



Socializing digital work via the courts?

Antonio Aloisi

IE Law School
IE University, Madrid

@_aloi

today's agenda



- 1. Platform work litigation: an assessment of patterns**
 - The second platform age, a mapping exercise
- 2. Status classification is not enough**
 - Limited scope, platform shortcuts and failure to comply
- 3. Alternative pathways: GDPR, equality law and OSHA**
 - Addressing the main legacies of platform work
- 4. Lessons learnt. A closer look at the regulatory initiatives**
 - Avoiding the rabbit hole of a too narrow personal scope

- 1 -

***The classification dilemma.
Emerging patterns in case law***

welcome to the second platform age

- Platforms are embroiled in several lawsuits on the **appropriate classification** of workers
- Reassessing the **binary divide** between employment and self-employment
- The judicial results have been **mixed and erratic**, but a trend is consolidating
- A trend toward the **demystification** of several tropes (“autonomy fiction”)
 - Increasingly, higher courts are recognizing the existence of an **employment relationship**
 - A **rich, bottom-up exchange of messages** between courts horizontally and vertically

	(Lack of) autonomy	Instructions	Control	Sanctions	Availability	Personal work	Business integration
--	--------------------	--------------	---------	-----------	--------------	---------------	----------------------

Italy 1/20		X	X	X		X	
France 3/20	X	X		X			
Spain 9/20	X	X	X	X			X
UK 2/21	X	X	X	X		X	
Germany 12/21		X			X	X	

a modern conception of criteria

- Main criteria interpreted in a **modern way**
 - (Schedule/task/organisational) flexibility
 - (Algorithmic) control
 - Ownership of assets
 - Business integration
 - Also: substitution clauses
- A **consistent set of patterns** is emerging, thanks to the **primacy of facts** principle, also resonating with the **CJEU** case law
- However, concrete **advancements** have been slow to materialise

- 2 -

***Too little, too late.
Reasons for disappointment***

the inherent limits of this approach

- Litigation is a costly, **unpredictable and protracted** way to secure employment rights
- Despite major victories, worker classification is **not fulfilling its dual purpose**:
 - to ensure the adequate **functioning of state welfare** by means of taxation and social security transfer
 - to guarantee a **proper bilateral match** between managerial prerogatives and responsibilities, subjection and protections
- We cannot rely on **complaint-based** case law to shape meaningful outcomes

the inherent limits of this approach

- Existing standards leave too much room for **circumvention and arbitrage**
 - In terms of effects, the answers to the dilemma have a **limited scope (case-by-case)**
 - Platforms are **twisting language and tweaking their terms** to undermine the rulings' outcome (**refusal to comply**)
 - Platforms promote their business model as a **new paradigm** + massive campaigns aimed at **nullifying** court decisions and reforms
 - In the meantime, the object of several claims has **shifted towards other aspects**

- 3 -

***New pathways for ensuring the
application of existing rules***

a selection of current problems



Algorithms and transparency

- Delegation of **managerial prerogatives** to non-human agents (“boss ex machina”)
- The full lifecycle of **employer functions**: from hiring to firing, from assessment to task allocation



Antidiscrimination & equality law

- Practices resulting in the **competitive attribution** of positions, slots and tasks thanks to **inferential analytics** and predictive algorithms
 - Lack of (human) **discretion** in AI-driven governance



Occupational health and safety

- **Unsustainable workloads** (logistics)
- Exclusion of **self-employed workers** from the scope of protection
- Refusal to provide PPE **to minimise the risk of reclassification**

avenues for strategic litigation



Algorithms and transparency

GDPR ban: solely **automated decisions, including profiling**, producing legal effects

Information and access rights + national DPA

Safeguards: GDPR principles, domestic rules on monitoring



Antidiscrimination & equality law

Indirect discrimination: algorithmic **blindness** in rating workers absent for constitutionally protected reasons

Unjustified: neither legitimate aim nor necessity and proportionality



Occupational health and safety

In Italy and the UK: **riders and PPE, personal scope of H&S includes self-employed**

Amazon France, Covid19: the lack of prevention is a breach of employers' duty of care (rectified in practice)

- 4 -

*Fail, fail again, fail better.
From litigation to regulation*

the broader picture of digital rights

- Platform work **cannot be viewed in isolation**
- The challenges that result from digital transformation extend well **beyond the blurred boundaries** of the phenomenon
- Even the most extreme inventions tested in this arena are now **proliferating in a wide range of sectors**
 - For example, **algorithmic management**, which is now invading workplaces worldwide, facilitated by remote working arrangements and a lack of forward-looking managerial strategies

“

The **boss-worker pyramid** embedded in centralised organisations is **spreading all over the labour market**, without the entitlements compensating the lack of agency that are enshrined in the employment relationship.

Thus, the **effectiveness of existing limits to the excess of power is impaired**, since canonical limits were conceived at a time when the potential of new techniques was unthinkable.

”

regulating a segmented market

- Should the proposed EU legislative initiative mainly (merely?) be designed to address misclassification issues, **it would be a missed opportunity**
 - The measure risk being too **narrow** in its scope and too timid in its substantive content
 - Failure to **deliver improvements**
- In the context of the European Pillar of Social Rights, EU institutions must **incorporate lessons learnt** to tackle the multidimensional issues that undermine the the social *acquis*
 - A **multi-pronged, future-proof approach**

thank you!

Antonio Aloisi

antonio.aloisi@ie.edu
www.bossexmachina.ie.edu



The “**Boss Ex Machina**” research project has received funding from the European Union’s Horizon 2020 Research and Innovation Programme under the Marie Skłodowska-Curie grant agreement No 893888