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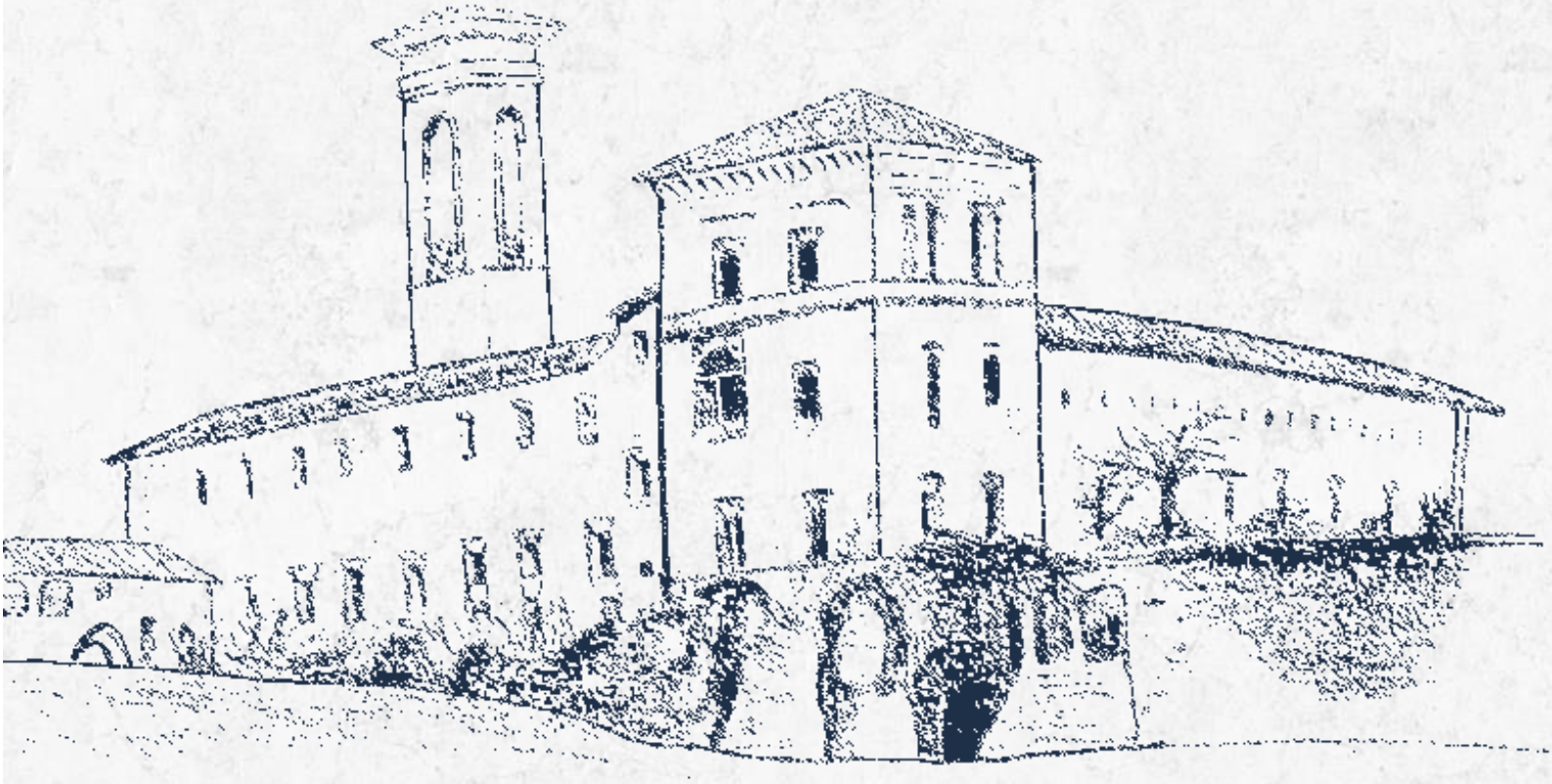

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Two Notions to Delimit the Nature of Work on Digital Platforms: Autonomy and Alienness

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Abstract

Nowadays, we are experiencing an increasing and ever-growing resort to the use of technologies at work, and even new forms of employment are appearing through the use of digital platforms. These have been labelled with different terms such as "collaborative platforms", "sharing economy", "on demand economy", "gig economy", etc. Such reality has raised the justified question as to whether these forms of work provision are covered by Labour Law, or whether, on the contrary, they are excluded. Consequently, the purpose of this article is to analyse the personal scope of Labour Law, providing a critical view of subordination as a defining element of employment relationships and revaluing autonomy and alienness[1]: two notions that can delimit the employment nature of work on digital platforms.

Keywords: Platform Economy; Gig Economy; Employment Relationship; Autonomy; Alienness; Subordination; Self-employed workers.

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[1] Translator's note: The term "ajenidad" in Spanish refers to an essential condition of the employment contract, which implies that workers do not assume the risks or the benefits of providing their activity, they are not the owners of the means of production, do not provide their labour force directly for the market and do not use their own brand, but that of others, integrating themselves into the organisational structure of another person (their employer). Since there is no equivalent in the English language for such a notion, in the foregoing translation it shall be referred to as 'alienness' or 'alienation'.

Introduction

The implementation of "new forms of work" through the development of digital platforms has been linked to an economic explanation of the market that is intrinsically collaborative (among people), known as sharing economy, platform economy, on demand economy or gig economy[2]. Nevertheless, in some cases there is little at the core of the phenomenon of the business models to justify an altruistic notion such as sharing or helping. On the contrary, the on demand economy is clearly driven by economic incentives.[3]

On the other hand, the activity itself, i.e., the exchange of these goods or services, does not represent any novelty either. On the contrary, what is new is the rise of these technological tools of digital applications and platforms which allow this exchange activity to grow and be enhanced.[4]

But there is one novel character widely present in the gig economy, since the design of these business models rests on a methodical speech, as well as a formal implementation that is based on two central ideas: the first is related to the legal nature of the activity of these business structures; and the second, which naturally relies on the previous one, is linked to the legal relationship between the underlying service provider and the digital platform itself.

Certainly, the work carried out in the gig economy has been organizationally structured, in most cases, in such a way as to be formally apart from the regulatory scope of Labor Law. This new reality has very important implications considering that the consolidation of this paradigm

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[2] This term has been proposed by DE STEFANO as a "slogan" which lately has captured the attention of the media. (V. De Stefano, "The rise of the 'just in time workforce': On- demand work, crowdwork and labour protection in the 'gig economy'", *Inclusive Labour Markets, Labour Relations and Working Conditions Branch*, Conditions of Work and Employment Series, No 71, ILO, Geneva, p. 1 (2016), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf).

[3] M. Freedland and J. Prassl, "Employees, workers and the 'sharing economy' Changing practices and changing concepts in The United Kingdom", *Spanish Labour Law and Employment Relations Journal*, V. 6, No 1-2, Labor Law, Economics Changes and New Society Research Group - Carlos III University of Madrid, p. 17 (2017), https://e-revistas.uc3m.es/index.php/SLLERJ/article/view/3922.

[4] A. Aloisi, "Commoditized workers: case study research on Labour Law issues arising from a set of 'on-demand/gig economy' platforms", *Comparative Labor Law and Policy Journal*, Vol. 37, No 3, p. 655 (2016), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2792331_code2428967.pdf?abstractid=2637485&mirid=1.

of business organisation is having and will continue to have an increasingly real and negative impact on the working conditions of service providers, generating greater precariousness in comparison to the typical protection scheme of a dependent employment relationship. Note that, for example, the work developed on digital platforms generates a series of factual problems for the provider of the underlying services, such as a formal expansion of the boundaries of self-employment; laxed working hours; an impact on health and safety; difficulties of collective action; and inconveniences for social protection.

Accordingly, the phenomenon of digital platforms, far from being a novelty, is presented instead as one more expression of the trends towards the de-standardisation of Labour Law, precariousness and outsourcing, which is deepened by the novel administration through platforms governed by algorithms[5]. In this sense, VALLAS and SCHOR point out that platforms represent a manifestation of a much broader trend that has allowed companies to outsource risks that they had previously been forced to take. Initially, the evident effect on temporary employment and outsourcing is that working time becomes a commodity and the worker is disconnected from previous systems of social protection. What platforms then provide is a convenient and readily available infrastructure with which to limit the company's obligations to the workforce it relies on. From this point of view, platforms provide business organisations with another way of achieving accumulation through dispossession, i.e., the use of legal and financial mechanisms with which to root out the economic rights that workers previously enjoyed.[6]

In this sense, DUBAL has stated that "what is disruptive about the platform economy is the rate at which technology and venture capital together have spurred the growth of precarious unregulated independent contractor work".[7] In a similar way, CHERRY has described that "the

[5] A. Goldin, "Los trabajadores de plataforma y su regulación en la Argentina", *Documentos de Proyectos* (LC/TS.2020/44), Comisión Económica para América Latina y el Caribe (CEPAL), Santiago, p. 15 (2020), https://www.cepal.org/es/publicaciones/45614-trabajadores-plataforma-su-regulacion-la-argentina.

[6] S. Vallas and J. Schor, "What Do Platforms Do? Understanding the Gig Economy", *Annual Review of Sociology*, 46:1, p. 8 (2020), https://www.annualreviews.org/doi/pdf/10.1146/annurev-soc-121919-054857.

[7] V. Dubal, "Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy", *Wisconsin Law Review*, No 239, p. 752 (2017), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2597&context=faculty_scholarship.

new crowdwork seems a throwback to the de-skilled industrial processes associated with Taylor, but without the loyalty and job security".[8]

Therefore, there is a debate on the importance of taking action such as the regulation of these phenomena in order to prevent such precariousness from spreading to the rest of the economy. The regulatory approach has been influenced by the disruptive narrative with the past, since a generalized idea has been transmitted about the inadequacy of institutions and labor regulation, on the basis of considering that new phenomena require new regulations.[9]

However, it is also justified to ask (and I believe that this question should be asked chronologically before resorting to legislative intervention) if the classic categories and tools of Labour Law (such as dependency, which defines the legal configuration of an employment relationship) are sufficient to determine whether these new forms of work fall into the scope of Labour Law.

Various courts in all the continents have tried to answer this question and this has generated, rightly or wrongly, conflicting and inconsistent positions: on the one hand, it is understood that these forms of work provision are those of an independent or self-employed worker (and therefore, both the organisational business model and the inapplicability of Labour Law protection to these providers are validated), and on the other hand, it is construed that the work provided on digital platforms falls into the typical category of a dependent worker, thus extending Labour Law protection to these providers.

All this analysis would lead to the following question: are these new forms of work provision covered by Labour Law?

In short, it comes down to the old problem of establishing the scope of application of Labour Law and determining who are (or even who should be) the individuals protected by this discipline.[10]

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[8] M. Cherry, "Beyond misclassification: the digital transformation of work", *Comparative Labor Law & Policy Journal*, No 37, pp. 2-3 (2016).

[9] M. Rodríguez Fernández, "Anatomía del trabajo en la Platform Economy", AADTySS, p. 5, https://www.aadtyss.org.ar/docs/ANATOMIA_DEL_TRABAJO_EN_LA_PLATFORM_ECONOMY_MLRF.pdf.

[10] G. Davidov, M. Freedland and N. Kountouris, "The Subjects of Labor Law: 'Employees' and Other Workers", at M. Finkin and G. Mundlak (Eds.), *Research handbook in comparative labor law*, Eduard Elgar, p. 16 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561752.

2. Legal Classification Problems Generated by Work Carried Out on Digital Platforms

When the work developed in the gig economy is analyzed, there is a strong temptation to "close the case" by calling for a generalised re-classification aimed at protecting workers engaged in particularly flexible forms of employment. However, this would be an easy way to solve the controversy quickly and definitively, although the idea may be flawed, as it generalises that all work carried out on platforms should be considered as false self-employment (bogus self-employed workers).[11]

Indeed, not all digital platforms operate in the same way[12], nor are the services provided within the framework of this type of company in any way homogeneous. However, they have a common denominator as they use the internet and applications to connect the user with the provider of a good or service[13]. On the one hand, digital platforms that truly belong to the sharing economy will, in principle, be excluded from the scope of Labour Law since they tend to fit in with voluntary actions or friendly and benevolent work[14], while on the other hand, the remaining ones which are developed in a professional manner, also have their own particular characteristics that will require their appropriate study and legal framework, some of them having a special connection with Labour Law.

Notwithstanding this diversity of models, many of the companies that own digital platforms consider themselves to be providers of information society services, whose activity is limited exclusively to intermediation

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[11] V. De Stefano and A. Aloisi, *European legal framework for "digital labour platforms"*, European Commission - Publications Office of the European Union, Luxemburg, p. 47 (2018), https://publications.jrc.ec.europa.eu/repository/bitstream/JRC112243/jrc112243_legal_framework_digital_labour_platforms_final.pdf.

[12] J. Prassl and M. Risak, "Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork", *Comparative Labour Law and Policy Journal*, No 8/2016, p. 1 (2016), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2733003_code2511333.pdf?abstractid=2733003&mirid=1.

[13] R. Serrano, "Nuevas formas de organización empresarial: economía colaborativa -o mejor, economía digital a demanda-, trabajo 3.0 y laboralidad", at M. Rodríguez-Piñero and M. Hernández (Dirs.), *Economía colaborativa y trabajo en plataforma: realidades y desafíos*, Editorial Bomarzo, Albacete, p. 25 (2017).

[14] F. Calvo, "Uberpop como servicio de la sociedad de la información o como empresa de transporte: su importancia para y desde el derecho del trabajo", at M. Rodríguez-Piñero and M. Hernández (Dirs.), *Economía colaborativa y trabajo en plataforma: realidades y desafíos*, Editorial Bomarzo, Albacete, p. 372 (2017).

between the user or customer requesting a specific service on that platform and the provider of that service. Therefore, the companies formally present themselves as intermediaries between supply and demand, without any control or development of the product on offer, applying their energies to the creation of a mere technological support[15]. For this reason, they tend to label themselves as platforms developed within the scope of the sharing economy.

In line with this approach, if a company focuses its activity only on the development of a technological product, such as an application or digital platform, and does not actually provide any additional service, naturally, it will not be necessary for it to have dependent workers for the purpose of providing a different service which does not constitute or form part of its core of business. Therefore, the providers of the underlying service offered within these platforms are considered by companies as self-employed or genuine entrepreneurs and businessmen.

However, when analysing this reality based on Labour Law, a problem arises from the moment these discursive and formal premises begin to distance themselves from the material facts. In this sense, the first aspect to consider is whether the technological support is accompanied by the offer of an underlying service, allowing to understand that it is incorporated or it constitutes the usual or main line of business of the digital platform.

In addition to the above, the second element to analyse corresponds to the development of the work provided by those who are formally self-employed, bearing in mind that the picture becomes more complex when the digital platform orders, manages and controls the worker and, in addition, receives a fee for each service provided.[16] In such cases, on the one hand, the organisational model of these platforms could shift from a self-classification as sharing economy companies to that of platform economy or on demand economy (which has led to the designation of these situations as improper models of sharing economy or sharing economy in a broad sense[17]). Furthermore, on the other hand, the

[15] M. Alameda, *Empleo autónomo en la hibridación del mercado de trabajo*, LA LEY 15181/2018 (2018), www.laleydigital.laley.es.

[16] Alameda *supra* 12.

[17] L. Miranda, "Economía colaborativa y competencia desleal. ¿Deslealtad por violación de normas a través de la prestación de servicios facilitados por plataformas digitales?", *Revista de Estudios Europeos*, No 70, Instituto de Estudio Europeos de la Universidad de Valladolid, Valladolid, pp. 207-208 (2017).

classification of the legal relationship established with the service provider could eventually be re-routed towards one of dependent work.
The complexity pointed out is increased by the fact that what arises from the forms is not a determining element when it comes to defining the application of the legal regime of Labour Law. On the contrary, what is essential to the extension of labour protection regulations comes to the analysis of what actually happens in real life. Because of this, Labour Law has traditionally based its foundations on the concepts of dependence or subordination and alienness so as to include within its scope of application all the legal relationships that gather these essential elements.
For this reason, the "new forms of work" analysed from the point of view of Labour Law pose a problem of legal classification. Its resolution will lead to the inclusion of a given factual situation within the scope of application and protection of the Labour Law system, or on the contrary, to its exclusion.

3. Conceptual Premises and Legal Framework to Determine the Nature of the Relationship between Service Providers and Digital Platforms

As a starting point, it should be noted that there are certain concepts and premises that have been legally considered as central dogmatic elements in the processes of determining the existence (or not) of employment relationships. These are constructions legitimised by some regulatory statements in Comparative Law, as well as by doctrinal constructions and/or case law interpretations that have an important inclination towards their universal application. In particular, many of these statements are contained in the ILO International Labour Recommendation No. 198 (hereinafter ILO R198)[18], which sets out the inspiring and guiding principles for the policies to be applied by member States after failing to agree on the adoption of an International Convention on this matter.
From an historical perspective of the drafting process of ILO R198, its approval has been particularly significant and has clarified the objectives, principles and instruments of the ILO and of Labour Law. Likewise, regarding its importance and legal effectiveness, this international

[18] C. Carballo has highlighted the universal nature of ILO R198 ("Patrono y Empresa. Revisita a propósito del trabajo mediante plataformas digitales", *Tripalium. Justicia Social y Trabajo Decente*, Vol. I, No 1 (2019), www.tripaliumsite.wordpress.com).

instrument indicates' what both the legislator and the judge should and should not do[19].

In short, ILO R198 constitutes the appropriate legal framework to be considered, as it contains a series of particularly important dogmatic statements on the determination of an employment relationship.

First, it establishes the application of a specific method as it enhances the "typological method" or the "similarity judgement"[20] by detailing the specific indicators that should be considered in the determination of an employment relationship. In this sense, there has been an intentional deviation from the "criterion of subsumption"[21], insofar as this would have required the express recognition of a specific definition of employment relationship, as well as the identification of its essential elements. The practical difficulties resulting from the diverse normative realities of each Member State, as well as the different political views of the social actors and governments, have undoubtedly been decisive barriers when opting for a different method, to allow for the universal application of the statements endorsed in the ILO R198.

Secondly, and hand in hand with the method adopted, certain conditions that operate as indicators for the determination of the existence of an employment relationship are enunciated; specifically, remuneration, subordination, economic dependence, alienness, personal service, durability, and exclusivity.

Thirdly, and no less important than the other two statements, the international instrument expressly confirms a position which breaks away from the element of subordination by disregarding it as the only essential element to typify an employment contract.

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[19] O. Ermida, "La Recomendación de la OIT sobre la relación de trabajo (2006)", *rev. Derecho Laboral*, No 223, FCU, Montevideo, p. 683 (2006).

[20] Translator's note: Procedure used to diagnose the existence of an employment relationship, which consists of looking for indications which may reveal such relationship, by analysing multiple elements, and weighing how many elements point towards an employment relationship and how many point towards a self-employed figure.

See B. Waas, "The legal definition of the employment contract in section 611a of the Civil Code in Germany: An important step or does everything remain the same?", *Italian Labour Law e-Journal* 12, No 1, pp. 26–27 (2019), https://doi.org/10.6092/issn.1561-8048/9695.

[21] Translator's note: The criterion of subsumption is used to diagnose the existence of an employment relationship by indicating which elements are essential for an employment relationship to exist, and therefore, if only one of them is missing, it is concluded that there is no employment relationship. It compares regulations with reality, and every element expressly required by the legislator must be verified.

In this sense, Chapter II of the ILO R198 establishes the facts related to the performance of work as the fundamental principle to base the determination of an employment relationship, and it lays down the techniques to make this determination, including presumptions'. As for subordination or dependence, a "displacement" is detected, since it introduces the idea that this criterion ceases to be hegemonic and seems to be exhausted, to the extent that it is merely mentioned by way of example[22].

4. Critical Review of the Central Role of Subordination in the Determination of the Existence of an Employment Relationship

Since the origins of Labour Law it has been difficult to establish the boundaries between subordinate work and self-employment, as the emergence of new employment realities provokes the resurgence of old debates and generates centrifugal and centripetal tensions that expel or integrate certain types of ways of working from or into the scope of application of Labour Law[23]. For this reason, it has been pointed out that the history of Labour Law is identified with the history of subordination, and also with the history of objecting to subordination as a distinctive criterion of dependent work[24].

Despite this constant opposition and tension, it is possible to point out that currently there is a strong tendency which suggests the inadequacy of the criterion of dependence as an element that defines the essence of an employment contract, and therefore the scope of the application of Labour Law.

The fact that dependence was set out in the ILO R198 as a merely exemplary instrument and not a determining and imperative one, ratifies it is being questioned, as well as its deep insufficiency for the determination of the existence of an employment relationship.

Consequently, it would be reasonable to raise a naturally critical and stirring question. The question comes down to figuring out if it is imperative and essential to analyse the element of subordination in order

[22] H. Barretto, "La determinación de la relación de trabajo en la Recomendación 198 y el fin del discurso único de la subordinación jurídica", *rev. Derecho Laboral*, No 225, FCU, Montevideo, pp. 91-98 (2007).

[23] J. Cruz Villalón, "El concepto de trabajador subordinado frente a las nuevas formas de empleo", *Revista de derecho social*, Nº 83, pp. 13-14 (2018).

[24] D. Rivas, *La subordinación. Criterio distintivo del contrato de trabajo*, FCU, Montevideo, p. 34 (1996).

to classify the legal relationship or whether, on the contrary, it would be plausible to postulate its displacement as the sole defining criterion of the existence of an employment relationship.

In historical terms the total suppression of this element would constitute an inadequate solution from the point of view of the subject of study that is proper to Labour Law, since ontologically this is based on the work freely provided by man, when employed by a third party, in exchange for valuable consideration and in a subordinate manner[25]. Some authors even postulate the idea that subordination and dependence constitute the two vulnerabilities present in the protection purposes of Labour Law regulations[26]. However, and in line with the aforementioned critical approach, it would be possible to introduce some considerations and nuances in relation to the postulate of dependence and its classical identification as a central element of an employment contract.

Indeed, it can be reasonably understood that the element of dependence has historically been effective, given that in the process of recognition of a legal relationship this device was simple, evident and almost intuitive, since in most cases it did not require a complex logical operation. On the other hand, when the case did not have a simplistic and obvious answer, the procedure showed its weakness, as it was necessary to resort to the technique of the bundle of clues[27], hitherto limited to marginal or exceptional cases. Nowadays, the problem has worsened with the increased use of this technique, which, would be good if used exceptionally, or in other words, it is all the more effective the less it is used. In this way, it is possible to diagnose that due to the profound transformations under way, this process of recognition of dependence (simple, evident and almost intuitive) has lost its original primacy; and therefore the need to explore the boundaries of dependence becomes more and more usual and the technique of the bundle of clues reveals (according to its growing use) its congenital weakness[28].

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[25] A. Plá Rodríguez, *Curso de derecho laboral*, T. I, V. I, Acali Editorial, Montevideo, p. 92 (1976).

[26] G. Davidov, "The Status of Uber Drivers: A Purposive Approach", *Spanish Labour Law and Employment Relations Journal*, V. 6, No 1-2, Labor Law, Economics Changes and New Society Research Group - Carlos III University of Madrid, pp. 10-11 (2017), https://e-revistas.uc3m.es/index.php/SLLERJ/article/view/3921/2477.

[27] Translator's note: technique which unlike the criterion of subsumption, instead of verifying the presence of all elements in the situation analysed, infers the existence of a subordinate relationship from the combination of several indicators.

[28] Goldin *supra* 5, pp. 17-18.

The grounds for questioning subordination as a central delimiting criterion of the boundary between the protection afforded by Labour Law and the exclusion from its scope of application stems from the very characteristics of this institution. The reason is that it has a purely legal scope, also defined as a possibility or power of the employer, which is expressed and verified by the presence of four specific powers: the powers of organisation, management, control, and discipline.

In short, if subordination is conceived in this way, this element will respond to a question of a strong socio-economic nature, such as the question of who needs social protection, with the technical-formal answer that everything depends on how and under what conditions work is performed[29].

And precisely in order to respond to this question, a method resembling that of the bundle of clues, of empirical and scarcely reliable content, has been flexibly followed, insofar as it is not based on the search for legal descriptions of contracts, abstractly speaking, but on the presence, and the dose, of certain essential elements. This has led to the construction in case law of an indeterminate legal concept, such as that of dependence, which appears as a consequence of the performance of an activity within the organisation and management sphere of the employer[30].

By virtue of such content and extension, the inevitable consequence is reflected in the fact that subordination can be exercised or reserved and not exercised at the sole discretion of the employer.

This legal power has often been confused with a material force, to the extent of denying the existence of a state of subordination when there is no cohabitation between employee and employer, when there is no possibility to actually give orders or pronounce them verbally, because for some authors the subordination created by this contract would still be something like a restored form of servitude[31].

For this reason, one of the questions arising from this observation is that it would be unreasonable that the verification of one of the possible central elements of the contract depended on the verification of a legal

[29] J. Ugarte, "La subordinación jurídica y los desafíos del nuevo mundo del trabajo", *Revista Gaceta Laboral*, Vol. 11, No 1, Universidad de Zulia, Venezuela, p. 29 (2005), http://www.redalyc.org/articulo.oa?id=33611102.

[30] M. Palomeque and M. Álvarez De La Rosa, *Derecho del Trabajo*, 24th edition, Editorial Universitaria Ramón Areces, Madrid, pp. 476- 477 (2016).

[31] F. De Ferrari, *Derecho del Trabajo*, Vol. I, Depalma, 2nd edition, Buenos Aires, p. 317 (1968).

and not a factual matter, whose manifestation even depends on the will of one of the parties in the relationship.

For subordination to exist, it does not need to be materialized, but instead it is verified when one of the contracting parties is empowered to direct the activity of the other. Likewise, from this power to direct stems the related powers of control and supervision of the activity; from which it follows that subordination implies the simple possibility of directing even if it is not used. In addition, in actual fact, the power to direct can be exercised by the employer or by those who represent him, and furthermore, it manifests itself in naturally varied ways, and with varying degrees of intensity[32].

This suggests the idea that it is reasonable to deduce that this element should be considered as a potential effect of the employment contract. In this sense it can be identified abstractly with a state of latency as in most cases it may be exercised by whoever is attributed the status of employer, or it may be hibernating and awaiting its subsequent manifestation.

This has a transcendental consequence when determining the presence of an employment relationship, since from both points of view, whether substantial, or adjectival or evidential, the element of subordination could be assigned a somewhat relegated importance, at least in terms of the central role traditionally attributed to it.

Indeed, if the powers of organisation, management, control, and discipline that are inherent to the employer are not externalised, it is easy to see that there would be a case of probatio diabolica at the expense of the worker, insofar as the verification of this legal element would on many occasions be materially impossible. However, if considered as an effect of the employment contract, this component would cease to have the transcendence traditionally attributed to it, especially when proving the existence of the employment relationship. In any case, its importance is vindicated if it manifests in facts and is unveiled in reality, since in that case it would be possible to carry out an analysis to verify its factual expression, to rule out any doubts as to the classification of the legal relationship under analysis.

In line with this consideration, what is truly particular (the essence) about the platform economy is the voluntary "passivity" of the companies to exercise the power to impose penalties and/or the power to terminate a

[32] A. Plá Rodríguez, *Curso de derecho laboral*, T. II, V. I, Ediciones Idea, Montevideo, p. 25 (1991).

contract. And, in this sense, on occasions it is a merely contained permissiveness that does not entail a complete waiver of them[33].

For this reason, a false debate on subordination or dependence has been generated when it comes to classifying the relationship between service providers and the companies that own digital platforms. In this sense, an apparent freedom of the service provider has been suggested, as well as a deliberate dissipation of the characteristic features of the employer. On this basis, corporate slackness generates false problems such as the "right to refuse work", or "no fixed work schedules". For this reason, it can be proposed a different reading, considering instead that the fact that employers do not exercise some of their powers does not mean that they do not have them and, therefore, does not blur their legal nature[34].

To complement this analysis, it is appropriate to make a reading from the point of view of alienness, as one of the central elements that identify an employment contract. Subordination, as it has been pointed out, constitutes a consequence or an effect of the contract; or in other words, a latent state that governs it. Precisely, the employer is vested with a power, which content is identified with the possibility of organising the work, directing the tasks of other individuals, controlling, and penalising them. On the other hand, this entitlement arises from the initial transfer of the fruits of the workers' labour (i.e., a manifestation of alienness) and, particularly, of part of their freedom.

For this reason, organising the work, giving peremptory and specific instructions, carrying out a meticulous control of the work done, and eventually penalising the worker, are contingent and not necessary aspects. It follows that their manifestation and materialization depend on the free will of the employer, so if they exist and are expressed their limits shall be set by Labour Law. On the other hand, if they are not articulated, Labour Law will allow the employer to unilaterally decide to restore part of the worker's freedom. But the state of subordination will remain latent, and its materialization and manifestation will depend exclusively on the employer. Criticism to the central role of subordination in determining the existence of an employment relationship responds to the need to reorder

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[33] I. Beltran, "Economía de las plataformas (*platform economy*) y contrato de trabajo". *Ponencia XXIX Jornades Catalanes de Dret Social (marzo'18)* (2018), https://www.academia.edu/.

[34] I. Beltran, "Riders de Glovo: ¿trabajadores o TRADEs? (¿hasta qué punto estamos "apegados" a nuestras ideas?)", *Una mirada crítica a las relaciones laborales*. Blog entry for February 18 (2019), https://ignasibeltran.com/2019/02/18/riders-de-glovo-trabajadores-o-trades-hasta-que-punto-estamos-apegados-a-nuestras-ideas/.

its importance as a mere consequence of alienness[35]. Subordination of the worker is an inevitable consequence of the situation of those employed by a third party on a long-term basis. This is because the very organisation of this work binds them to comply with the instructions of the employer, and on the other hand, because those who live off work provided to another depend economically on the person who provides them with this profit opportunity[36].

As practice shows, the starting point followed for the analysis of the classification of the relationship between the parties, when in doubt, has turned out to be identical, in those solutions that were inclined to identify the existence of employment by a third party as well as in those that recognised a hypothesis of self-employment. In this sense, in accordance with the traditional criterion and for the purpose of giving one answer or the other, the study of each case has been limited to the proof of the essential elements of the employment contract, by reviewing them in terms of whether they were verified. If they were not verified, the existence of an employment relationship was ruled out, as this tipped the balance in favour of its non-existence[37].

It should be noted that, predominantly, this criterion has found (and finds) as its main obstacle the impossibility of fully and effectively proving

[35] J. Maldonado, "Superación del concepto clásico de contrato de trabajo", *El futuro del trabajo que queremos. Conferencia Nacional Tripartita*, Ministerio de Empleo y Seguridad Social, Madrid, p. 381 (2017).

[36] A. Sempere, "Sobre el concepto de Derecho del Trabajo", *Revista Española de Derecho del Trabajo*, No 26, Civitas, Madrid, p. 184 (1986).

[37] Such approach is used in many judgments dictated at the comparative level. See, among others: 33a Vara do Trabalho de Belo Horizonte, Process No 0011359-34.2016.5.03.0112, 02.13.2017; 8a Vara do Trabalho de São Paulo, Tribunal Regional do Trabalho, 2nd Região, Public Civil Action ACPCiv 1001058-88.2018.5.02.0008, Orders No 1001058- 88.2018.5.02.0008, 06.12.2019; Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Juzgado de lo Social No. 11 of Barcelona, Sentence No. 213/2018, 05.29.2018, Appeal No. 652/2016; Juzgado de lo Social No. 6 of Valencia, Judgment No. 244/2018, 06.01.2018, Appeal No. 633/2017; Juzgado de lo Social No. 5 of Valencia, Sentence No. 197/2019, 10.06.2019, Appeal No. 371/2018; Juzgado de lo Social No 1 of Madrid, Sentence No 128/2019, 03.04.2019; Judgments No 130/2019 and 134/2019, 04.04.2019; Juzgado de lo Social No 19 of Madrid, Sentence No 188/2019, 22.07.2019; Juzgado de lo Social No. 33 of Madrid, Judgment No. 53/2019, 02.11.2019, Appeal No. 1214/2018; Juzgado de lo Social No. 1 of Gijón, Judgment No. 61/2019, 02/20/2019, Appeal No. 724/2018; Tribunal Superior de Justicia of Asturias, Social Chamber, Judgment No. 1818/2019, 07.25.2019, Appeal No. 1143/2019; Corte Suprema di Cassazione, Sezione Lavoro, Judgment No 1663/20, 24.01.2020.

the element of subordination, in its factual expression of the exercise of the power to organise, to direct, control and discipline.

In essence, when applying the aforementioned reasoning to the work carried out on digital platforms it could be argued with sufficient grounds that this type of analysis, blurs the element that constitutes the reference point for the resolution of the legal relationship between a provider of the underlying service and a digital platform.

Indeed, by unravelling that a worker is genuinely autonomous, as formally declared by the companies that own digital platforms, it would be possible to overcome the barriers mentioned, and avoid solutions contrary to the material reality (derived from procedural evidentiary deficiencies), as well as conclusions that truly leave workers unprotected.

In this way, and by way of example, the traditional analysis centred on the element of subordination has been strongly highlighted and attacked by the legislation of the State of California in the United States[38]. This legislation has established a normative criterion for determining the existence of an employment relationship, which obliges the contracting entity to prove, among other requirements, that the worker is autonomously and habitually engaged in a trade, occupation, or business of the same nature as the work carried out for the contracting entity. This means that the law requires the company to prove that this virtually "independent" worker is indeed a genuinely self-employed worker, a genuine entrepreneur, or in other words, something conceptually more important, that the element of alienness does not verify.

From the examination carried out, it can be said that the ideas of ALONSO GARCÍA are correct. On the one hand he pointed out that the element of subordination is not going to disappear; although on the other hand, "this concept cannot play a role of such absolute relevance that it determines the inclusion or exclusion of certain types of work in the framework of our discipline"[39].

[38] A ballot measure exempting companies that own digital platforms from the application of Labour laws (known as '*Yes on Prop 22*', under the motto of '*Save App-Based Jobs & Services*', formally identified as the '*Protect App-Based Drivers and Services Act*') has recently been passed.

[39] M. Alonso García, *Introducción al estudio del Derecho del Trabajo*, Bosch, p. 89 (1958).

5. Proposed Criteria to Determine the Existence of an Employment Relationship

For the purpose of determining the nature of the relationship established between a service provider and the companies owning digital platforms, the procedure and criteria suggested in this paper postulate a systematisation which comprises three specific stages of analysis, calling on a method of indicators and its typological technique that shall be applied in each specific case.

In this way, the following concepts or hypotheses must be verified: firstly, the nature of the activity carried out by the digital platform must be preliminarily unravelled; secondly, as a fundamental issue, it will be necessary to carry out a study centred on verifying the authenticity of the autonomy of the service provider and the notion of alienness (this being the neuralgic or key point); and finally, it will be necessary to resort to an analysis (adjuvant and accessory to the main examination) of the remaining notions: the voluntary personal provision of work, working for a valuable consideration and the verification of the possible manifestations of dependence or subordination.

5.1. Preliminary Issue: Classification of the Nature of the Activity Carried Out by the Companies Owning Digital Platforms

A scenario where it is verified that a company limits its activity exclusively to the intermediation between supply and demand of a good or service, would determine the non-existence of an employment relationship between the service provider and the digital platform. Such a conclusion would stem from the fact that it is a technology company dedicated to providing information society services, with no impact whatsoever on the underlying service or on the service provider. In other words, there would be no impositions, instructions, guidelines, or other manifestations in relation to the work itself. In contrast, the company will cease to be an intermediary when it offers more than simply putting the user in contact with a service provider.

It is therefore necessary to consider different specific items in order to confirm if it is a horizontal platform that creates a virtual space where the buyer and the provider of a good or service interact freely and negotiate their own conditions. Otherwise, it would be a vertical platform that is deeply integrated into the market and directly offers the underlying good or service.

The first element to analyse relates to unravelling who organises the service, determines the price of the exchanged product, as well as its conditions and forms of provision. This will allow to elucidate the possible existence of control and influence of the digital platform over the underlying service offered and over the service provider, as well as the verification of an interest in the organisation of that service.

Thus, the fact that the platform issues recommendations or suggestions on how to carry out a service, or imposes certain demands or requirements for the purposes of providing it, are indicators of the organisational interest of its undertaking, moving it away from a mere intermediary platform that provides information society services, and bringing it closer to the classification of a company that effectively offers the underlying service instead.

The second aspect to study is the key component or primary asset when offering that service. This aspect must be analysed in the light of a basic premise: in order to be considered a defining feature, such asset must constitute the essence of the organisational business structure set up to provide that particular service, enabling it to be identified as the essence of the brand.

The third important matter concerns the implementation of a system which assesses or monitors the quality of the underlying service. The introduction of a mechanism to assess the service providers (either in-house or external, requested from the users), to control the quality of the service (with the consequent increase in work assignment to those with higher ratings, or the suspension of those providers who do not meet a predetermined rating), will be sufficiently important signs to reflect the interest of the platform in organising and controlling the underlying service. Indeed, such an approach would be incompatible with its consideration as a mere intermediary between the supply and demand of a service.

The most important case in this matter corresponds to the one that was submitted to a decision of the CJEU, whose intervention has been limited to a preliminary ruling, question raised by the Commercial Court No. 3 of Barcelona, with respect to a procedure between the Elite Professional Association Taxi and Uber Systems Spain, SL.

Precisely, on that occasion the Court had to qualify the legal nature of the service provided by Uber, analyzing whether it is an intermediation service, which connects a non-professional driver who uses his own vehicle with a person who wishes to make an urban displacement; or if, on the contrary, it creates at the same time an offer of urban transport services. The ruling has opted for the second interpretation and concluded

that "this intermediation service must be considered as an integral part of a global service whose main element is a transport service"[40].

The aforementioned conclusion rests on considering that a service such as the one at issue, is not limited to an intermediation service that consists simply in connecting a non-professional driver who uses his own vehicle with a person who wants to make an urban displacement. Indeed, in this case, passenger transport is carried out by non-professional drivers who use their own vehicle, while the provider of this intermediation service creates at the same time an offer of urban transport services, which makes accessible specifically through computerized tools (through the application), and whose general operation it organizes in favor of people who wish to use this offer to carry out a specific urban displacement.

Likewise, the Court has explained that Uber's intermediation service is based on a selection of non-professional drivers who use their own vehicle, to whom this company provides an application, without which, on the one hand, these drivers would not be in conditions to provide transport services and, on the other hand, people who wish to make an urban displacement could not use the services of the aforementioned drivers. For this reason, the CJEU expressly maintains that "Uber exercises a decisive influence on the conditions of the services provided by these drivers", establishing the maximum price of the ride, receiving payment from the customer and then paying a part to the non-professional driver of the vehicle, and exercising certain control over the quality of the vehicles, as well as the suitability and behavior of the drivers, which in their case may lead to their exclusion.

Consequently, the definition of the nature of the activity of the company owning the digital platform as the provider of the underlying service (by virtue of its organisation and control) will determine the need to continue with the analysis of the other criteria in order to answer the question about the nature of the relationship between the company and the service provider.

[40] CJEU, Judgment of December 20, 2017, C-434/15.

5.2. Main Criterion: Verification of the Authenticity of the Autonomy of the Service Provider's Entrepreneur Status and Revaluation of the Element of Alienness

5.2.1. The Central Role of Analysing the Authenticity of the Autonomy of the Service Provider's Entrepreneur Status

Instead of the usual path followed during the procedure to determine the existence (or not) of an employment relationship in the work provided via digital platforms, the alternative corresponds to the verification of the authenticity of the autonomy of the service provider's entrepreneur status, for the purpose of revealing the real and factual existence or non-existence of the figure of the self-employed worker.

The advantage of this mechanism lies in placing the focus on questioning the figure that formally emerges from the documents or outward appearance, and that may be eventually disputed by the provider, in order to compare its structural basis and essential elements with what actually happens. Thus, avoiding the difficulties posed by the classic criterion for determining the employment relationship, which is limited to the central analysis of the concurrence of the concept of subordination (since it is usually considered as an essential element of the employment contract).

A study focused on the traditional determination of the personal scope of application of Labour Law could exclude many cases from the protection afforded by this legal system, based on the absence of typical adequacy of a work provision with respect to the conceptual elements that determine a subordinate relationship.

On the contrary, the suggested technique focuses on determining the level of authenticity of the autonomy of the entrepreneur status that the service provider virtually holds. This constitutes the essential element that must be actually verified for the development of a work activity carried out by an independent work provider; and whose verification constitutes not only a *sine qua non* requirement for that classification to be applicable, but also an element that excludes the concept of dependent work or employment by a third party.

Indeed, the main criterion for delimiting self-employment and employment by a third-party lies in the actual verification of the existence of the independence of those providers, who must substantively provide the service on their own account, in order for the concept of self-employed worker to be applicable. Therefore, the individual who carries out a human activity on a personal basis, without technical, economic,

organisational, structural, productive and brand independence, cannot be considered a self-employed worker.

The reason is that, three characteristics are essential requirements of self-employment: firstly, the existence of a genuine autonomous business organisation of their own; secondly, the assumption of the risk of the economic activity; and finally, regularity[41].

In this sense, on the one hand, an activity carried out on one's own account is incompatible with the concurrence of alienness and its various manifestations, and on the other hand, the existence of genuine autonomy in the performance of the activity, as well as the absence of the element of alienness, constitutes an obstacle to the configuration of dependent work.

In any case, this does not mean that subordinate workers cannot have a certain margin of autonomy in the performance of their work. On the contrary, work that is organised, determined, used, and exploited by the employer is not incompatible with the existence of a degree of worker autonomy when dully performing the work provision, without this turning it into autonomous work. Subordinate forms of work can thus include a considerable margin of freedom, autonomy and self-determination of the worker[42].

It is likely that the arduous task of scrutinising subordination causes such a burden that it prevents due attention from being paid to its flip side, i.e.; autonomy or independence: in the binary logic that (as a general rule) characterises labour legislation, whoever does not provide personal services with subordination or dependence does so in conditions of autonomy or independence[43].

Accordingly, while self-employed workers provide services independently and autonomously, assuming the profits and costs of the economic activity, employees provide services within the scope of the management, organisation and control of another individual without assuming the risk of the business activity[44].

Self-employment requires the existence of a genuine and independent organisation, where individuals provide their own means of production, freely choose when to work, how much to work and how to work, and

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41 A. Ginès and S. Gálvez, "Sharing economy vs. uber economy y las fronteras del Derecho del Trabajo: la (des)protección de los trabajadores en el nuevo entorno digital", *InDret*, No 1, Barcelona, p. 14 (2016), http://www.indret.com/pdf/1212_es.pdf.

42 M. Rodriguez-Piñero, "Contrato de trabajo y autonomía del trabajador", *Trabajo subordinado y trabajo autónomo en la delimitación de las fronteras del Derecho del Trabajo. Estudios en homenaje al Profesor José Cabrera Bazán*, Editorial Tecnos, Madrid, pp. 21-22 (1999).

43 Carballo *supra* 16, p. 115.

44 Ginès and Gálvez *supra* 38, p. 13.

take over the results of their activity, assuming the business risks. Such elements are diametrically opposed to the concept of alienness, which is essential in the activity regulated by Labour Law.

Some interpretive views have devoted special emphasis to verifying the real autonomy of the service provider in order to validate the formal qualification assigned by companies as autonomous and independent workers. Based on this, certain facts considered relevant to rule out the presumed autonomy have been outlined, such as, for example, that providers cannot fully organize their activity (both its practical aspects of execution, such as setting the price and owning a portfolio of clients). Consequently, a central point of study refers to the determination of the existence of an effective freedom in favor of the providers, regarding the choice of working days and hours, as well as the place to execute the service, or the route chosen (in the case of the ride hailing services or the delivery of goods), as well as the power of acceptance or rejection of the different orders. There is a broad coincidence in relativizing the aforementioned freedom, insofar as it is conditioned in many cases by the valuation system introduced in the platforms, which is built by said companies on the basis of the application of an algorithm that allows the customers evaluate the service and to generate a statistic or rating scale, which acts as a determining element for the assignment of new tasks, as well as for the suspension of the provider in case of breaching the canons of conduct established by the platforms. All this determines that in many cases the freedom to reject tasks is merely virtual and that it is not possible to choose the days and hours to work with total freedom[45].

[45] See, among others: Fair Work Commission of Australia, "Joshua Klooger v Foodora Australia Pty Ltd", U2018 / 2625, 16.11.2018; 33a Vara do Trabalho de Belo Horizonte, Process No 0011359-34.2016.5.03.0112, 02.13.2017; 42nd Vara do Trabalho de Belo Horizonte, Process No 0010801- 18.2017.5.03.0180, 06.12.2017; Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Juzgado de lo Social No. 11 of Barcelona, Sentence No. 213/2018, 05.29.2018, Appeal No. 652/2016; Juzgado de lo Social No. 5 of Valencia, Sentence No. 197/2019, 10.06.2019, Appeal No. 371/2018; Juzgado de lo Social No 1 of Madrid, Sentence No 128/2019, 03.04.2019; Judgments No 130/2019 and 134/2019, 04.04.2019; Juzgado de lo Social No 19 of Madrid, Sentence No 188/2019, 22.07.2019; Juzgado de lo Social No. 33 of Madrid, Judgment No. 53/2019, 02.11.2019, Appeal No. 1214/2018; Juzgado de lo Social No. 1 of Gijón, Judgment No. 61/2019, 02/20/2019, Appeal No. 724/2018; Tribunal Superior de Justicia of Asturias, Social Chamber, Judgment No. 1818/2019, 07.25.2019, Appeal No. 1143/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Plenary, Sentence No 1155/2019, 27.11.2019, No of Appeal 588/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 2, Judgment No. 1223/2019, 12.18.2019, Appeal No. 714/2019; Cour de Cassation, Chambre Sociale,

In short, for the purpose of determining the nature of the relationship between the service providers and the companies owning digital platforms, the main criterion lies in the analysis of the true autonomy of the entrepreneur status of the service provider, and in particular, in the presence of alienness in its various projections (alienness of the results and/or benefits and of the risks; alienness of the ownership of the means of production; alienness of the brand and of the market; and the worker's incorporation to the organisational structure of the company)[46].

5.2.2. The Generic Concept of Alienness: Alienness of The Results and/or Benefits and Alienness of the Risks

The notion of alienness has been developed based on the description of a situation in which the fruits of labour are destined for a person other than the person performing the service. By virtue of this, what is important is the "original assignment" of these fruits, since from the moment they are produced, they belong to another person[47]. This allows us to determine two sides of this element, as it is understood that workers are alien to the results of what is produced and its profit, and in contrast, they are also alien to the contingencies involved in business exploitation. It is for this

Judgment No 374, 04.03.2020; Cour d'Appel de Paris, Chambre 2, RG n ° 18/08357, 10.01.2019; Labor Commissioner of the State of California, "Barbara Ann Berwick v. Uber Technologies, Inc., a Delaware corporation, and Rasier - CA LLC, a Delaware limited liability company ", Case No. 11-46739, 06/16/2015; Tribunal de Apelaciones del Trabajo de 1er Turno, Sentence No 111/2020, 03.06.2020.

[46] There is a large amount of judgments that have addressed the note of alienation in the framework of the work carried out in the platform economy. See, among others: Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Juzgado de lo Social No. 5 of Valencia, Sentence No. 197/2019, 10.06.2019, Appeal No. 371/2018; Juzgado de lo Social No. 6 of Valencia, Judgment No. 244/2018, 06.01.2018, Appeal No. 633/2017; Tribunal Superior de Justicia of Asturias, Social Chamber, Judgment No. 1818/2019, 07.25.2019, Appeal No. 1143/2019; Juzgado de lo Social No 1 of Madrid, Sentence No 128/2019, 03.04.2019; Judgments No 130/2019 and 134/2019, 04.04.2019; Juzgado de lo Social No 19 of Madrid, Sentence No 188/2019, 22.07.2019; Juzgado de lo Social No. 33 of Madrid, Judgment No. 53/2019, 02.11.2019, Appeal No. 1214/2018; Tribunal Superior de Justicia of Madrid, Chamber of the Social in Plenary, Sentence No 1155/2019, 27.11.2019, No of Appeal 588/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 2, Judgment No. 1223/2019, 12.18.2019, Appeal No. 714/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 1, Sentence No. 40/2020, 01.17.2020, Appeal No. 1323/2019; Tribunal de Apelaciones del Trabajo de 1er Turno, Sentence No 111/2020, 03.06.2020.

[47] Plá Rodríguez *supra* 23, p. 93.

reason that two basic effects of alienness are usually highlighted, identifying each of them with "alienness of the results" and "alienness of the risks".

In this sense, the meaning of alienness is broad and complex, and it cannot be reduced to the fact of "working for someone else" or "the work being destined for someone else". In fact, alienness should not be explained from a "positional" description of the parties in the framework of the relationship between them, or by verifying whether the work provided benefits to another person, but rather it could be understood attending to the results of the work, what is produced or its fruit.

In the same sense, it is not the same to work "for another" (this is what almost everyone does, sometimes with a merely economic otherness; other times - most of the time - with otherness in a strict, legal sense) as to work "on behalf of another" (this is only done by those who provide their labour activity within the framework of an employment contract)[48]. Therefore, it is necessary to differentiate between otherness (understood as working "for" another) and alienness (working "on behalf" of another), attributing to the latter a specific and distinct meaning where the decisive factor is the context, the concrete form and the conditions in which the work is provided to another person[49].

Thus, self-employment implies an initial acquisition of the fruits of labour, whereas working on behalf of another requires the transfer of the fruits of labour to another person from the beginning. Naturally, the necessary counterpart of both concepts is, in the case of self-employment, assuming the risks in the execution of the activity, and in the case of working on behalf of another, transferring those risks to the person who acquires the fruits of labour, initially transferred by the one who works.

The main exponent of this notion was ALONSO OLEA, who emphasizes that the fruits of labour are initially and directly attributed to a person other than the individual who performs the work[50]. In this way, self-employed work is opposed to working on behalf of another by virtue of the fact that, in the former, the person who works retains the initial ownership of the fruits of their labour[51].

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[48] M. Alarcón, "La ajenidad en el mercado: Un criterio definitorio del contrato de trabajo", *Revista Española de Derecho del Trabajo*, No 28, Civitas, Madrid, p. 501 (1986).

[49] S. González, "Trabajo asalariado y trabajo autónomo en las actividades profesionales a través de las plataformas informáticas", *Temas Laborales,* No 138, p. 93 (2017).

[50] M. Alonso Olea, *Introducción al Derecho del Trabajo*, Civitas, Madrid, pp. 50-52 (1994).

[51] M. Alonso Olea and M. Casas Baamonde, *Derecho del Trabajo*, 10th edition, Universidad de Madrid – Facultad de Derecho, Madrid, p. 30 (1988).

MONTOYA has introduced a nuance to this conception, insofar as he has emphasised that what is transferred to the employer are not the results themselves, but rather the capital gains or economic profit arising from the worker's activity[52]. By virtue of this variant and nuance, ALONSO OLEA and CASAS BAAMONDE stated that the expression "results" should be conceived in such a broad sense that it covers all the results of the productive work of man, intellectual or manual, valuable in itself or associated with that of others, be it a good or a service; alienness refers to the capital profit of the work[53].

Other authors preferred to refer to alienness of the risks as a typical feature of the employment contract, referring to the fact that the employer must bear unfavourable economic results without the worker being affected, since otherwise, the fact of participating in the economic and production adversities would imply bringing it closer to the figure of a corporate contract[54]. Along the same lines, DAVIDOV has referred to alienness as the incapacity to absorb risks[55].

Notwithstanding these different approaches provided by legal doctrine, what is clear is that in the employment contract, workers do not take ownership of either the results of their work nor its capital profit. Instead, from the very moment they enter into the employment relationship, they freely hand them over to their employer; and in return for this initial cession, they also disengage themselves from the economic results of the company, not assuming any unfavourable circumstances of the same. The risks of business development are borne exclusively by the employer.

Thus, for example, the fact that workers do not determine the price of their services on their own free will is a true reflection of the alienness of the results and of the lack of autonomy. Indeed, the individual who takes ownership of the results of their work, personally organises it, determines the rates for their service, possibly negotiates with the client the price of the product or service, establishes the payment method, assumes the direct collection of the same, etc. In this sense, the results of the work would be attributed exclusively to that individual, as well as the capital

[52] A. Montoya, *Derecho del Trabajo*, 38th edition, Editorial Tecnos, Madrid, p. 40 (2017).

[53] Alonso Olea and Casas Baamonde *supra* 46, p. 30.

[54] G. Bayón Chacón and E. Pérez Botija, *Manual de Derecho del Trabajo*, 11th edition, Marcial Pons, Madrid, p. 18 (1978).

[55] This author highlights two weaknesses of labour relationships, identified precisely in reference to two essential concepts as subordination and alienness (he has named this last term as '*dependency')* (Davidov *supra* 24, p. 14).

profits, and eventually the assumption of the business risks of that undertaking.

5.2.3. Alienness of the Ownership of the Means of Production

The generic concept of alienness is also closely linked to several of its species, such as that referring to "alienness of the ownership of the means of production". This element determines that the equipment and the working tools are property of the employer and not of the worker[56]; or in other words, it refers to the ownership of the productive elements, understood as the management of the productive infrastructure used by workers in the provision of their services[57].

This analysis shows that self-employed workers own the means necessary to carry out their activity, not requiring external infrastructure either to produce the goods or carry out the services entrusted to them, nor for their subsequent insertion in the market[58].

Consequently, in the gig economy, where the platform itself provides the underlying service, the main productive elements, without question, together with the brand, are the platform or technological application, which allows to organise and manage all the other production aspects that become accessory. For this reason, even if the service provider contributes some specific material means, such as a car in the case of ride-hailing services, or a two-wheeler in the case of a food or other goods delivery service, this is not relevant for the purpose of identifying alienness of the ownership of the means of production, precisely because they are not significant elements, nor representative of the existence of a genuine business structure of their own. Moreover, the service will be endowed with certain characteristics, which will make it identifiable not with a specific provider, but with the type of service provided by the platform, offered to consumers as a brand[59].

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[56] J. Gorelli, "Plataformas digitales, prestación de servicios y relación de trabajo", *El derecho del trabajo en la actualidad: problemática y prospectiva. Estudios en homenaje a la Facultad de Derecho PUCP en su centenario*, Pontificia Universidad Católica del Perú, Lima, p. 90 (2019).

[57] Ugarte *supra* 27, p. 48.

[58] A. Valdés, "El trabajo autónomo en España: evolución, concepto y regulación", *Revista del Ministerio de Trabajo y Asuntos Sociales*, No 26, Ministerio del Trabajo e Inmigración, Spain, p. 24 (2000).

[59] Calvo *supra* 11, pp. 353-354 and 366-367.

5.2.4. Alienness of the Brand and of the Market

Other projections of the analysed genre are "alienness of the brand" and "alienness of the market". Conceptually, it is possible to identify that the worker does not act directly with the customers, but does so through the intervention of the employer, who controls the relationship with the market of potential customers[60].

The factual and/or legal impossibility for service providers to enter the market by offering their own brand, and in such case, having to do so on behalf of others by means of a brand that is not their own, prevents them from being classified as self-employed workers. In that sense, the fact that a customer acknowledges that the services offered are inherent to the brand of the company which owns it, and not to the specific provider of that service, is a revealing element of the existence of this kind of alienness.

Direct producers are legally alien to the consumers of "their' products" (which are not their own), and therefore, this is verified whenever a stranger legally comes between the direct worker and the consumer, collecting the price for that good or service, having paid the worker a salary and seeking to make a profit. In addition, alienness of the market exists as something constitutive in the social relationship, as well as from the legal point of view and *ab initio*. In short, alienness of the market, together with the alienness of the ownership of the means of production, are prior to and comprehensive of the alienness of the risks, of the capital profits or of the results, the latter being mere consequences of the former[61].

Precisely in relation to this aspect lies the main difference between companies that own digital platforms and operate as mere intermediaries between supply and demand for goods or services, and those that actively intervene in the market and offer the underlying service.

5.2.5. The Integration of the Worker in the Organisation of the Enterprise

According to ILO R198, "the integration of the worker in the organisation of the enterprise" constitutes a specific indicator for the determination of the existence of an employment relationship, when the work performed leads to include such integration. For this reason, the

[60] Gorelli *supra* 51, p. 90.
[61] Alarcón *supra* 43, pp. 499-505.

aforementioned international instrument requires the analysis to focus on facts, and on the concrete details relating to the performance of such work[62].

This notion evokes those situations in which there is no business organisation of the service providers themselves[63], and no assumption of the risks and benefits of the activity[64].

In short, in this respect there lies a particular difference between self-employed and employed workers. Self-employed workers carry out individual work on their own account, in other words, they carry out their own business in undertakings organised and structured by themselves; whereas employed workers do not carry out any undertakings, do not

[62] Many rulings at a comparative level have indicated that the determination of the nature of the link must be resolved on the basis of the evaluation of the material reality of the facts (applying the principle of primacy of reality largely recognized in Latin America) especially on the modality of execution of the activity, above any documentary formality that tries to define in advance said link. See, among others: 33a Vara do Trabalho de Belo Horizonte, Process No 0011359-34.2016.5.03.0112, 02.13.2017; Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Tribunal Superior de Justicia of Madrid, Chamber of the Social in Plenary, Sentence No 1155/2019, 27.11.2019, No of Appeal 588/2019; Rechtbank Amsterdam, Case No. 7044576 CV EXPL 18-14763, 01.15.2019; Employment Appeal Court of the United Kingdom, Appeal No UKEAT / 0056/17 / DA, "Uber BV & ors -v- Aslam & ors", 10.11.2017; United Kingdom Court of Appeal, Civil Division, Case No A2 / 2017/3467, "Uber BV & ors -v- Aslam & ors", 19.12.2018; Juzgado Letrado del Trabajo de la Capital de 6to Turno, Sentence No 77/2019, 11.11.2019; Tribunal de Apelaciones del Trabajo de 1er Turno, Sentence No 111/2020, 03.06.2020.

[63] Montoya *supra* 47, pp. 69-70.

[64] See, among others: Fair Work Commission of Australia, "Joshua Klooger v Foodora Australia Pty Ltd", U2018 / 2625, 16.11.2018; Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 1, Sentence No. 40/2020, 01.17.2020, Appeal No. 1323/2019; Cour de Cassation, Chambre Sociale, Judgment No 374, 04.03.2020; Cour d'Appel de Paris, Chambre 2, RG n ° 18/08357, 10.01.2019; Rechtbank Amsterdam, Case No. 7044576 CV EXPL 18-14763, 01.15.2019; Employment Appeal Court of the United Kingdom, Appeal No UKEAT / 0056/17 / DA, "Uber BV & ors -v- Aslam & ors", 10.11.2017; United Kingdom Court of Appeal, Civil Division, Case No A2 / 2017/3467, "Uber BV & ors -v- Aslam & ors", 19.12.2018; State of New York Unemployment Insurance Appeal Board, No 596722, 07/12/2018; Juzgado Letrado del Trabajo de la Capital de 6to Turno, Sentence No 77/2019, 11.11.2019; Tribunal de Apelaciones del Trabajo de 1er Turno, Sentence No 111/2020, 03.06.2020.

have their own business but are inserted in the economic activity of another[65].

Certainly, this indicator has an open and complex character and assumes the recognition that workers are alien to the organisation of the productive process in whose sphere they provide services, thus revealing a certain deficit of autonomy, which is also equivalent to identifying a certain degree of subordination, which could be described as structural[66].

Thus, this element is usually dogmatically identified as an indicator of dependence. Truthfully, in essence, it is preferable to describe it as a manifestation of alienness, insofar as without its own structure and autonomy, it is not possible to identify a type of self-employment, but rather work on behalf of another (a third party other than the provider). In fact, if an individual is inserted in the organisation of another, alienness is externalised.

On the other hand, although marginality in the provision of a service or the lack of continuity has been raised as an indicator of non-employment[67], it would also be possible to offer a different reading from the point of view of the worker's' autonomy and their insertion in an alien organisational structure. In fact, this lack of continuity could actually be considered as a manifestation of the absence of an organisational structure of their own, and therefore of a structural dependence on another company, or in other words, of a lack of autonomy and insertion in an alien organisational structure.

It must therefore be concluded that the verification of the integration of the worker in the organization of the enterprise will be conditioned by the classification of the nature of the activity carried out by the enterprise owning the digital platform. After all, if the latter were considered to be engaged in offering and performing the underlying service, then the admission that the concrete and individual provider of that service is integrated in the organisation would gain force.

Notwithstanding the above, the specific definition of this type of alienness will depend on an overall analysis of the other aforementioned elements. Indeed, the fact that the service provider fulfils the same corporate purposes as the principal company, as well as the fact that integral parts of its production cycle are carried out without its own business organisation,

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[65] R. De Lacerda Carelli, "O trabalho em plataformas e o vínculo de emprego: desfazendo mitos e mostrando a nudez do rei", *Futuro do trabalho. Os efeitos da revolução digital na sociedade*, Escola Superior do Ministério Público da União, Brasília, p. 75 (2020).

[66] Carballo *supra* 16, p. 114.

[67] Serrano *supra* 10, p. 26.

without the results and profits of the business, transferring the risks to the principal company, with the latter providing the brand and the technological application that operates as the main and fundamental asset for the service and intervenes in the market, are all defining elements for the purpose of assuming that the service provider lacks true autonomy and therefore carries out an activity on behalf of others.

5.3. Adjuvant Criterion: Verification of the Free Will Provision of Personal Services, in Exchange for Valuable Consideration and Manifestations of Subordination

In addition to the necessary verification of the element of alienness, it would also be necessary to consider the other typical elements of the employment contract, namely a free will provision of a personal service in exchange for valuable consideration.

In addition to said assessment, and in the event of any interpretative doubts arising in relation to the weighting of the aforementioned elements, it would be useful to verify any possible manifestations of subordination that may be seen in each specific case.

The presence of indicators revealing alienness of the results and risks, as well as alienness of ownership of the means of production, alienness of the brand and the market and the insertion of the worker in the organisation of the enterprise, not only would verify one of the essential elements of an employment contract (alienness), but it would also reflect the assumptions that constitute the employer's powers of organisation, management, control and discipline, i.e. the legal components of subordination, whose manifestation is contingent in the facts.

Thus, if the externalisation of the powers of organisation, management, control, and discipline (any of them in an isolated and independent manner) was confirmed, it would be possible to complete the process proposed for its legal classification, in the sense of the existence of an employment relationship.

Likewise, such powers could be inferred to be verified to a greater or lesser extent depending on the evidential scope arrived at, in relation to the nature of the activity carried out by the company owning the digital platform. Indeed, if it were confirmed that the company actually provides the underlying service, it would be possible to extract elements that assume that the link between the service provider and the platform is an employment relationship, given that we would be dealing with a company that provides and manages the underlying service, exercises decisive and influential control over it and assumes the organisation of the way it is

provided (power of control, organisation and management over the work and the workers).
By way of example, in relation to the work provided in the delivery of goods and merchandise, the importance of the control (geolocation) of the service providers, the greater or lesser remuneration based on the periods in which said individuals are connected to the platform application, the possibility of being deactivated if they do not connect periodically or fail to fulfil some of their obligations, and very especially the ownership of the app through which the workers must connect in order to be able to provide the services, will be the determining elements for assessing whether or not there is a salaried employment relationship.[68]

5.3.1. Power of Organisation

The delivery service of goods and merchandise provided through digital platforms, is an example to point out that the technology provided by this companies constitutes the core of the business, in such a way that the determination of the working hours, as well as the areas where the activity is provided, is irrelevant[69].
However, the absence of a working timetable, both in relation to when to provide the service and in terms of its extension or duration (i.e., when, and how much to work) are not sufficient elements, much less decisive, to understand that the digital platform does not organise the work.
As noted above, two factors can work against this formal freedom to choose when and how much to work, especially in the case of vertical platforms.
The first is that the organisation of the service is generally structured by virtue of a convergent and multitudinous concert of providers, which allows the platform to have the service always covered, regardless of whether a particular provider is unable to attend or decides not to be available at particular periods.
The second, dependent on the above, is the result of the remuneration system usually adopted in this kind of situations. Indeed, as the remuneration is linked to the effective provision of the service, and also as

[68] E. Rojo, "Unas notas sobre el objeto del Derecho del Trabajo", *El nuevo y cambiante mundo del trabajo. Una mirada abierta y crítica a las nuevas realidades laborales*. Blog entry for April 16 (2019), http://www.eduardorojotorrecilla.es/2019/04/unas-notas-sobre-el-objeto-del-derecho.html.
[69] Carballo *supra* 16, p. 113.

it is better remunerated in those cases in which the service is provided in the time slots of greater demand, there is an intense conditioning both to be active and available in a greater number of hours, and to do so in those in which the digital platform needs a larger volume of workers at its disposal, according to the market and consumption requirements.

In short, the technological means can operate as a mechanism for work assignment and for the distribution of customers to be served by service providers according to the needs or requirements of the demand. If we add the fact that this assignment is conditional on the ownership of the database of customers and service providers, which is the exclusive property of the platform, a clear indicator of power of organisation becomes evident. Furthermore, in the case studies it has been found that the assignment of tasks and customers is in many cases conditioned, for example, by geographic issues (which are determined by a geolocation system), or according to the result of assessments (which are required from customers in relation to their degree of satisfaction with the work provided by the service provider), or even by the rate of orders' acceptance (recorded and analysed by the algorithm in the platform). As it can be appreciated, all these information elements are owned by the digital platforms, which serve as a basis for organisational and operational decision-making.

Likewise, in many cases, the price to be charged to the customer will be determined through the algorithm. In connection with the above, in addition to setting the cost or fee, digital platforms also usually manage its collection, through the implementation of on-line payment systems, by means of electronic mechanisms. This means that the digital platforms are the ones that agree with the financial companies on the payment methods (banks, credit cards, etc.) and not the service providers themselves. In addition, customers' credit card data are in the sole and exclusive possession of the companies that own the platforms.

These are some of the essential elements of a business organisation for the management of a certain service.

In other cases, a clear sign of the power of organisation can be seen when a selection process is adopted for the individuals who will provide the service, assessing them according to certain pre-established criteria. This is a revealing indication of the power of organisation of the digital platform, since if it were operating as a mere intermediary between supply and demand for a service, its intervention in one of the market factors would not be compatible with the nature of the activity (mediating between producer and consumer).

Another suggestive indication of an activity of organisation of the productive process and of the provision of labour is the implementation of help or support systems for the service providers (known as helpdesk). While formally, the general discourse among platforms often states that they are not enterprises that provide an underlying service, but that simply intermediate between its supply and demand, the implementation of these help and support desks for service providers contradicts this statement in facts. Indeed, these arrangements to provide technical support and assistance represent an inherent element of the organisation of an underlying service.

5.3.2. Power of Management

Some court decisions have valued the service provider's compulsion to comply with certain recommendations and instructions given through the digital platform, since failure to do so could lead to poor customer ratings and, ultimately, to penalties imposed by the algorithm (ranging from a reduction in the number of tasks assigned to deactivation and removal from the application)[70]. Therefore, the analysis of this element must be complemented with the other powers of the employer, in particular, with the powers of control and discipline of the service provider.

At the same time, in some cases there is a clear presence of the power of management in relation to the place where the work is provided. Specifically, in those off-line platforms for the delivery of merchandise or

[70] See, among others: Fair Work Commission of Australia, "Joshua Klooger v Foodora Australia Pty Ltd", U2018 / 2625, 16.11.2018; 33a Vara do Trabalho de Belo Horizonte, Process No 0011359-34.2016.5.03.0112, 02.13.2017; Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Juzgado de lo Social No. 33 of Madrid, Judgment No. 53/2019, 02.11.2019, Appeal No. 1214/2018; Juzgado de lo Social No. 1 of Gijón, Judgment No. 61/2019, 02/20/2019, Appeal No. 724/2018; Tribunal Superior de Justicia of Madrid, Chamber of the Social in Plenary, Sentence No 1155/2019, 27.11.2019, No of Appeal 588/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 2, Judgment No. 1223/2019, 12.18.2019, Appeal No. 714/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 1, Sentence No. 40/2020, 01.17.2020, Appeal No. 1323/2019; Cour d'Appel de Paris, Chambre 2, RG n ° 18/08357, 10.01.2019; Cour de Cassation, Chambre Sociale, Judgment No 374, 04.03.2020; Cour de Cassation, Chambre Sociale, Judgment No. 1737, 11.28.2019; Rechtbank Amsterdam, Case No. 7044576 CV EXPL 18-14763, 01.15.2019; Employment Court of the United Kingdom, Case No. 2202512/2016, "Ms M Dewhurst -v- CitysprintUK ltd", 05.01.2017; Juzgado Letrado del Trabajo de la Capital de 6to Turno, Sentence No 77/2019, 11.11.2019; Tribunal de Apelaciones del Trabajo de 1er Turno, Sentence No 111/2020, 03.06.2020.

goods, or even ride-hailing services, the computer application usually determines unilaterally the place where the service is to be performed (the final destination), as well as the route for the delivery (where the service provider must circulate), which is controlled by a geolocation system. The same is true for some on-line platforms, as the work must be executed on a single, specific computer system.

On the other hand, there has also been a formal idealisation of an alleged freedom to choose the working hours in favour of those who perform the service, and, correlatively, a right to refuse tasks when the worker deems it convenient.

However, it is possible to verify a practical compulsion to devote a large number of hours to work and in the time slots required by the platform, as well as the material impossibility of resorting to the refusal of task assignments. It should also be added that the latter possibility is not an unbalancing element in favour of the alleged autonomy of the service provider.

Indeed, the power to refuse is not an exclusive or novel characteristic of the platform economy. On the contrary, what is truly innovative in comparison with traditional work, is not that the worker may not comply with the successive business requirements (in this case, the proposal of each new task), but the decision of the platform to tolerate (to a greater or lesser degree) this type of behaviour. Furthermore, paragraph 10 of EU Directive 2019/1152 recognises that in the case of employment by a third-party, if the work pattern is unpredictable, workers may refuse a work assignment (under certain conditions). Hence, if in a relationship of employment by a third-party it is recognised that the "right to refuse" and self-organisation is not a notion contrary to subordinate work, how is it possible to allege self-employment on the platforms providing the underlying service?[71]

In short, in these flexible models of work organisation, in which the worker's total temporal freedom to perform tasks is claimed, the employer asserts a greater dominance over the worker, who is not subject to any specific working time frame. The business logic can be summed up as providing freedom to choose working hours, in exchange for a power to manage the worker that is intensified over a wide temporal space.

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[71] I. Beltran, "Directiva 2019/1152 y «derecho al rechazo»: los riders/glovers son trabajadores por cuenta ajena", *Una mirada crítica a las relaciones laborales*. Blog entry for November 11 (2019), https://ignasibeltran.com/2019/11/11/directiva-2019-1152-y-derecho-al-rechazo-los-riders-glovers-son-trabajadores-por-cuenta-ajena/.

5.3.3. Power to Control

Modern expressions of control can be seen in several examples[72]. Such is the case of the geolocation systems installed in mobile devices, which indicate the real-time location of the service providers, as well as all their movements, routes, pauses, waiting or resting times, speed, etc. It should be noted that such an instrument constitutes a potentially invasive means of control of a service provider's privacy, particularly in the transport activities, whether of goods or merchandise, or of people. Precisely, this monitoring mechanism allows the platform to acquire transcendental information for the purpose of optimising the organisation and management of the company, by virtue of classifying the service provider as one who fulfils the task quickly or slowly, who follows the most suitable route or deviates from it, etc.

If we add to this instrument the control carried out by the service users (through the rating of the service), we expose the existence of an extremely complete monitoring mechanism of the work activity, by incorporating to this accumulation of information the expectations and standards demanded by the customer, which serve as a basis for better decision making in the company and for adopting the relevant organisational, managerial and disciplinary measures (decisions that are often automated through the algorithm implemented for this purpose).

[72] See, among others: Fair Work Commission of Australia, "Joshua Klooger v Foodora Australia Pty Ltd", U2018 / 2625, 16.11.2018; 33a Vara do Trabalho de Belo Horizonte, Process No 0011359-34.2016.5.03.0112, 02.13.2017; Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Juzgado de lo Social No. 6 of Valencia, Judgment No. 244/2018, 06.01.2018, Appeal No. 633/2017; Juzgado de lo Social No. 1 of Gijón, Judgment No. 61/2019, 02/20/2019, Appeal No. 724/2018; Tribunal Superior de Justicia of Asturias, Social Chamber, Judgment No. 1818/2019, 07.25.2019, Appeal No. 1143/2019; Tribunal Superior de Justicia of Madrid, Chamber of the Social in Plenary, Sentence No 1155/2019, 27.11.2019, No of Appeal 588/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 2, Judgment No. 1223/2019, 12.18.2019, Appeal No. 714/2019; Cour de Cassation, Chambre Sociale, Judgment No 374, 04.03.2020; Cour d'Appel de Paris, Chambre 2, RG n ° 18/08357, 10.01.2019; Cour de Cassation, Chambre Sociale, Judgment No. 1737, 11.28.2019; United States District Court Northern District of California, Case No. C-13-3826 EMC, "Douglas O'Connor, et. al., v. Uber Technologies, Inc., et al. ", 03/11/2015; United States District Court Northern District of California, Case No. C-13-cv-04065-VC, "Patrick Cotter, et al., V. Lyft, Inc. ", 03/11/2015; State of New York Unemployment Insurance Appeal Board, No 596722, 07/12/2018; Juzgado Letrado del Trabajo de la Capital de 6to Turno, Sentence No 77/2019, 11.11.2019; Tribunal de Apelaciones del Trabajo de 1er Turno, Sentence No 111/2020, 03.06.2020.

The power to control is also reflected in other cases when there are negative consequences for the workers derived from their deviation from the instructions of the platform. Such realities have surfaced in several legal disputes with reports of the algorithm suspending the assignment of tasks to those who are available to work because they had previously rejected some work assignments, or because they are not available at peak hours, among other similar examples. In practice, there have also been situations with even more serious consequences, like the disconnection of a service provider from the service platform, by removing that person from the application as a sanction imposed by the platform itself.
In short, DEGRYSE argues that "algorithms have taken over the functions of a traditional company: they coordinate production, match supply and demand, organise, control and appraise the workforce"[73].

5.3.4. Power to Discipline

The analysis of manifestations of the punitive power[74] must be carried out in conjunction with those of the other powers, insofar as the submission to the exhaustive control referred to above (with the constant demand for greater connectivity and availability, both to have more work assignments and to obtain better and more remuneration) operates correlatively with the pressures arising from the possibility of being deactivated or poorly rated by customers who may harm the workers (depriving them of their source of income).
The possibility of reducing the work assignments given to service providers, by virtue of their rating and prior assessment, constitutes an element that allows to identify the development of a punitive manifestation, typical of the notion of subordination, and far removed

[73] I. Daugareilh, C. Degryse and P. Pochet (Eds.), *The platform economy and social law: Key issues in comparative perspective*, Working paper 2019.10, European Trade Union Institute, ETUI, Brussels, pp. 25-26 (2019).
[74] See, among others: 33a Vara do Trabalho de Belo Horizonte, Process No 0011359-34.2016.5.03.0112, 02.13.2017; Tribunal Supremo, Social Chamber, Plenary, Judgment of doctrine unification, 09.25.2020, Appeal No. 4746/2019; Juzgado de lo Social No. 1 of Gijón, Judgment No. 61/2019, 02/20/2019, Appeal No. 724/2018; Tribunal Superior de Justicia of Madrid, Chamber of the Social in Plenary, Sentence No 1155/2019, 27.11.2019, No of Appeal 588/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 2, Judgment No. 1223/2019, 12.18.2019, Appeal No. 714/2019; Cour de Cassation, Chambre Sociale, Judgment No 374, 04.03.2020; Cour de Cassation, Chambre Sociale, Judgment No 1737, 11/28/2019; Juzgado Letrado del Trabajo de la Capital de 6to Turno, Sentence No 77/2019, 11.11.2019.

from the possible autonomy and freedom to exercise an undertaking on one's own account. The same conclusion can be extrapolated to the fact of unilateral deactivation of the provider's account or its suspension for not complying with certain instructions or rules of conduct required by the digital platform.

6. Concluding Remarks

1) There are important objections to the self-characterisation made by some companies owning digital platforms as intermediary companies providing information society services, limiting their activity to the simple development of technology, and linking supply and demand for a good or service.

In particular, the rebuttal to that classification stems from the factual verification of several factors, which, taken together or individually, lead to the conclusion that in fact the activity carried out is limited to the supply and provision of the underlying service performed by the providers. Thus, the fact that these companies exercise decisive influence over the organisation and management of the service and of the service providers themselves is more than sufficient evidence to overturn the self-classification made by the companies.

2) The propositional content of this work has materialized in the projection of criteria for the determination of the nature of the relationship established between service providers and digital platforms, by considering a critical review of the central role of the element of subordination and a revaluation of the element of alienness.

This leads to the conclusion that when determining the existence of an employment relationship, the element of subordination has been relegated in importance, at least in terms of the central role traditionally conferred to it.

3) In this paper it is understood that verifying the authenticity of the autonomy of the entrepreneur status of the service provider and the revaluation of the element of alienness are the main criteria to determine the existence of an employment relationship.

In short, the main criterion lies in the analysis of the authenticity of the autonomy of the entrepreneur status of the service provider, and in particular, of the presence of alienness in its various projections: alienness of the results and/or profits and of the risks; alienness of the ownership of the means of production; alienness of the brand and of the market; and insertion of the worker in the organisation of the company.

4) In the event of genuine doubts arising when verifying the main criterion suggested, the analysis of possible manifestations of subordination would become important. Hence, the verification of the exercise of any of the powers of organisation, management, control, or discipline would form part of the complementary examination, considering that the presence of any of them in isolation would represent a manifest incompatibility with the alleged autonomy of the worker.

To detect some of the contingent manifestations of subordination, several particular aspects of work in these realities become relevant.

Firstly, the analysis will be enriched after having addressed the first classification problem referred to the determination of the activity carried out by digital platforms.

Secondly, there are many indications of the employer's exercise of the power of organisation. The algorithm setting the price of the services, as well as the management of its collection, the possession of the relevant information data for business decision-making, such as work assignment and the distribution of customers, the implementation of a selection process for service providers, the creation of support systems for service providers, among other examples, are indications of this power.

Furthermore, there are several practical expressions that converge to mitigate the alleged provider's freedom of choice of when and how much to work, which would presumably constitute an element incompatible with the exercise of the employer's own power of organisation. In fact, the company's power of organisation is not exhausted since it is irrelevant whether a particular provider cannot or chooses not to be available at certain periods, since there is a convergent and multitudinous concert of providers, which allows the platform to have the service always covered. Moreover, the remuneration system usually adopted in this type of situation considerably limits the alleged formal freedom. As remuneration is linked to the actual provision of the service, as well as being better remunerated when the service is provided in the time slots with the highest demand, there is an intense conditioning both to be active and available during a greater number of hours, and to do so during those hours when the digital platform needs a larger volume of workers at its disposal, due to market and consumer requirements.

In another aspect, in casuistry there are also expressions of the exercise of the power of management. By way of example, behavioural suggestions or recommendations become intense directives, as compliance with them is linked to the rating processes set up by the platform, the result of which can lead to the suspension or deactivation of a service provider, or to a reduction in the work assignments.

On the other hand, there are many indications of the platforms' exercise of the powers of surveillance. Generally, the greatest influence of this power is concentrated in the implementation of the control system which requests customers to rate the work. Likewise, other means of control are exercised using novel technological instruments, such as geolocation systems generally implemented on off-line platforms.
Finally, the element that is most evident in the facts, relates to the exercise of punitive powers. Even if, statistically, its manifestation is occasional, suspending a provider's account or disabling access to it is a typical expression of the discipline inherent in a dependent employment relationship.

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