, CJEU, 30 May 2013, Case C-342/12.

[22] CJEU, 14 May 2019, C-55/18, *cit.*, paragraph 60 of the reasoning.

[23] As, for example, the testimony.

[24] CJEU, 14 May 2019, Case C-55/18, *cit.*, paragraph 54 of the reasoning.

weaker party in the relationship, which could deter workers from testifying against their employer to avoid potential retaliation that could negatively impact the employment relationship. For these reasons, testimonial evidence cannot, by itself, be considered an effective means of proof capable of ensuring the effective respect of the rights provided by the Charter and the directive.

The most significant aspect, some years after the Court's ruling, concerns identifying the tools our legal system has adopted to comply with the Court's principles.

The Court has already observed that it is up to the Member States, within the exercise of discretionary power, to define the concrete modalities for implementing the time measurement system, considering the specificities of different sectors of activity and the particularities of some enterprises, regarding their size.

According to initial reconstructions, paper registers[25] or electronic badges might be accepted, provided that the system adopted is suitable for ensuring the effectiveness of the rights enshrined by the Court [26].

The issue of measuring working hours is a topic that much of the legal doctrine has examined. Among the many points of reflection, one of the added values provided by the Court of Justice lies in qualifying the measurement system as "objective, reliable, and accessible", which is why systems that might prescribe superficial or approximate annotations of working hours by the employer do not seem appropriate.

With specific reference to internal legislation, it should first be noted that there is no explicit implementation of the principle established by the Court of Justice. However, it is possible to examine Legislative Decree No. 104 of 2022, the so-called "transparency decree" implementing Directive 1152 of 2019, to examine some convergence profiles.

Given the faithful, almost always literal, transposition of the directive's provisions, this discussion will refer, by way of example, directly to the internal regulations.

The provisions introduced under the so-called "transparency decree" also have significant implications for the issue of working hours.

It is appropriate to recall the main objectives of the Directive, to understand the motivations that led the European legislator to introduce regulations on working hours.

Indeed, several of the recitals of the directive highlight the more specific objectives considered by the EU legislator, which are then directly concretized by the regulations.

For example, pursuant to considerando No. 19, information on working hours should include "information on breaks, daily and weekly rest periods and the amount of paid leave, thereby ensuring the protection of the safety and health of workers".

The recurring reference to safety protection needs in EU working hours legislation helps clarify the legislator's objectives.

[25] As it happens in Spain, where article 34.9 of the Workers' Statute, as amended by Royal Decree-Law No. 8 of 8 March 2019, establishes the obligation to keep a daily timekeeping register. This register must specify the actual start and end times of each worker's workday, without prejudice to flexible scheduling. The register must be accessible to employees, their legal representatives, and labor inspectors for a period of four years.

[26] LECCESE, Vito Sandro, La misurazione dell'orario di lavoro e le sue sfide, *Labour & Law Issues*, vol. 8, n. 1, 2022, p. 6.

Additionally, considerando No. 21 states that "if it is not possible to indicate a fixed work schedule because of the nature of the employment, such as in the case of an on-demand contract, employers should inform workers how their working time is to be established, including the time slots in which they may be called to work and the minimum notice period that they are to receive before the start of a work assignment".

To meet this identified need, a detailed set of informational obligations has been established.

Of particular importance is the reference, in considerando No. 1, to article 31, paragraph 2, of the Charter of Fundamental Rights of the European Union, emphasizing the guarantee of workers' rest and the limitation of maximum working hours.

Article 4 of the legislative decree, amending article 1 of Legislative Decree No. 152/1997, has regulated specific informational obligations concerning aspects related to working hours.

According to the mentioned article 1, as rephrased by the transparency decree, the employer, whether public or private, is required to inform the worker of "the schedule of normal working hours and any conditions related to overtime work and its remuneration, as well as any conditions for shift changes, if the employment contract provides for an organization of working hours that is entirely or largely predictable" (letter o).

Furthermore, "if the employment relationship, characterized by largely or entirely unpredictable organizational methods, does not provide for a scheduled normal working time, the employer shall inform the worker about: 1) the variability of the work schedule, the minimum amount of guaranteed paid hours, and the remuneration for work performed in addition to the guaranteed hours; 2) the reference hours and days within which the worker is required to perform work tasks; 3) the minimum notice period to which the worker is entitled before the start of a work assignment and, if permitted by the contractual type in use and agreed upon, the deadline by which the employer can cancel the assignment" (letter p).

These two provisions are evidently complementary and provide for two different obligations for the employer, who must comply in one way or another depending on the predictability of the organization of working hours[27]. In broad terms, it is appropriate to clarify what is meant by an "entirely or largely predictable" organization of working hours, and an employment relationship characterized by largely or entirely unpredictable organizational methods.

The notion of "predictability" of working hours is elusive and appears to be characterized by aspects of opacity[28]. It should be clarified that the predictability of the temporal placement of the work performance should be assessed not with reference to the type of employment contract but to the organization itself. In other words, this derives from the exercise of the organizational powers of the employer to determine the scheduling of acti-

[27] GAROFALO, Domenico, TIRABOSCHI, Michele, Prime riflessioni sul decreto trasparenza (d.lgs.104/2022) modificato dal decreto "lavoro" (d.l. 48/2023), *Argomenti di Diritto del Lavoro*, n. 4, 2023, p. 667.

[28] TURSI, Armando, "Trasparenza" e "diritti minimi" dei lavoratori nel decreto trasparenza, *Diritto delle Relazioni Industriali*, n. 1, 2023, p. 18 and 20.

vities according to the working hours chosen by the employer, such as through shift work, and not from the type of individual agreement concluded with the worker[29].

The unpredictability of work activity, on the other hand, manifests when it is not possible to establish a work schedule and, thus, to determine ex ante the temporal placement of the performance[30].

The principle established by the Court of Justice regarding the measurement of working hours is framed and compatible with the legal framework of the transparency decree, concerning the information on working hours provided by letters o) and p) mentioned previously. This assertion could be supported by the objectives of the decree itself, as stated in the recitals of the directive implemented, which seem to establish, in addition to an adequate level of transparency and predictability for working conditions, also indirectly, a verification of the implementation of the information's content.

For instance, to ensure the protection of workers' safety and health, it can be inferred, indirectly from the content of the transparency decree, that the employer, in addition to complying with the previously mentioned informational obligations regarding working hours, is also directly responsible for implementing the content of the information. Thus, in this sense, the information becomes a prerequisite for ensuring compliance with a specific right[31].

In this context, an extensive interpretation of article 13 of the decree could be useful, understanding the worker's complaint as aimed at obtaining the correct information and ensuring the implementation of the information's content. This assertion would allow us to maintain that the worker cannot be treated unfavorably for the violation of the informational obligations, and for those related to working hours, it can be argued that the necessity to measure working hours is inherent to ensure compliance with the rights and objectives set out in the 2019 directive's considerando.

The issue of measuring working hours has been recently addressed, from a *de iure condendo* perspective, by the European Parliament Resolution of 21 January 2021, with recommendations to the Commission on the right to disconnect (2019/2181(INL))[32].

Article 3, paragraph 2, provides the obligation for Member States to ensure that "employers set up an objective, reliable and accessible system enabling the duration of time

[29] Also, PROIA, Giampiero, Trasparenza, prevedibilità e poteri dell'impresa, *Labor*, n. 6, 2022, p. 647. Moreover, it is noteworthy that the same decree defines, echoing a provision of the Directive, the organization of work as "the form of organizing working time and its distribution in accordance with a specific arrangement established by the employer" (article 2, paragraph 1, letter c).

[30] In any case, employment relationships falling under an unpredictable organization may include those of intermittent subordinate work (articles 13 and following of Legislative Decree No. 81/2015), given the specific organizational function of the contract itself, designed so that the employer can utilize the service "on request". These scenarios may also encompass cases where collective bargaining provides, as may occur in the case of remote work, for goal-oriented work without predetermined working hours.

[31] Executed by anyone in the sense of CJEU, 14 May 2019, Case C-55/18, *cit.*, paragraph 56 of the reasoning: "by contrast, a system enabling the time worked by workers each day to be measured offers those workers a particularly effective means of easily accessing objective and reliable data as regards the duration of time actually worked by them and is thus capable of facilitating both the proof by those workers of a breach of the rights conferred on them by Articles 3 and 5 and 6(b) of Directive 2003/88, which give specific form to the fundamental right enshrined in Article 31(2) of the Charter, and also the verification by the competent authorities and national courts of the actual observance of those rights".

[32] The resolution with recommendations has not yet been adopted today.

worked each day by each worker to be measured, in accordance with workers' right to privacy and to the protection of their personal data. Workers shall have the possibility to request and obtain the record of their working times". The principle established by the Court of Justice in the case *Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank*, combined with the context of the proposed directive, aims to protect the effectiveness of the right to disconnect, both substantively and dynamically. As a matter of fact, the proposal stipulates that workers can request and obtain the record of their working hours[33].

Additionally, according to article 4, paragraph 1, letter b), the system for measuring working hours falls within the working conditions that must be guaranteed by Member States. It seems appropriate to consider that this article should also be read considering article 7, paragraph 1, letter b), regarding informational obligations, according to which Member States are required to ensure that employers provide each worker with clear, sufficient, and adequate information in writing about the right to disconnect, particularly with specific reference to the system of measuring working hours.

This latter provision seems to align perfectly with the previously interpreted transparency decree currently implemented in domestic law.

Considering the foregoing part of the doctrine has pointed out that, although the obligation to establish a certain and objective system for measuring working hours is crucial for the effective enjoyment of the right to disconnect, particular attention must also be paid when the work is performed in an agile manner, especially in the absence of precise time constraints[34].

In such cases, one of the desirable solutions could be the establishment of alert mechanisms, managed by algorithms or artificial intelligence, which could simplify the measurement of remote work performance, as already provided for by collective bargaining, particularly at the company level[35].

3. The reinterpretation of European jurisprudence's principles on working hours in relation to remote work: potential implications for agile work hours.

In light of the significant efforts undertaken by EU jurisprudence in recent years[36] to adapt the notion of working time by extending the strict definitions outlined in article 1,

[33] FENOGLIO, Anna, Una veste digitale per il diritto al riposo: il diritto alla disconnessione, *Lavoro Diritti Europa*, n. 4, 2021, p. 13.

[34] LECCESE, Vito, Se il lavoro iperconnesso diventa l'occasione per scaricare sull'uomo il rischio di impresa, *Guida Lavoro*, 39, 2019, X; BIASI, Marco, Individuale e collettivo nel diritto alla disconnessione: spunti comparatistici, *Diritto delle relazioni industriali*, n. 2, 2022, p. 403.

[35] In this regard, the virtuous example of the Campari Agreement must be reported. See DAGNINO, Emanuele, Il diritto alla disconnessione nell'esperienza contrattual-collettiva, *Lavoro Diritti Europa*, n. 4, 2021, p. 6, note 25 with reference to tools "for managing the reporting of attendance/absences ... which will generate an alert related to exceeding working hours as well as possible warning messages suggesting disconnection once the normal working hours are reached".

[36] See CJEU, 3 October 2000, Case C-303/98; CJEU, 9 September 2003, Case C-151/02; CJEU, 5 October 2004, Cases C-397/01 and C- 403/01; CJEU, 7 September 2006, Case C-484/04; CJEU, 17 November 2016, Case C-216/15; CJEU, 21 February 2018, Case C-518/15.

paragraph 2, letter a) of Legislative Decree No. 66 of 2003, it is appropriate to consider whether legislative intervention is necessary to modify the regulation of working hours in view of the rapid and radical changes in the world of work.

It is also necessary to consider the current level of potential absorption of the principles established by the jurisprudence of the Court of Justice, with specific reference to digital work, which currently finds its point of emergence and connection with positive law in the form of agile work.

First and foremost, it should be noted that agile work, as it stands, cannot a priori be considered as a free zone from the application of restrictive regulations on working time, especially due to the evident lack, in most cases, of the conditions of self-determination defined by article 17, paragraph 1, of Directive 2003/88/EC on working time and article 17, paragraph 5, of Legislative Decree No. 66 of 2003[37].

Unless one is dealing with a specific situation where the worker could maintain an autonomous decision-making power regarding when and how much to work because they are not subject to "precise time constraints"[38], all other situations appear to fall within the scope of European working time regulations and the national transposition thereof. In the former consideration, it is likely that the elements outlined in the directive cannot be easily identified in remote work execution modes, characterized by spatial-temporal fluidity and the free self-determination and self-organization of work activities regarding when and how much to work.

From the considerations made thus far, it emerges that the most recent jurisprudence of the Court of Justice supports the position that the applicability of "only the maximum duration limits of daily and weekly working hours deriving from law and collective bargaining" pursuant to article 18, paragraph 1[39], cannot be generally extended to all agile workers.

The extension of such regulation is evaluated concerning some agile workers who, due to the result-oriented nature of their collaboration, are not obliged to comply with a "working schedule"[40], both concerning the EU-derived limits and those sourced from domestic law.

For these reasons, reflection on the current relevance of the notion and concept of working time is more pertinent than ever and probably requires reconsideration. Despite the diminished need for spatial-temporal coordination of work performance, there is now a perspective of broadening the concept of working time, tied to new principles arising from the evolution of living law.

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[37] On the problematic coordination, see PROIA, Giampiero, *L'accordo individuale e le modalità di esecuzione e di cessazione della prestazione*, in FIORILLO, Luigi, PERULLI, Adalberto (a cura di), *Il Jobs act del lavoro autonomo e del lavoro agile*, Torino, Giappichelli, 2018.

[38] In other words, when not involved in situations involving the coexistence of the three elements identified in Article 1, paragraph 2, letter a) of Legislative Decree No. 66 of 2003.

[39] ROZZOLINI, Orsola, Lavoro agile e orario di lavoro, *Diritto delle Relazioni Industriali*, n. 2, 2022, p. 383 ss.

[40] BELLOMO, Stefano, *Orario di lavoro, riposi, ferie: i principi costituzionali, la normativa europea ed il quadro regolativo definito dal d.lgs. 8 aprile 2003 n. 66*, in SANTORO-PASSARELLI, Giuseppe (a cura di), *Diritto e processo del lavoro e della previdenza sociale*, Milano, Giappichelli, 2020, p. 1205 ss.

The new notion of working time should consider, above all, flexible work organization, exceeding, in certain situations, the paradigm of the relevance of time and emphasizing organization linked to a program. This is a consequence of the changes in both the space and time of subordination in digital work.

4. The containment of work time and the guarantee of undisturbed enjoyment of non-work time: the role of disconnection.

It is no coincidence that the national legislator began, as early as 2017, to focus on the issue of the "new" overlap between work and non-work time, with particular reference to digital work. Indeed, to attempt to contain work time and prevent it from encroaching on non-work time[41], the legislator introduced the right to disconnect into our legal system, inextricably linking it to remote work as a measure to protect workers[42] and improve work-life balance[43]. Simultaneously, the legislator's intent was to allow workers to enjoy their free time without intrusion into their private lives outside working hours. The protection of the right to disconnect for remote workers thus addresses the specific needs arising from the nature of work in the digital era, which heavily relies on technological tools. Actually, there is no clear definition of disconnection provided by law in our legal system[44].

The only legislative acts mentioning disconnection date to[45]: the first one to 2017, Law No. 81, article 19, and the second one to 2021, Law No. 61, converting Decree-Law No. 30 of 2021, article 2, paragraph 1-*ter*.

Regarding Law No. 81 of 2017, an interpretative reading of article 19, while not providing a definition of disconnection, indirectly leads legal practitioners to consider it related particularly to non-work time[46].

Based on the content of article 19, it can be argued that it is necessary to identify specific technical and organizational measures within the remote work agreement to ensure the separation of workers from technological tools[47].

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[41] Thus avoiding the interference of work in non-work time called "time porosity". See GENIN, Émilie, Proposal for a Theoretical Framework for the Analysis of Time Porosity, *International Journal of Comparative Labour Law and Industrial Relations*, n. 3, 2016, 281 ss.; WEISS, Manfred, Digitalizzazione: sfide e prospettive per il diritto del lavoro, *Diritto delle Relazioni Industriali*, n. 3, 2016, p. 657 ss.

[42] SPINELLI, Carla, *Tecnologie digitali e lavoro agile*, Bari, Cacucci, 2018, p. 153.

[43] KRAUSE, Rüdiger, *"Always-on": The Collapse of the Work-Life Separation in Recent Developments, Deficits and Counter-Strategie*s, in ALES, Edoardo, CURZI, Ylenia, FABBRI, Tommaso, RYMKEVICH, Olga, SENATORI, Iacopo , SOLINAS, Giovanni(a cura di) *Working in Digital and Smart Organizations*, Palgrave Macmillan, 2018, p. 223 ss.

[44] Cf. on the subject of right of disconection CALDERARA, Dario, *Garanzia della disconnessione nel rapporto di lavoro*, Torino, Giappichelli, 2024, in particular p. 68-69.

[45] Before the introduction of Law No. 81 of 2017, agile working was regulated through agreements under collective bargaining, such as the Nestlé Agreement of October 12, 2012, the Barilla Agreement of March 2, 2015, the Zurich Agreement of September 23, 2015, the Snam Agreement of November 26, 2015, the Euler Hermes Agreement of January 15, 2016, the Axa Agreement of April 12, 2016, and the Eni Agreement of February 6, 2017.

[46] TIMELLINI, Caterins, La disconnessione bussa alla porta del legislatore, *Variazioni su temi di Diritto del Lavoro*, n. 1, 2019, p. 332.

[47] ALES, Edoardo, Il lavoro in modalità agile e l'adeguamento funzionale della subordinazione: un processo indolore?, *Federalismi*, n. 34, 2022, p. 183.

Article 2, paragraph 1-*ter*, does not offer additional insights into the notion of disconnection, except for formally qualifying it as a right and respecting any agreed periods of availability[48].

From a contractual perspective, besides the multiple regulations provided by collective bargaining agreements, the National Protocol on Agile Work of December 7, 2021[49], attempts to outline a "new normal" for post-pandemic agile work and is worth examining to identify a definition of disconnection.

For a more precise definition of disconnection, it is currently necessary to refer to the European Parliament's Resolution of January 21, 2021, with recommendations to the Commission on the right to disconnect. Article 2 of this resolution states that "disconnect means not to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working time".

The notion of the right to disconnect is found in considerando No. 10 of the draft directive, which defines it as "workers' right not to engage in work-related activities or communications outside working time, by means of digital tools, such as phone calls, emails, or other messages. The right to disconnect should entitle workers to switch off work-related tools and not to respond to employers' requests outside working time, with no risk of adverse consequences, such as dismissal or other retaliatory measures. Conversely, employers should not require workers to work outside working time. Employers should not promote an 'always on' work culture in which workers who waive their right to disconnect are clearly favoured over those who do not. Workers reporting situations of non-compliance with the right to disconnect in the workplace should not be penalised". In practice, disconnection can be achieved by turning off company phones during non-working periods, setting devices to offline mode to signal "unavailability"[50], or prohibiting work-related communications during disconnection periods[51]. It can also involve allowing employers to send communications if workers do not receive them during their disconnection period.

Therefore, the right to disconnect is crucial in a digitalized context to allow workers to reclaim their free time[52], a right increasingly recognized by both national[53] and European jurisprudence[54].

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[48] FENOGLIO, Anna, Una veste digitale per il diritto al riposo: il diritto alla disconnessione, *Lavoro Diritti Europa*, n. 4, 2021, p. 10.

[49] Article 3, National Protocol on Smart Working of December 7, 2021, available at the following website: https://www.lavoro.gov.it/notizie/Documents/PROTOCOLLO-NAZIONALE-LAVOROAGILE-07122021. See ALBI, Pasqualino, Introduzione: il Protocollo nazionale sul lavoro agile tra dialogo sociale e superamento della stagione pandemica, *Lavoro Diritti Europa*, n. 1, 2022, p. 1 ss.; ZOPPOLI, Lorenzo, Il protocollo sul lavoro agile nel settore privato e gli "altri", *Lavoro Diritti Euro*pa, n. 1, 2022, p. 1 ss.

[50] TIMELLINI, Caterina, Il diritto alla disconnessione nella normativa italiana sul lavoro agile e nella legislazione emergenziale, *Lavoro Diritti Europa*, n. 4, 2021, p. 9.

[51] MAGAGNOLI, Silvia, Diritto alla disconnessione e tempi di lavoro, *Labour & Law Issues*, n. 2, 2021, p. 95 ss.

[52] NICOLOSI, Marina, La disconnessione nel patto di agilità tra legge, contrattazione collettiva e diritto europeo, *Lavoro nelle Pubbliche Amministrazioni*, n. 4, 2022, p. 695 ss.

[53] See Cass. 21 May 2008, n. 12962, in *Rivista italiana di diritto del lavoro*, 2008, II, p. 825 ss., with note by BOLEGO, Giorgio, *Sul potere del datore di lavoro di variare la collocazione dell'orario nel full time*.

[54] See CJEU, 21 February 2018, Case C-518/15; CJEU, 9 March 2021, Cases C-344/19 and C-580/19.

The blurred boundaries of the regulation, which does not specify a precise time frame but only requires it to be adequate to ensure respect for workers' personal lives, necessarily raise questions about its placement and effectiveness.

Thus, this provision does not represent a regulatory endpoint as it is currently explicitly addressed only to some remote workers, specifically agile workers. It is undoubtedly desirable for both European [55] and Italian legislators to intervene to broaden the scope of such protection and better define its boundaries, particularly concerning the measurement of working hours and implementation methods.

The mentioned European resolution envisions a commendable combination of recognizing the right to disconnect and requiring companies to adopt "an objective, reliable, and accessible system that allows for the measurement of the duration of the daily working hours performed by each worker," in line with the Court of Justice's earlier ruling in the Grand Chamber judgment of May 14, 2019, C-55/2018. This approach reinforces the belief that the containment of working hours and the guarantee of undisturbed enjoyment of non-working time are complementary and essential guarantees, neither interchangeable nor substitutable.

SECTION 2: LEGAL ISSUES ON PLATFORM WORKERS' CLASSIFICATION

1. Italian legislation on platform work

The issue of qualifying the employment relationship of platform workers in Italy has been the subject of initially conflicting positions.

Indeed, the Italian debate mainly focused on the riders, as major disputes involved these workers. There has never been any doubt that the rider worked with companies operating through digital platforms. In other words, no ruling has recognised the platforms' function as mere intermediaries. Furthermore, there are no known cases in which platforms involving riders have identified themselves as intermediaries.

The debated issue has been the nature of the employment relationship, namely whether the relationship between the rider and the digital platform was an autonomous or subordinate employment relationship. Like many other continental legal systems, the Italian legal system distinguishes between subordinate workers (employees) and autonomous workers (self-employed) and applies different protections to each category.

Initially, platforms classified the working relationships with riders as autonomous, sometimes in the form of coordinated and continuous collaborations. This form of autonomous work involves coordination by the commissioning company and is subject to some special, sometimes more protective, regulations.

[55] Recently, consultations have been initiated under Article 154 of the Treaty on the Functioning of the European Union (TFEU) to gather opinions on the possible direction of EU action aimed at ensuring fair telework and the right to disconnect (first phase started on April 30, 2024, and concluded on June 11, 2024 - C(2024) 2990 final).

Disputes over the classification did not take long to arise. The most well-known case, at least initially, was the Foodora case, in which judges ruled in three different ways in the three levels of judgment. The autonomous workers sought recognition of the subordinate nature of the relationship or at least its hetero-organized nature.

At this point, it is necessary to introduce a peculiarity of Italian legislation to explain what has just been said. There is a norm, Article 2 of Legislative Decree No. 81 of 2015, which provides that hetero-organized collaborations, identified as those continuous, predominantly personal collaborations organised by the commissioning party, are subject to the regulations of subordinate work, with some exceptions.

Italian scholars have long debated the systematic meaning of this rule, particularly whether it regulated subordinate or autonomous work[56]. It is not relevant to deepening the issue here. Suffice it to say that in the early years of disputes over the classification of riders' relationships, the rule's application on hetero-organized collaborations became the most common way to apply subordinate work regulations.

In fact, in the context of the Foodora case, as early as the appeal judgment in 2018[57], the application of the norm on hetero-organized collaboration to riders was admitted. This choice was confirmed by the Italian Supreme Court (Corte di Cassazione) ruling of January 24, 2020[58], which also deemed applicable to riders some regulations that the appellate court had denied (for example, dismissal regulations).

The growing importance of the norm regarding hetero-organized collaborations in categorizing riders can likely be explained by the concept that this rule enabled the implementation of subordinate work regulations to relationships that may not fit the usual subordinate model.

The path chosen by the judges was also supported by the Italian government, which, by amending the same norm on hetero-organized collaborations with Decree-Law No. 101 of 2019, specified, perhaps unnecessarily[59], that it should also apply "when the methods of performance are organized through platforms, including digital ones".

By explicitly mentioning digital platforms in the norm, the intention was to suggest the applicability of the rule to riders. However, it should be noted that, as will be seen in the analysis of case law on platform work, there has been a gradual trend to classify the working relationship of platform workers directly as subordinate, without going through the norm on hetero-organized collaborations.

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[56] *Ex multis*: SANTORO-PASSARELLI, Giuseppe, Ancora su eterodirezione, etero-organizzazione, su coloro che operano mediante piattaforme digitali, i riders e il ragionevole equilibrio della cassazione n. 1663/2020*, Massimario di Giurisprudenza del Lavoro*, numero straordinario, 2020, p. 203 ss.; MARESCA, Arturo, La disciplina del lavoro subordinato applicabile alle collaborazioni etero-organizzate*, Diritto delle Relazioni Industriali*, n. 1, 2020, p. 146 ss.; PISANI, Carlo, Le nuove collaborazioni etero-organizzate, il lavoro tramite piattaforme digitali e gli indici presuntivi della subordinazione, *Argomenti di Diritto del Lavoro*, n. 6, 2019, p. 1191 ss.; ZOPPOLI, Antonello, La collaborazione eterorganizzata: fattispecie e disciplina, *Diritti Lavori Mercati,* n.1, 2016, p. 33 ss.

[57] App. Turin, 4 February 2019, n. 26.

[58] Cass. 20 January 2020, n. 1663.

[59] PISANI, Carlo, Le nuove collaborazioni etero-organizzate*, cit.*, p. 1201; D'ASCOLA, S, La collaborazione organizzata cinque anni dopo, *Lavoro e diritto*, n. 1, 2020, p. 11.

As a consequence, some digital platforms have begun to classify riders as subordinate workers from the outset, even through the signing of collective agreements[60].

However, it should be noted that the aforementioned Decree-Law No. 101 of 2019 also introduced regulations exclusively aimed at self-employed riders (located in Articles 47-bis ff. of Legislative Decree No. 81 of 2015). These regulations apply obviously in cases where the norm on hetero-organized collaborations can't be applied because there's not a hetero-organization by the digital platform. It is worth emphasizing that these regulations apply specifically to riders and not to other platform workers.

To apply these regulations, digital platforms are considered "the programs and computer procedures used by the commissioning party that, regardless of the place of establishment, are instrumental to delivery activities, setting the compensation and determining the methods of performance" (Article 47-bis). The definition, by providing that the digital platform determines the compensation and methods of performance, seems to contrast, as some scholars have argued[61], with the autonomous nature of the riders' work to which the regulations should apply.

The rules provide more protective measures than those normally applicable to autonomous workers, due to the riders' weakness in the market, even when they are autonomous and not subordinate workers. There are obligations of information and the stipulation of a written contract. These obligations are sanctioned through compensatory indemnities (Article 47-ter). Regarding the compensation for autonomous riders (Article 47-quarter), it is provided that:

- The compensation is determined according to the criteria established by collective agreements signed by the most representative national trade unions and employer organizations;
- If collective agreements are not signed, riders can't be paid based on deliveries made, and they must be guaranteed a minimum hourly wage in accordance with the provisions of national collective agreements of similar or equivalent sectors signed by the most representative national trade unions and employer organizations.

Based on these provisions, a collective agreement signed by an insufficiently representative organization[62] was considered not capable of providing a specific regulation on matters reserved for collective agreements signed by the most representative trade unions[63]. Moreover, the Ministry of Labour intervened with a note[64], specifying that even the collective agreements signed by the most representative organizations could not provide for compensation based solely on deliveries made.

[60] Collective agreement of 29 March 2021, signed by Just Eat and Italian trade unions (FILT-CGIL, FIT-CISL, UIL).

[61] See, for example, PERULLI, Adalberto, Il diritto del lavoro "oltre la subordinazione": le collaborazioni etero-organizzate e le tutele minime per i riders autonomi, *WP CSDLE "Massimo D'Antona".it,* n. 410, 2020, p. 59.

[62] Collective agreement of 9 september 2020, signed by AssoDelivery and UGL Riders.

[63] Trib. Bologna, 12 January 2023.

[64] Note of 17 September 2020 by the legislative office of the Italian Ministry of Labour.

Additionally, riders must be guaranteed a supplementary indemnity of no less than 10 per cent for work performed at night, during bank holidays, or in adverse weather conditions. The amount of these indemnities is determined by the aforementioned collective agreements or, if there are not, by a decree of the Minister of Labour and Social Policies.

Furthermore, the law extends to autonomous riders the anti-discrimination regulations and protections of workers' freedom and dignity provided for subordinate workers. In relation to this, it is specified that exclusion from the platform and reductions in work opportunities attributable to the non-acceptance of performance are prohibited (Article 47-inquires).

Finally, it is worth noting the provision of Article 47-species, which extends to riders' insurance coverage against accidents and regulations on workplace safety[65].

2. Italian case law on platform workers' classification

As reminded above, the Italian Supreme Court (Corte di Cassazione) ruling of January 24, 2020 has clarified several important regulatory aspects concerning the collaborations organised by the client, also defined as hetero-organized collaborations, introduced by Article 2, paragraph 1, Legislative Decree No. 81/2015.

In its ruling the Supreme Court takes into account and thoroughly examines the different interpretations of that legal provision envisaged by scholars and emerged in case law.

Essentially, four theories have been developed:

a) The first theory is based on the so-called "qualifying method" and fully recognises the classification of subordination for the activities performed by workers, such as those on digital platforms, which entail characteristics prohibited by Article 2, paragraph 1.
b) The second theory, proposed by the Turin Court of Appeal in ruling No. 26/2019[66], suggests to adopt an intermediate classification between autonomy and subordination. Such classification is characterised by the hetero-organization as per Article 2, paragraph 1 and is referred to as the *tertium genus*. The collaborations organised by the client should be considered a new contractual type within the legal system (however, prohibited by the principles of delegation enshrined in Law No. 183/2014), to which some protections deriving from the contract of employment regulations are granted. The Court of Turin's approach, deemed incorrect by the Supreme Court, did not consider feasible a generalised extension of the rules on subordination but chose a selective path, limiting applicable protections.

[65] PASCUCCI, Paolo, Note sul futuro del lavoro salubre e sicuro... e sulle norme sulla sicurezza di rider & co., *Diritto della Sicurezza sul Lavoro,* n. 1, 2019, p. 48.

[66] CARABELLI, Umberto, SPINELLI, Carla, La Corte d'Appello di Torino ribalta il verdetto di primo grado: i riders sono collaboratori etero-organizzati, *Riv. giur. lav.*, II, 2019, p. 91-99.

c) The third theory suggests to create a sub-category within autonomous work, where the identifying characteristics are significantly differentiated, falling within the broad notion of para-subordination.
d) The fourth theory refers to the "remedial approach," which is based on identifying some regulatory indicators to provide "strengthened" protection for workers who are particularly vulnerable as contracting parties, such as riders, extending to them the protections of subordinate work.

The last theory is the one embraced by the Supreme Court: it confirms the workers' autonomy in performing their activities while acknowledging strengthen protections to them, equivalent to those granted to employees[67].

The "remedial" position supported by the legitimacy judges of the Supreme Court leads to a significant consequence: when hetero-organization is identified, there is no automatic reclassification of the contractual relationship, but the employer must recognise to the hetero-organised workers the same economic and regulatory treatment applied to employees engaged in similar or related tasks.

Article 2, paragraph 1, Legislative Decree No. 81/2015 foresees a "disciplinary rule" that does not create a new legal paradigm. In other words, according to an anti-fraud perspective, the lawmaker has merely established the application of the contract of employment regulations to continuous, predominantly personal collaborations organised by the client. As a consequence, there would be no incentive for the employer to classify a worker as either hetero-organized or employee, since the applicable regulatory framework would remain the same in both cases.

However, according to the Supreme Court, the judge is not precluded from further investigating the facts potentially leading to the full recognition of subordination. This approach aligns with the general principle that it is the judge's responsibility to determine the nature of an employment relationship, thereby fitting the specific case into the appropriate legal category by considering the characteristics of the activity carried out within the particular relationship[68].

In this perspective, the decision of the Tribunal of Palermo on November 24, 2020 was the first Italian ruling to classify a rider's work performance as subordinate[69]. This decision was subsequently supported by the Tribunal of Turin[70] and the Tribunal of Milan[71], which adopted the same reasoning.

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[67] SPINELLI, Carla, I riders secondo la Cassazione: collaboratori etero-organizzati regolati dalle norme sul lavoro subordinato*, DLM*, 2020, p. 172-181.

[68] *Ex plurimis*, Cass. 24.8.2021, n. 23324; see CARINCI, Franco, DE LUCA TAMAJO, Raffaele, TOSI, Paolo, TREU, Tiziano, *Diritto del lavoro, Il rapporto di lavoro subordinato*, XI ed., Torino, Utet, 2022, p. 64 ss.

[69] RICCOBONO, Alessandro, Lavoro su piattaforma e qualificazione dei riders: una «pedalata» verso la subordinazione, *Riv. giur. lav*, n. 2, 2021, p. 241 ss.; SCELSI, Antonio Alessandro, Una nuova onomastica digitale per i poteri del datore di lavoro, *Labor*, 2021, p. 459 ss.

[70] Trib. Torino, 18 novembre 2021, commented by GARILLI, Alessandro, DE MARCO, Cinzia, La qualificazione del lavoro dei rider: ancora una volta il giudice accerta la subordinazione e individua nella piattaforma interponente il reale datore di lavoro*, Labor,* n. 2, 2022, p. 213 ss.

[71] Trib. Milano, 20 April 2022, commented by BELLAVISTA, Alessandro, Riders e subordinazione: a proposito di

The three lawsuit were sued to denounce the misclassification of the riders hired by three different multinational food delivery companies (respectively Foodinho/Glovo, Uber Eats and Deliveroo), all of which were adopting quite similar work organisational patterns.

The platform companies' main argument to confirm the riders were self-employed was that: *"there is no obligation to perform the service as the plaintiff is always free not to accept delivery proposals and work for other principals or cancel delivery proposals and work for other principals"*. This argument had been successful in the first trials on platform workers' misclassification, which excluded the subordination of riders[72].

On the contrary, in their rulings the Tribunals of Palermo, Turin and Milan, according to the principle of the primacy of facts, focused their analysis on how the workers had to execute the work performance, aiming to demonstrate the absence of a real freedom of choice by the riders and, consequently, the presence of the necessary features to ascertain the existence of an employment relationship.

The three Courts affirmed that the entire work performance of the riders was directed and controlled by the platforms. In particular, the system of access to booking slots was influenced by the rider's reputational ranking, the allocation of delivery proposals was determined by an algorithm based on criteria entirely unrelated *"to the preferences and choices of the worker"*, the performance of the assignments was pervasively controlled through geolocation.

Recently, the Tribunal of Milan further extended the employment protections recognised to hetero-organized workers according to the Italian Supreme Court (Corte di Cassazione) ruling of 2020, which determined that when the conditions set out in Article 2 are met, the legal framework for the contract of employment must apply. Based on this precedent, the judge in Milan decided in favour of the applicability to the food delivery riders of all trade union rights (September 28, 2023) and, for the first time, of social security protections (October 19, 2023)[73].

At this stage, it is important to argue whether recognising subordination in platform work case law is now a "non-issue." This conclusion can be reached, as the examined case law confirm (even if focused on riders only), because the jurisprudence interpretative approach, according to which all the protections of subordination apply to hetero-organized workers, is now well established. Thus, ultimately, any difference in the standard of protections between hetero-organised and subordinate workers has been overcome through the rulings of the Courts[74]. Therefore, currently, Article 2, paragra-

una recente sentenza, Lavoro Diritti Europa, n. 2, 2022; INGRAO, Alessandra, Riders: un altro passo verso la subordinazione, *Labour Law Issues*, vol. 8, n. 1, 2022, p. 59 ss.

[72] See Trib. Milano 10 September 2018, in *Riv. giur. lav*, 2019, II, 82 ss., commented by SPINELLI, Carla, Riders: anche il Tribunale di Milano esclude il vincolo di subordinazione nel rapporto lavorativo*;* Corte App. Torino 4.2.2019, quoting Trib. Torino 7.5.2018, in *RIDL*, 2018, II, p. 283 ss., commented by ICHINO, Pietro, Subordinazione, autonomia e protezione del lavoro nella gig economy.

[73] GRAVINESE, Antonella, Tutele collettive e previdenziali per i riders: superate anche le ultime riserve alla integrale equiparazione nel trattamento, *Riv.Giur.Lav.-Giurisprudenza-online_Newsletter*, n. 1, 2024

[74] A fundamental role to reach this goal was played by the litigation strategies put in place the Italian trade unions. See SENATORI, Iacopo, SPINELLI, Carla (eds.), *Litigation (Collective) Strategies to Protect Gig Workers' Rights. A Comparative Perspective*, Giappichelli, 2022.

ph 1, Legislative Decree No. 81/2015 provide for an adequate legal framework for the classification of platform workers. Such adequacy will have to be tested once the EU Platform Work Directive and the rebuttable legal presumption of subordination, which it introduces, will be implemented in the Italian legal order.

SECTION 3: THE IMPACT OF DIGITALIZATION ON THE INDUSTRIAL RELATIONS SYSTEM

1. Workplace Digitalisation and Trade Unions Strategies

The growing use of technology in the workplace, qualified as the "Fourth Industrial Revolution – Industry 4.0"[75], has profoundly impacted the labour market and work performance paradigms. The advent of a new digital era has facilitated the execution of work entirely or partially outside conventional workplaces. Additionally, processes such as recruitment, task assignment, training and performance management have been delegated to automated systems, a phenomenon known as "algorithmic management".

In this context, trade unions face many challenges in two main areas: union action modalities and collective rights exercise.

Technology enables new ways of conducting union activities, allowing a broader interaction, aggregation, and discussion than traditional ones. This includes using social media to promote collective initiatives, company mailing lists and new dynamics of union conflict[76]. However, the lack of physical interaction complicates the construction of "collective action"[77], adding individualistic tendencies of online workers to the already known crises in union representation mechanisms in the digital ecosystem[78].

This scenario has led the three major Italian Confederations to recognise the need for a deep renewal process to counteract the so-called union disintermediation[79] and manage the digitalisation of production processes.

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[75] On this topic, see SEGHEZZI, Francesco, *La nuova grande trasformazione. Lavoro e persona nella quarta rivoluzione industriale*, Bergamo, Adapt, 2017; SCHWAB, Klaus, *La quarta rivoluzione industriale*, Milano, FrancoAngeli, 2016; DEL PUNTA, Riccardo, *Un diritto per il lavoro 4.0*, in CIPRIANI, Alberto, GRAMOLATI, Alessio, MARI, Giovanni (eds.), *Il lavoro 4.0*, Firenze, Firenze University Press, 2018, p. 225 ss.

[76] The net strike and the union Twitter storm are significant examples. Although these actions cannot be classified under the right to strike as defined by Article 40 of the Constitution due to the absence of work abstention, they represent new forms of self-protection for collective interests. A union net strike is a coordinated and collective action by a group of workers who, after consultation and proclamation, organise a simultaneous, invasive, but non-predatory cyber-attack. This involves multiplying concurrent connections to the employer's target website to slow down or prevent its activity or accessibility. Conversely, a union Twitter storm (tweet bombing or Twitter bomb) is a planned and orchestrated attack on a company's social media account. It uses dedicated hashtags and retweets to spread across a social media platform where the employer has an active profile.

[77] GIARGIULO. Umberto, SARACINI, Paola, Riflettendo su parti sociali e innovazione tecnologica, *Quad. Diritti, lavori, mercati*, n. 15, 2023, p. 9 ss.

[78] TULLINI, Patrizia, L'economia digitale alla prova dell'interesse collettivo, *Labour Law Issues*, vol. 4, n. 1, 2018, p. 1 ss.

[79] SACCOIA, Giorgio, Il sindacato al tempo della rivoluzione digitale, *Ec. e soc. reg.*, 1, 2019, p. 79 ss.

In this sense, the CGIL[80], with the motto "Let's Negotiate the Algorithm!" or also "Let's Negotiate Digital Innovation", has created an online collaborative platform ('Idea-diffusa') to provide the necessary tools to *"interpret the ongoing changes and envision the union's role as an actor participating in the governance of these processes."*[81]

Similarly, the CISL[82], oriented towards direct participation of workers, has started 2017 the "Industry 4.0 Laboratory," which involves experts from the Polytechnic of Milan and maintains a *"permanent working group to help the union find an adequate perspective on innovation"*[83]. The Metallurgical Federation Fim-Cisl, with the programmatic motto "Smart Union to Drive Change", has promoted a "digital trade union card" and a "digital check-off" process based on blockchain technology.

In 2021, the UIL[84] created a digital trade union platform called 'Terzo Millennio', designed for the sharing of projects, training paths and common claims, described as a "*revolution in the way of being and doing unionism, which adds to the traditional and consolidated communication tools while strengthening the statutory organisational structure*". In line with this project, the Tertiary Federation of the Uil has established 'Net-worker,' an online trade union platform similar to the "Terzo Millennio" platform but targeted to web professionals and ICT workers. Noteworthy, in this context, is also the recent initiative (July 2024) involving the University of Foggia, UIL and Sicurform Italia Group, aimed at providing digital training courses for unemployed and underemployed individuals in the regions of Basilicata, Campania, Molise, Puglia and Sicily.

All these initiatives shed light on the divergences between the three confederations — particularly between the CGIL and the CISL— - in terms of approach to technological innovation. While the UIL's initiatives, with the exception of the recent project mentioned above, seem to be focused on "digitizing the union" and thus reshaping its future role, the CGIL's and CISL's approaches seem to be driven by a desire to project their respective visions and formulate union policies and strategies that respond to evolving social and labor realities. The CISL sees digitalization as an opportunity to modernize industrial relations and organizational structures. The CGIL, on the other hand, takes a more cautious stance, considering the possibility of involving employees in company decisions through their representatives and advocating measures to mitigate potential abuses.

Nevertheless, there are some jointly undertaken initiatives, such as the document published in March 2017, "An Italian Way to Industry 4.0 Looking at the Most Virtuous European Models". In this document, the three main Confederations agreed to highlight the lack of awareness regarding the new skills necessary to accompany and support Industry 4.0 processes, whose full implementation is *"an essential condition for enhancing the quality and competitiveness of production, economy and labour in our country".*

[80] General Italian Confederation of Labour.

[81] MAIOLINI, Cinzia, DE LUCA, Alessio, *IA: lavorare con l'intelligenza artificiale*, Roma, Ediesse, 2021.

[82] Italian Confederation of Workers' Unions.

[83] CAMPAGNA, Luigi, PERO, Luciano, PONZELLINI, Anna M., *Le leve dell'innovazione. Lean, partecipazione e smartworking nell'era 4.0*, Milano, Guerini Next, 2017.

[84] Italian Labour Union.

2. Workers' Participation vs. Collective Bargaining: still there?

The growing role of Artificial Intelligence in production processes has reawakened the historical debate on ethics, industrial democracy, and workers' participation. Given that the "industrial conflict" has historically found its "material basis"— its "real substrate or structure"—in the "prominent position" employers gain from decision-making power over production organisation[85], it is also evident that the algorithmic management of working conditions and the centralisation of decision-making powers within ICT systems have enhanced the imbalance of powers between the contracting parties in the employment relationship. This shift has led to a more pronounced form of "technological subordination" of workers.

More precisely, the lack of knowledge about the data processing methods and the operational modalities of complex automated monitoring and decision-making systems impacting employment relationships produces information asymmetries between employers and employees. Since such asymmetries accentuate the imbalance of powers between the contracting parties in the employment relationship, providing information and consultation rights to the employees and their representatives may be considered adequate protection tools. Such an approach is consistent with the international and supranational legal framework, which indicates the inappropriateness of relying solely on individual protection in situations where a power imbalance may manifest (see the ILO Code of Practice on the Protection of Workers' Personal Data, sections 5.8, 5.11, and 12.2; the EU Regulation 2016/679 (GDPR), Recital 43). In this sense, in recent years, managerial practices —where workers and their representative organisations' involvement often meant mere adherence to corporate restructuring programs and technology bargaining was marginal in the trade unions agendas— are being abandoned in favour of both more transparent working conditions and more effective procedures for informing and consulting employees and their representatives.

Aware of these changes, in 2016, CGIL, CISL, and UIL signed a document to outline "*A Modern System of Industrial Relations*," where social dialogue and workers' participation through information and consultation rights are indicated as a guiding criterion for the *"permanent technological and digital revolution."* Social partners believe that supporting trade unions' involvement in relevant matters concerning digitalisation as an antidote to digital changes' side effects on workers would restore the Confederate unionism's "*natural vocation as a driving force for economic and social development"*, allowing a response to the *"crisis of representation with a bold and discontinuous choice towards innovation, transparency and democracy."*

Since the Constitutional Charter (1948), the Italian industrial relations system has been centred on the conflict-collective bargaining binomial. Consequently, industrial democracy as a mode of governance of the employment relationship has historically held a secondary position. Article 46 of the Constitution, which recognises the workers'

[85] GIUGNI, Gino, *Il diritto sindacale*, Bari, Cacucci, 2014.

right to participate in the company management "in the manners and within the limits established by law", has remained substantially unimplemented.

However, the recent changes described seem to have settled favourable conditions for a revival of the industrial democracy method, not in opposition but in coordination with the classic negotiating approach.

The link between digitalisation, technology and industrial democracy is also emphasised in the agreement 'Contents and guidelines of industrial relations and collective bargaining', also known as the 'Factory Pact', signed in 2018, 9th March by Confindustria, CGIL, CISL, UIL. The signatory parties *"consider that a more effective and participatory system of industrial relations is necessary to qualify and implement the processes of transformation and digitalisation in manufacturing and innovative, technological, and industry-support services."* The Pact further addresses this issue in a specific section (6. g), where trade unions involvement in organisational settings are described as essential for fostering a *"different relationship between enterprises and workers,"* necessitated by economic, productive and technological changes, achievable through the interventions of company-level and national level collective bargaining. The task of collective bargaining is to *"enhance, in the various sectoral contexts, the most suitable paths for organisational participation"*. This Inter-sectoral Agreement signed just a few days before the Italian political elections, sent a clear message to the incoming government, underscoring the importance of industrial democracy and collective bargaining in the digital transition. Notably, the CGIL has highlighted the significance of this agreement by emphasising the enhanced industrial democracy achievable through its regulations. On the other hand, the CISL underscored the consensual foundation from which these regulations originate[86].

Finally, the implementation of industrial democracy in the digitalised workplace is also witnessed by recent trends at a national level.

The issue of involving trade unions and workers' representatives in several aspects of digitalisation, data management and the understanding of digital systems has been addressed in the proposal presented on January 29, 2024, by Slc-Cgil, Fistel-Cisl, and Uil-Com for the renewal of the National Collective Agreement for Telecommunications 2023-2025. The proposal states, *"the pervasiveness of algorithmic systems requires that trade unions receive the maximum amount of information on the digital systems used and the processing of data deriving from these systems. 'Negotiating the algorithm' is not a self-fulfilling prophecy. There is a need for real, daily involvement of workers' representatives in understanding AI-based systems."*

In the same vein, the draft national collective agreement for Metalworkers 2024-2027, which is under negotiation among Federmeccanica-Assistal, CGIL, CISL, and UIL, expresses the parties' hope for *"the establishment of adequate regulations to prevent distorted uses leading to abuses or violations of laws and/or collective agreements, to encourage participation in defining the processing of data (e.g., data protection, data retention, information rights, etc.) and to mitigate the negative impact of algorithms while sharing the*

[86] GASPARRI, Stefano, TASSINARI, Arianna, *Relazioni industriali 'intelligenti' in divenire? Approfondimenti dall'analisi delle risposte sindacali alla digitalizzazione in Italia, Erudit,* Département des relations industrielles, Université Laval, 2020.

benefits of artificial intelligence. Digital transformation must align with and respect workers' rights and collective bargaining".

3. Enforcing Trade Union Rights through Legislation

The Italian legal framework concerning collective rights to information and consultation mainly stems from the implementation of European law.

According to the Legislative Decree No. 25 of 2007 (art. 4, par. 3, lett. c), implementing Directive 2002/14/CE, information and consultation rights entail, firstly, communications to workers' representatives by the employer on matters of business interest, such as decisions likely to bring significant changes in work organisation, and secondly, the exchange of opinions on these matters between the parties.

Recently, Article 4 of Legislative Decree No. 104/2022, implementing Directive 2019/1152/EU on transparent and predictable working conditions in the European Union, and amending Article 1 of Legislative Decree No. 152/1997, has introduced information rights to the benefit of workers and trade unions. According to this provision, employers or public and private clients must inform workers about automated decision-making or monitoring systems relevant to hiring, task assignment, work performance, and contractual obligations. More precisely, the required information includes a) aspects of the employment relationship affected by automated decision-making or monitoring systems; b) purposes and goals of those systems; c) logic and functioning of those systems; d) categories of data and main parameters used to program or train those systems, including performance evaluation mechanisms; e) control measures on automated decisions, revision processes and the quality management system; f) the level of accuracy, robustness and cybersecurity of those systems, metrics used to measure these parameters and potential discriminatory impacts of these metrics.

For the first time in Italy, the law foresees information rights on automated decision-making or monitoring systems, granted to individual workers – who can also exercise them through works councils or territorial trade unions – but also directly to the workers' representatives[87].

Such information rights grounds the workers' representatives' power of control on algorithmic management; thus, their violation can be sanctioned as "anti-union conduct" under Article 28 of the Workers' Statute[88]. Trade unions can file a lawsuit in response to harmful behaviours adopted by companies aimed at preventing and/or limiting the exercise of trade union rights. The judge will issue an order for the employer to provide the necessary information[89].

[87] According to paragraph 6, information rights shall be provided "to the works councils or to the territorial unit of the trade unions that are comparatively more representative at the national level.

[88] The so called Workers' Statute, Law No 300/1970, is the fundamental regulation in Italy which support trade union activities in the workplace providing for trade union rights.

[89] RECCHIA, Giuseppe Antonio, Condizioni di lavoro trasparenti, prevedibili e giustiziabili, *Labour and Law Issues*, vol. 9, n. 1, 2023.

This was the case with the ruling of the Tribunal of Palermo, decree of April 3, 2023, which clarified that if information can be requested "also" by trade unions, they hold an additional right besides those granted to each worker. This judgement aligns with the Italian court's rulings on platform work[90], which have contributed to improving working conditions and recognising platform workers' rights due to litigation strategies pursued by trade unions and CGIL[91].

Article 4 of the Legislative Decree No.104/2022 has then been modified by the Legislative Decree No. 48 of May 4, 2023 (the so-called 'Labor Decree'), which amended Article 1-bis of the Legislative Decree No. 152/1997. Article 26 of the Labor Decree added the word 'fully' to identify the automated decision-making and monitoring systems which are the object of the rights to information; it also rewrote paragraph 8, excluding any obligations concerning those systems covered by secrets under industrial or trade law. Regarding the First Amendment, the norm shall be interpreted in the light of the Ministry of Labour Administrative Guidelines No. 19 of September 20, 2022, clarifying that providing information is mandatory not only regarding fully automated decision-making systems but also for those which imply human intervention, even if merely accessory. As for the Second Amendment, as clarified by case law[92], industrial and trade secrets cannot be considered an obstacle to providing information about the operational procedures of algorithmic management systems since they can only cover the mathematical formulas used.

4. Digital Trade Union Rights

As mentioned, the digital revolution extends beyond new union action methods and emerging industrial democracy needs, involving the way to practice trade union rights.

The absence of a traditional physical space where to perform their activity, named the *"exit of work from the traditional factory physical space"*, which affects many categories of workers nowadays, implies concerns regarding how to carry on the traditional trade union rights foreseen under Title III of the Workers' Statute. It is a "polycentric" regulation that provides workers protection as part of the employment relationship and supports the role of trade unions at the company level in hindering the employer's power.[93]

Technological workplaces and the transcendence of the "materiality" of places, envisaged by Law No. 300 of 1970 for the exercise of certain codified trade union rights, require rethinking the modalities to exercise those rights to ensure that the "new working spaces" become a vehicle for expanding collective rights, instead of contributing to their emptying.

An important tool for trade union activity is the notice board, which, under Article 25 of the Workers' Statute, must be made available by the employer in locations

[90] See above Sec. 2, par. 2.

[91] For further readings on this topic, see at least SENATORI, Iacopo, SPINELLI, Carla, *Litigation (Collective) Strategies to Protect Gig Workers' Rights: A Comparative Perspective*, Torino, Giappichelli, 2022.

[92] Trib. Palermo, 20th June 2023.

[93] See VENTURA, Luciano, Lo Statuto dei lavoratori: appunti per una ricerca, *Rivista Giuridica del Lavoro*, I, 1970, p. 531.

accessible to all workers within the production unit, allowing workers' representatives to post publications, texts, and communications related to trade union and working conditions matters. Article 26 recognises the workers' rights to collect contributions and engage in proselytism for their unions within workplaces without undermining normal business operations. Article 26 protects various legal situations concerning proselytism, propaganda, and collecting taxes. Dissemination through the notice board, proselytism, and collection of contributions are closely linked together by a logical necessity, whereby collecting memberships and contributions for union enrolment could not occur without "promotional propaganda" of the benefits deriving from union participation. The objectives and aims pursued by Articles 25 and 26 have led the social partners to regulate the virtual bulletin board through collective bargaining.

More structured collective agreements focus on the right to assembly and the activation of tools that enable remote interaction among workers and their representatives. According to Article 20 of the Workers' Statute, meetings are held at the company premises and serve as a means of workers' direct participation in union and labour interest issues. Article 20 allows collective bargaining, also at the company level, to define "additional modalities" for this right exercise, which has thus also been regulated by collective bargaining in its online version. It is up to the company to ensure entitled workers' representatives have electronic notice boards and suitable IT 'places' for conducting remote union meetings[94]. Company trade unions rarely provide a web platform for exercising online assembly rights.[95]

Case law is also moving towards the 'digitalisation' of classic trade union rights, including the use of email for union communication. The first ruling in this area dates back to the mid-1990s when the Tribunal of Milan established that *"the FIOM-FIM-UILM representatives at company level have the right, under Article 25 of the Workers' Statute, to use an electronic notice board to communicate with the workers identical to the IT tool used by the company with the same aim".* Recently, the Supreme Court[96] stated that "*the evolution of remote communication methods and the greater effectiveness achieved through reaching the workers via their email box shall be considered a necessary update of the transmission methods of information and communication to ensure the real effectiveness of trade union activity"*. Therefore, the Court has recognised that the distribution of union communications by email falls under the proselytism activity provided for and protected by Article 26 of the Workers' Statute. Thus, it is permitted whenever it does not undermine productive activity at the company level.

[94] See, for example, the following company agreements: TIM S.p.A. 04.08.2020; ABI 21.12.2020; Gromart S.r.l. 04.01.2021; Engie Italia S.p.A. 15.01.2021; WindTre, WindTre Italia, WindTre Retail 03.02.2021; SNAM S.p.A. 05.03.2021; Benetton Group CIA 09.09.2021; ENI S.p.A. 28.10.2021; Poste Italiane S.p.A 01.03.2022; Comdata S.p.A. 17.03.2022; Leonardo 08.03.2022; ENEL 21.03.2022; Fastweb S.p.A. and Fastweb Air S.r.l. 18.05.2022. See also Intesa Sanpaolo S.p.A. Protocol on *Principles and Guidelines for New Agile Work in the Telecommunications Supply Chain* 30.07.2020; Guidelines for agile work in the insurance and insurance/assistance sector 24.02.2021; National Collective Agreement for Laundries and Dry Cleaners - Industry Artisanship 28.02.2022 in Osservatorio sulla digitalizzazione delle relazioni industriali, Report 2023.

[95] Assolavoro, *Memorandum of understanding* of 24.11.2020.

[96] S.C. Cass. n. 35643 of 22 December 2022 e n. 35644/2022.