Digital work in the transport sector: in search of the employer

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ABSTRACT
This article analyses two of the major digital platforms dealing with transport: Uber and FlixBus. It reconstructs the nature of these platforms as transportation companies and studies their structures. It finds that such companies can assume ‘trilateral’ or ‘quadrilateral’ structures, depending on the subjects involved, with different consequences for labour relations. Following on from this, the article investigates the applicability of labour law in such structures, searching for an employment relationship in ‘trilateral’ structures and identifying the real employer in ‘quadrilateral’ structures.

KEY WORDS
Uber, FlixBus, gig economy, transport sector, competition law, trilateral structures, legal qualification, quadrilateral structures, functional approach, co-employment

Introduction
Analyses of work on digital platforms are often focused on the legal status of the relationship between platforms and workers.1 In some cases, the question ‘who is the employer?’ has been raised, in relation to the ‘trilateral’ structure of these relationships (platform–worker–client), which makes it difficult to understand whether the employer is the platform or the client (Prassl & Risak, 2016). These studies, however, assume that the relationships on these digital platforms are ‘trilateral’, neglecting the fact that they may sometimes be ‘quadrilateral’ (platform–partner company–worker–client). Moreover, because digital platforms are very active in the transport services sector, which has been revolutionised by the introduction of apps, it sometimes seems as if the use of online platforms, and the many questions that this raises, are

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1 On labour law in the gig economy, see De Stefano, 2016, for an overview. On the legal qualification issues in the gig economy, see Biasi, 2017; Voza, 2017a, 2017b; Perulli, 2017; Treu, 2017; Aloisi, 2016b.
synonymous with this sector. A key question here is whether such platforms should be considered to be transport companies or digital companies.

The present article aims to answer some of these questions.

First, we examine two of the major platforms dealing with transportation: Uber and FlixBus, with particular reference to national and European Union jurisprudence. In the light of these reflections, the second section of this article tries to address the legal consequences of the nature of these two platforms, focusing on the Italian experience. The decision to study these specific platforms is that they have adopted both ‘trilateral’ and ‘quadrilateral’ structures. The third section discusses the issues raised by ‘trilateral’ structures, focusing on whether it is possible to identify a labour relationship between the platform and the driver. Fourth, the legal issues raised in ‘quadrilateral’ structures are studied, with the aim of identifying the real employer. Finally, some conclusions are offered, to understand whether the principles of the employment contract are still valid in the digital economy.

Are Uber and FlixBus transportation companies?

The Uber and FlixBus models are similar in some aspects but different in others

Coming from two different parts of the world (California and Germany, respectively), both companies have grown rapidly during recent years and can now be considered as leaders in their sectors. Indeed, Uber and FlixBus are both active in the transport of passengers: the former is similar to a cab or a car-and-driver hire company; the latter can be compared to an intercity bus company. But the peculiarity of these enterprises is they do not deal directly with transport. Uber and FlixBus are apps through which passengers have the opportunity to find the most suitable means of travel, with the help of digitalisation. The Uber app allows passengers to call drivers nearby, thanks to the GPS system incorporated into the drivers’ smartphones, while the FlixBus app makes it possible to book and buy digital tickets for buses, see where the stops are and receive information on delays. For this reason, the success of these companies is often attributed to the strong impact of digitalisation, able to innovate the transportation sector and reduce the costs of services. However, the real secret of Uber and Flixbus stems from their business models.

Uber’s organisational structure is shaped by the use of two different models. In the first type, private drivers, who are owners of their cars, open an account and begin to collaborate with the app, after a driving test to verify their skills and knowledge of the

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2 Uber was founded in 2009 and is established in San Francisco. Today, it is present in 68 countries at least, with a value of over US$60 billion (Aloisi, 2016a:672). FlixBus was founded in Munich and spread across Germany thanks to the end of the national rail monopoly in 2013 (FlixBus website, retrieved on 12 June 2018 from https://www.flixbus.co.uk/company/about-flixbus). In 2015, FlixBus began to operate in all Europe and in 2016 it also acquired its principal competitor, Megabus, to provide transportation services in continental Europe (Busworld, retrieved on 12 June 2018 from https://www.busworld.org/articles/detail/2888/flixbus-acquires-megabus-europe).


4 Retrieved on 13 June 2018 from https://www.flixbus.co.uk/service/bus-app.
city where the activity is performed (Aloisi, 2016a:672–73). In the second type, Uber collaborates with drivers’ cooperative societies that employ the drivers themselves.5

By contrast, FlixBus has established a network of Small and Medium Size Enterprises (SMEs) throughout Europe.6 In particular, FlixBus manages these companies which own and maintain the buses, dealing only with logistics, booking and commercialisation.7

It can therefore be seen that neither Uber nor FlixBus has the formal organisational responsibility for the range of functions exercised by a traditional transport company, simply because they are not the owners of the means of transport through which their activities are performed. For this reason, the nature of these enterprises is still questioned, since it could be claimed that they are nothing but platforms, or, more specifically, electronic intermediaries or providers of information services.

Indeed, some important clarifications on the nature of these enterprises in Europe have already been made by jurisprudence at national and supranational levels.

Italian8 and Spanish9 judges, first, and the European Court of Justice (ECJ),10 subsequently, have stated that Uber cannot be considered only as a platform.11 Not only does Uber select its drivers, stipulating specific requirements (for example by specifying particular types of car, or the possession of a driving licence), but it also controls the drivers’ activities through the rating system and sets the fares.12 In other words, Uber exerts direct control over factors which shape the performance of the transport service, modifying the transport supply with respect to the demand from passengers.13 Consequently, the activity performed by Uber is in competition

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5 Retrieved on 13 June 2018 from https://www.uber.com/it/blog/milan/guidare_con_uber_in_italia_17/.
6 A list of such companies can be consulted at https://www.flixbus.com/company/partners/buspartners?wt_eid=215134114666452775&;wt_t=1516447298182&ga=2.9110135.358517828.1516441055–119806198.1515341146 (retrieved on 14 June 2018).
7 See Premessa and paragraph 2 Contratto di collaborazione FlixBus.
13 See Opinion of Advocate General Szpunar, point 51.
with other transportation enterprises both because of the unbreakable nexus between the platform and the transportation services offered by drivers\textsuperscript{14} and through the connection with the passengers' demand.\textsuperscript{15} In other words, if Uber drivers are in competition with taxi drivers, Uber itself is in competition with traditional taxi companies,\textsuperscript{16} because it is impossible for it to exist without the performance of the drivers.\textsuperscript{17}

Beyond the competition law consequences of these decisions, it is interesting to see how the statement about the transport company nature of Uber can affect FlixBus.

Indeed, FlixBus controls the quality of buses, sets timetables and fares.\textsuperscript{18} Moreover, it also exercises its power over labour relationships by fixing working time\textsuperscript{19} and laying down specific requirements for hiring and the tasks of workers.\textsuperscript{20} In this sense, even if FlixBus does not deal directly with transportation, claiming to deal only with logistics, booking and commercialisation, it actually imposes its supply conditions onto the enterprises it controls, establishing a strong nexus with their transportation performance; indeed, FlixBus activities cannot survive and make no sense without those of the partner companies. Therefore, FlixBus is undoubtedly in competition with intercity bus companies and consequently it should be deemed a transport company.

In the light of this, the lack of a substantial structure is not sufficient to exclude Uber and FlixBus from the status of transportation companies, because in practice they organise entrepreneurial transportation activities, exploiting the advantages stemming from the violation of competition law, which enable them to circumvent the tariffs set by the State for passenger transportation services.\textsuperscript{21} On this issue, the Advocate General of the ECJ has been very clear, stating that whether a company, like Uber or FlixBus in our case, is (or is not) the owner of the means of transport

\textit{is [. . .] irrelevant, since a trader can very well provide transport services using vehicles belonging to third persons, especially if he has recourse to such third persons for the purpose of those services, notwithstanding the nature of the legal relationship binding the two parties.}\textsuperscript{22}

\begin{enumerate}
\item Opinion of Advocate General Szpunar, point 56.
\item Article 2 Contratto di collaborazione FlixBus.
\item Article 2 Allegato n ° 1, Servizi di linea e uso dei veicoli, Contratto di collaborazione FlixBus.
\item For example, in Italy drivers have to speak Italian fluently and to have a good appearance. Moreover, they have to help passengers with luggage, sell snacks and drinks on board, gather payments and announce bus stops (Article 2 Allegato n ° 2, La qualità nel servizio delle linee, Contratto di collaborazione FlixBus).
\item Trib. Torino, Sez. I, 22 March 2017, points 4.5.3, 4.5.8, 4.6.2; Trib. Torino, Sez. spec. Impresa, 1 March 2017, points 4.5.8, 4.6.2, 4.7.3.
\item Opinion of Advocate General Szpunar, point 55.
\end{enumerate}
Searching for labour law in digital transportation companies

The judgements that Uber is a transport company, mentioned above, could also have some consequences for labour law issues.

First of all, if platform companies such as Uber, and therefore FlixBus, are transportation companies, the related legislation, both concerning competition and labour law, should be applied, with certain distinctions.

Since, as already noted, Uber is similar to (and in competition with) cab and car-and-driver hire companies, it should be subject to the specific laws regulating these enterprises.23 Focusing on the Italian system, it is interesting to see that such legislation gives some information about the juridical nature of the drivers’ labour relationships because it allows for these activities to be exercised, in general terms in three different ways: as craft enterprises, as cooperative societies or as entrepreneurs (see Article 7, paragraph 1, Italian Law no. 21/1992). This heterogeneity means that the application of the transport status provision does not lead to a general solution that can determine the legal status of Uber drivers, because under this law they could be formally either entrepreneurs or working partners, who, under Italian labour law,24 may also be employees to whom the related national collective agreements25 are applied.26

Looking at FlixBus, we have seen that its activity, performed through the partner companies that employ the drivers, consists of offering intercity bus services. Thus, the special Italian legislation for transportation workers,27 as well as the European directives concerning driving times, breaks and rest periods,28 together with the national transport collective agreements, should be applied. This solution has been followed in Italy by FlixBus itself which, on 18 December 2017, signed a Protocol with the Confederation of Trade Unions, providing for the application of the transport national collective agreements to the labour relationships between the partner enterprises and the workers they employ.29 However, the binding nature of this agreement is questionable because it has been concluded only by FlixBus and not by the partner companies. In this sense, the Protocol appears to be just a social responsibility

23 Law no. 21/1992 in Italy.
24 See Article 1, paragraph 3, Law no. 142/2001, according to which the working partner’s performance can be subordinate, quasi-subordinate, self-employed or any other typology of labour relationship.
25 That is the CCNL Autoferrotranvieri 23 July 1976 (so-called ‘Testo Unico Autoferrotranvieri’).
26 See for example CCNL per i lavoratori delle cooperative esercenti attività nel settore TAXI, 4 June 2008; CCNL per i soci e i dipendenti delle cooperative esercenti attività nel settore autonoleggio con e senza autista, noleggio autobus, scuolabus e locazione veicoli, 14 March 2007.
27 The reference is mainly to the old Royal Decree no. 148/1931, which delegates many parts of the specific regulation to collective agreements, especially concerning working time and wages. Indeed, the general discipline on working time, contained in Legislative Decree no. 66/2001, implementing EU Directives 93/104 and 2000/34, does not apply to transports (see Article 2, paragraph 1, Legislative Decree no. 66/2001).
tool through which FlixBus indicates to the Trade Unions its intention to comply with the Italian legislation and to exercise its economic power over the partner companies to this end. It is noteworthy that the Protocol was signed on 18 December 2017, namely two days before the ECJ decision on Uber, giving some indication of its real nature. In other words, it seems that FlixBus intended to distance itself from the Uber model to protect its reputation with consumers. Here too, the application of transportation legislation does not solve the legal status issues of FlixBus workers, because those regulations, although they can be used to improve working conditions, are addressed to all road transport drivers, regardless of the nature of their labour relationships.30

It is worth noting that the Uber and FlixBus phenomena are covered by the same regulation concerning strike action because they offer a public service, the transport of passengers, for which a particular law applies in case of strikes.31 This means that these companies are subject to the limits laid down by the law on strikes in public services.32 However, even this regulation does not offer a solution for the legal status of workers on these platforms either, because it is addressed both to employees and to self-employed people.33

To determine employment status, it is therefore necessary to look more closely at how the relationship between platform and driver is articulated in Uber and FlixBus. To this end, it is important to understand that platforms similar to Uber go beyond acting as mere intermediaries between drivers and passengers and ask whether the interferences of the platform in the performance of their work can be sufficiently important to establish a labour relationship with drivers (Gogliettino, 2018:7).

Scholars have generally focused on the Anglo-Saxon ‘control test’34 to establish whether gig economy workers are employees. Indeed, although work in the gig economy is generally characterised by time flexibility, platforms exercise forms of control that may be more invasive than those of subordination (De Stefano, 2016; Cherry, 2016). As already mentioned, Uber controls the quality of performance through a rating system35 – with consequences for the worker’s very right to remain on the platform, and therefore for the persistence of the legal relationship – as well as controlling the execution of the work through the GPS system. The same principles may be applied to FlixBus, since this company imposes a number of restrictions on drivers. For example, it requires that drivers have a ‘welcoming and

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30 See Article 2 Legislative Decree no. 234/2007; Article 1 Regulation no. 2006/561; Article 2 Directive no. 2002/15.
31 Law no. 146/1990.
32 As, for example, guaranteeing the service through a minimum of workers or giving notice of ten days at least.
33 Indeed, Article 1 Law no. 146/1990 states that the limits on strikes in public services apply regardless of the nature of the labour relationship.
34 As it is known, English and American courts have elaborated some criteria or tests to identify the existence of an employment relationship in the concrete case. The ‘control test’ is one of the most important tests for this purpose and its best known expression has been given in Yewens v. Noakes (1880) 6 QBD 530, 532, 533: ‘a servant is a person subject to the command of his master as to the manner in which he shall do his work’. On the Anglo-Saxon tests of subordination, see Deakin and Morris, 2012:145 ff.
35 Retrieved on 18 June from https://help.uber.com/it_IT/h/478d7463-99cb-48ff-a81f-0ab227a1e267 which explains how passengers can assign from one to five stars to drivers. The same system is adopted for example by Lyft (retrieved on 18 June from https://www.lyft.com/).
well-groomed appearance’, which implies the obligation to wear uniforms offered by FlixBus; it bans smoking in front of passengers; and it requires them to speak Italian fluently (Loffredo, 2018:135). Moreover, drivers are charged with additional tasks such as loading and unloading baggage, selling snacks and drinks, implementing the company’s advertising campaigns and being obliged to be friendly to customers.36

However, the presence of this kind of control may be not considered sufficient to qualify Uber and FlixBus drivers as employees, because ‘the company may very well provide its services through independent traders who act on its behalf as subcontractors’.37 Thus, the analysis of the two platforms may take two different paths, because of the divergences in their contractual structures. As seen above, the Uber structure is sometimes ‘trilateral’, being composed as follows: Uber platform–independent driver–passenger. Therefore, taking into account the control exercised by Uber over its drivers, the question about ‘who the employer is’ seems to be no longer relevant, as we are presented with a dichotomy whereby the driver may be classified either as an independent contractor or an employee. The well-known Aslam case in the UK concerned a situation where this ‘trilateral’ scheme was present and was resolved by a decision that Uber is an employer, even though its drivers have the status of ‘workers’ rather than ‘employees’.38

However, in other situations both Uber and FlixBus use a structure that is ‘quadrilateral’, involving a four-way relationship: the platform–the partner cab/transport company–the drivers–the passengers. In such cases, Uber and FlixBus have a double controlling power: towards the collaborating companies on the one side, and towards the drivers on the other. Thus, in relation to the issue of who the employer is, the key question here is whether only the partner companies are liable for labour obligations or whether Uber and FlixBus also have responsibilities as employers.

The legal qualification of performances in ‘trilateral’ structures

As seen above, in ‘trilateral’ structures the critical point is whether workers are employees or independent contractors. Because Uber offers the best example of ‘trilateral’ structure, a study of the nature of its working relationships can be useful for answering this question.

Until now, attempts to establish the employment status of Uber drivers have adopted a number of different approaches.39 In this research, carried out within the

36 See Article 2 Allegato n. 2, La qualità nel servizio delle linee, Contratto di collaborazione FlixBus.
37 Opinion of Advocate General Szpunar, point 54.
39 Besides the already mentioned control test, it is worth recalling the so-called purposive approach (Todoli-Signes, 2017; Davidov, 2017).
In general terms, the exercise of directive and control powers is inherent in the business models of platforms: the performance is interactive, so that the employer’s powers can be put into action live, in real time. Even if such interactivity is lacking, control can be exercised over the outcome of the performance and by means of the employer’s directives that are given at the beginning of the performance (on telework, see Nogler, 2000; Gaeta, 1995; Ichino, 1992). Furthermore, there is an Italian jurisprudential trend to rule that directive power can consist in the mere possibility of being able to address directives to workers, varying depending on the organisational context and the professional content of the performance (Marimpietri, 2009:34; Ichino, 1992:25). Therefore, even if Uber did not exercise its directive power directly, the online connection with workers would still allow for this opportunity and consequently there would be an element of subordination. Moreover, it is undeniable that an Uber driver’s performance is strongly controlled both geographically, due to the use of GPS, and qualitatively, due to the adoption of the customer rating system. The same reasoning could be followed to find the disciplinary power, as there is always a possibility of exercising this power even if this does not actually happen in practice (Zoppoli, 2015:64). In fact, Uber uses a sort of disciplinary power whenever it terminates a driver’s account because of violations of terms and conditions, because such terminations are justified by the workers’ conduct (Birgillito, 2016:73). Still, a considerable part of the business risk is borne by the platform which, on the one hand, receives profits and incurs losses coming from the drivers’ activity, while, on the other hand, it decides the costs of the performance and owns the Uber brand, that is exploited in commercial terms and leads to globally

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40 See most recently Italian Court of Cassation 11 October 2017, no. 23846, in DeJure.
41 In jurisprudence see in particular Italian Court of Cassation 27 November 2002, no. 16805, in DeJure.
42 See, for example, Italian Court of Cassation 27 October 2016, no. 21710, in DeJure; Italian Court of Cassation 26 August 2013, no. 19568, in DeJure.
identify Uber services as a unique entity (Prassl & Risak, 2016:640–41). Also, the reputation that drivers gain on Uber, through its rating system, is not portable to other platforms; therefore, drivers cannot in fact diversify their own risk by working for different platforms (see Todoli-Signes, 2017:261 ff.). In addition, the majority of Uber drivers work continuously for Uber itself, again largely due to the non-portability of reputation. Furthermore, sometimes Uber provides workers with the equipment needed to carry out their work, by renting electronic devices to drivers. In any case, the fact that work tools belong to drivers does not necessarily exclude a relationship of subordination, because some organisational forms of subordination, such as homeworking, teleworking and ‘agile working’, are indifferent to the question of ownership of work tools. Here, the pronouncement of Advocate General Szpunar is relevant, according to which the ownership of the means of transport is not relevant for determining the relationship between Uber and its drivers.

This latter observation is also useful for identifying the presence of another element of subordination: the inclusion of drivers in the Uber organisation. The concept of organisation does not exactly match with the substantial structure of the employer but with its productive activity (Campobasso, 2012:25) so that for the employer's organisation to be deemed to exist it suffices that the employer organises the worker’s performance (Persiani, 1966), especially concerning working time and the place of work. If we look at Uber, the platform seems to organise the worker’s performance because, on the one side, Uber defines the geographical area where drivers operate, while, on the other, it decides what constitutes the driver's working time, which starts 'as soon as [the driver] is within his territory, has the App switched on and is ready and willing to accept trips and ends as soon as one or more of those conditions ceases to apply.'

Lastly, the personal character of the performance, though devalued by work on digital platforms (Tullini, 2017:152–53), may still be found, since access to drivers' accounts is permitted, of course, only to those who possess both their username and password.

In conclusion, in the specific case when Uber adopts the ‘trilateral’ structure, there are many elements of the driver’s performance that lead to the driver’s status being deemed to be that of an employee under Italian labour law.

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44 According to Berg (2016), 37% of Amazon Mechanical Turk and CrowdFlower workers interviewed in a survey carried out by the International Labour Organization, in November and December 2015, rely on these platforms as their principal source of income.

45 See Section 2.6 Uber Technology Services Agreement.

46 The reference is to Law no. 81/2017 (Articles 18–24) which introduced in Italy a new form of work where the performance is carried out partly in the employer's premises and partly outside, thanks to the use of Information and Communications Technologies.

47 Opinion of Advocate General Szpunar, point 55.

48 This conclusion is corroborated by Article 2 Law no. 81/2015 which provides that when ‘time and space’ are organised by the client in a quasi-subordinate performance, the legislation on subordination is applied.


51 See Section 2.1 Uber Technology Services Agreement.
Who is the employer? Applying the functional approach to ‘quadrilateral’ structures

We now turn to the ‘quadrilateral’ structures used sometimes by Uber and adopted by FlixBus as its particular business model to see whether the functional approach can be useful here too. Research has shown that breaking down the role of the employer and looking separately at those subjects involved in a labour relationship to identify who exercises the functions of an employer can shed light on employment status (Prassl, 2015). According to Prassl and Risak (2016), the Uber platform takes on all five of the employer's functions in this situation, making Uber the sole employer in the case of a trilateral relationship.

However, if we try to apply this functional approach to the ‘quadrilateral’ model sometimes adopted by Uber and usually by FlixBus, as its peculiar feature, it is often considered that the idea of a sole employer is difficult to rebuild. Actually, this conclusion can be rebutted using a careful schematic analysis of the employer's functions in this context:

First, we look at the inception and termination of the employment relationship. When Uber and FlixBus collaborate with partner companies, these companies have the power to select drivers, as well as to begin and terminate the labour relationship. However, this does not preclude the possibility that the economic power exercised by the platform on the partner company could lead to interference in the labour relationship between the company and the driver. Indeed, if, for example, a driver does not comply with the terms and conditions set by the platform, that platform could bring pressure to bear on the company to terminate the collaboration with the driver, forcing the partner company to dismiss that driver. The same situation can arise in relation to hiring drivers, because the inception of the labour relationships is only possible if the partner company complies with the rules and requirements set by the platform. Thus, although the partner companies are formally the sole employers of the drivers, this does not correspond to the reality, due to the economic imbalance between these partner companies and the platform. Consequently, the first function (that of hiring and firing) is shared by platforms and partner companies.

The second employer's function we examine is who receives the labour and its fruits. This second function of the employer is also shared between partner companies and platforms. This is how it works: passengers pay the platform through the electronic system and the profit is then shared with the partner company, which pays the drivers’ wages. Moreover, the platform handles all the invoicing, claim reconciliation and complaints, so that this function, even though it is nominally shared between the two subjects, seems in practice to be exercised more by the platform than by the partner company.

52 For example, the 'quality' conditions set by FlixBus are actually obligations and duties, as it is textually proclaimed in Article 2 Allegato n ° 2, La qualità nel servizio delle linee, Contratto di collaborazione FlixBus.
53 According to Article 6 Contratto di collaborazione FlixBus, the parties has the right to compensation in case of breach of the contract. Moreover, if the partner company does not comply with the quality conditions, mainly concerning working time and drivers’ performances, FlixBus can terminate the contract.
54 Specifically, in FlixBus earnings are shared as follows: 70% to the partner company; 30% to FlixBus (see Article 3 Contratto di collaborazione FlixBus).
The third function is the provision of work and pay. Here, looking closely, we see that work is provided by the platform. Indeed, the customers’ network is that of the platform, since passengers go to the platform to buy tickets. They consider the partner companies and the platforms to be a single entity (and probably do not know they are different subjects). On the other hand, as already noted, drivers are paid by the partner companies, who pay their wages directly, as agreed in the employment contracts. Thus, even this function is shared by the two ‘employers’.

Management of the enterprise in relation to its internal market constitutes the fourth function. This factor is undoubtedly carried out by the platform. Both Uber and FlixBus coordinate the productive factors relating to their business. Indeed, even if the means of transport are owned by the partner companies, it is the platforms that decide the timetables and routes, set the minimum standards of quality for services, fix the working hours and specify the specific behaviours drivers must adopt towards passengers.

Finally, we turn to the management of the enterprise in relation to its external market. Here, the business risk is shared between the platforms and their partner companies. Indeed, on the one side, the latter make available their substantial structure, including vehicles and workers, while, on the other side, the platform handles the brand and the image of the transport service, as is demonstrated by the fact that the means of transport and the drivers’ uniforms carry the platform logo.

The ‘quadrilateral’ model: towards co-employment?

The application of the functional approach to the ‘quadrilateral model’ leads to the theme of co-employment (see most recently Garofalo, 2017:38 ff.). Therefore, at this point it becomes necessary to investigate whether in the Italian system there are legal instruments that make it possible to trace back the labour relationship both to the platform and to the partner companies.

According to some Italian scholars, in the presence of an integrated undertaking, where the traditional unity of the business structure is replaced by a network structure composed of a plurality of firms, each with its task in the productive cycle, it is possible to speak about co-employment (Carinci, 2016:735; Speziale, 2010). Indeed, the integrated undertaking exists thanks to contractual integration, namely the adoption of commercial contracts creating stable business relationships among enterprises, particularly strong in the case of economic dependence. This organisational integration allows the undertakings involved in a network of enterprises to share productive factors. However, it must be recognised that labour is itself a productive factor. This means that the workers’ performance can also be shared in the network (Speziale, 2010:38). Thus, we have to focus our attention on the connection between the commercial contract and the employment contracts themselves. In fact, the business and organisational needs and decisions directly affect the labour relationships. It can be

55 Indeed, the means of transports used by Uber and FlixBus are immediately recognisable. Uber cars are identified by the Uber brand put on their body. According to Articles 1 and 2 Allegato n° 2, La qualità nel servizio delle linee, Contratto di collaborazione FlixBus, the FlixBus brand is on the buses, which are green, and also on the uniforms worn by drivers and provided by FlixBus itself.
said that all the undertakings involved in a network have a common interest: to
organise the labour relationships with the aim of reaching a unique economic objective
(Speziale, 2010:38 ff.). In this sense, even if, from a formal point of view, only some
enterprises have labour relationships, the others which have not concluded employment
contracts should also be considered as employers, with all the legal consequences of this
(Speziale, 2010:45 ff.). Indeed, the reconstruction of a plurality of employers is not
against Italian labour law (Treu, 2015:14; Razzolini, 2013:33), because this legal system
does not provide a definition of an employer but only of an employee (Speziale, 2010:26 ff.).56 Moreover, through the notion of an employee, under the interpretation offered by
the courts with the ‘empirical’ approach, seen above, it is possible to rebuild the idea of
co-employment because it is clear that in an integrated undertaking, all characteristics
of subordination can be present. Indeed, the directive and disciplinary powers can be
exercised by the formal employer on behalf of the connected undertakings; the control
power is often directly exercised based on the results of the workers’ performance; and
the profits are shared among the employers, whether their role as employers is formal
or actual (Speziale, 2010:47 ff.). Thus, the functional approach we have applied seems to
produce a reverse view of the indices of subordination, so that, even if we wanted to
find a specific disposition to identify who the employer is, Article 2094 of the Italian
Civil Code could be sufficient, giving the definition of the employee and, therefore,
implicitly, of the employer.

In the light of this co-employment theory, there is room to consider
Uber and FlixBus as co-employers together with their partner companies in the
‘quadrilateral’ model.

There is no doubt that the relationship between the platform and the partner
company produces what is in effect an integrated enterprise, regardless of the
commercial contract formally adopted between the parties. The transport activity,
which is a phase of the productive cycle, is performed by the partner companies,
whereas the platforms deal with other phases, such as logistics, booking and
commercialisation. This would suffice to consider platforms as employers, due to the
common organisational interest they share with the partner companies. Indeed, the
drivers are inserted into the whole organisation of the integrated undertaking
composed of the platform and the partner companies, and the platform itself uses the
productive factor of their work, as is demonstrated by the fact that the employer’s
powers are exercised by platforms, sometimes directly, sometimes indirectly, through
the partner companies, thanks to the relationship of economic interdependence which
binds them together.

Conclusions
In conclusion, we have seen that Uber and FlixBus are employers not only when they have
a direct relationship with drivers but also when they adopt a ‘quadrilateral’ structure,
namely when some of the employers’ functions are shared with partner companies.

56 Article 2094 of the Italian Civil Code defines the employee as someone who obliges herself/himself
to collaborate in the enterprise, in exchange for wages, executing the performance under the employer’s
dependence and direction.
For some authors, this conclusion is not entirely satisfactory. Indeed, the co-employment doctrine is controversial at the moment in Italy, especially because its regulation is incomplete (Biasi, 2014:124; Mazzotta, 2013; Pinto, 2013) and this might explain why there is not much case law yet in this respect. Moreover, if we follow the jurisprudential trend relating to co-employment in Italy, the consequence of rebuilding a plurality of employers is generally the joint liability of employers towards workers (Treu, 2015:22; Biasi, 2014:134).

However, the analysis carried out shows that the protection of workers in the gig economy is nevertheless quite possible under current conditions. Of course, we do not yet have the basis to create a general rule to solve the problems of all online digital platform work, because the protections and rules which have to be applied depend on the concrete case in question (Voza, 2017a:10).

Therefore, the empirical approach proposed seems able to make the structure of the employment contract suitable for the new business models introduced by platforms. But if the structure of the employment contract is still valid for digital work, it has to be asked whether the gig economy, far from being an unprecedented phenomenon, is in reality still ‘the same old song and dance’.©

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REFERENCES


57 For a reconstruction of this debate, see Garofalo, 2017, 38 ff.
58 Indeed, the only textual reference to co-employment is Article 30, paragraph 4-ter, Legislative Decree no. 276/2003, according to which co-employment is allowed in networks of companies.
59 For a study on jurisprudence about co-employment in Italy, see Greco, 2013.
60 See, for example, Italian Court of Cassation 5 March 2003, no. 3249, in DeJur; Italian Court of Cassation 20 October 2000, no. 13904, ivi; most recently App. Roma 22 May 2017, no. 2809, retrieved on 20 June from http://www.soluzionilavoro.it/2017/07/27/codatorialita-e-unicita-del-rapporto-di-lavoro/.