Title: Platform workers: issues with qualifications and new opportunities for protection

INTRODUCTION

1. For a while now, the gig economy has been a developing social phenomenon in several ways. One of the newest organizational structures in the digital economy, high heterogeneity in the types of labour being done is what this phrase alludes to[1]. Robotics, increasing employment pressure, and the dangers of digitized prevarication of a significant portion of the residual workforce have all contributed to the challenges that have arisen as a result of the application of technology in the workplace. Given the affirmation of economic scenarios that provide new forms of entrepreneurship and employment that labour law is called to acknowledge, frame, and regulate, the issue of the regulation of work is portrayed in this context as being various and complex[2].

2. STATE OF THE ART

2.1. DOCTRINAL POSITIONS

About the legal eligibility of riders, it is necessary to explain several doctrinal perspectives.
ICHINO, who is concentrating on the events involving umbrella corporations, believes that the answer might involve providing platform workers with the necessary rights and making accommodations for the unique way in which their jobs are organized[3].
TREU proposes putting the issue of legal qualification of relationships in the background and focusing on instruments for the protection of rights, starting from a jurisprudential analysis formed in the USA on gig economy workers and on the system of protections occasionally invoked by workers and/or recognized by the courts[4].

2.2. CASE-LAW ANALYSIS

Leaving aside the doctrinal stances on the matter, it should be highlighted that, at the current level of the art, the issues with these new figures have been signs of a heated dispute, including jurisprudential ones.

What commentators are debating today was posed in the same way as the so-called Pony Express[1].

The first real ruling on the merits by the Italian Courts is that of the Court of Turin in 2018, concerning the qualification of the relationship of Foodora workers.

The aforementioned Court excluded, on the one hand, the existence of subordination, focusing attention on the three main points that characterize it: managerial power, organizational power, disciplinary power[2]. On the other hand, to draw a sort of boundary between the notion of coordination and that of subordination, and enhancing the provision of art. 409, n. 3, c.p.c., the applicability of art. 2, d.lgs. n. 81/2015: it is necessary, in the latter case, the subjection of the worker to the managerial and organizational power of the employer[3].The above orientation has been overturned by the Court of Appeal of Turin, which has proposed for an autonomous model of qualification of the rider's employment relationship: the latter is placed in a third perspective with respect to the subordinate contract pursuant to art. 2094 of the Italian Civil Code and the coordinated and continuous collaboration referred to in art. 409 c.p.c. The sentence of the Supreme Court on the Foodora case, enhancing the requirement of "hetero-organization", has led to the application of Legislative Decree. n. 81/2015 and made a significant distinction with art. 409 co. 3 c.p.c.

Finally, two recent and important pronouncements should be remembered. The first, inherent in the Court of Palermo[4], qualified the riders as employees, given that their service is entirely organized by the digital platform. The second, relating to the Court of Milan[5], confirmed the majority orientation that leaned towards the subordinate nature of the riders' working relationship: the latter, delivering food to domicile for digital platforms, they cannot be qualified as autonomous, when their performance is managed in a timely and stringent manner by the algorithm.

2.3. LEGISLATIVE FRAMEWORK

Following the Foodora case and the critical issues that emerged in terms of protecting the health and safety of riders, to resolve the jurisprudential contrast regarding the exact legal classification of the case in question, the legislator intervened, also on the impetus of the

[1] Cass. Civ., Sez. Lav., 20 gennaio 2011, n. 1238, in Giust. Mass. Civ., 2011, I, p. 185
[2] Cass. civ., Sez. lav., 8 febbraio 2010, n. 2728, in De Jure
[3] A.a.V.v., *op. cit*, pp. 26-27.
[4] Trib. Palermo, sez. lav., 24/11/2020, n. 3570, DeJure.
[5] Trib. Milano, sez. lav., 20/04/2022, n. 1018, DeJure.

unions, with legislative decree no. 101 of 3 September 2019, (converted by Law 2 November 2019, n. 128), dictating a specific discipline aimed at "protecting work through digital platforms".

The legislator, with the insertion of Chapter V-bis within the d.lgs. n. 81/2015, has sanctioned a series of "obligations or minimum levels of protection" in favour of non-hetero-organized riders (not falling, therefore, within the scope of application of Article 2 of the same decree), nor hetero-direct (not subordinate pursuant to Article 2094 of the Civil Code), and thus preparing a "minimum safety net consisting of a nucleus of fundamental social rights". Art. 47-bis, paragraph 1, of d.lgs. n. 81/2015, after having expressly excluded from the protections contained in the following articles (from 47-ter to 47-octies[6]) the work services whose execution methods are organized by the platform, limits the subjective scope of Chapter V-bis to *"self-employed workers who carry out activities of delivery of goods on behalf of others, in urban areas and with the help of velocipedes or motor vehicles referred to in Article 47, paragraph 2, letter a), of the highway code, through platforms, including digital ones[7]". It should also be considered that the aforementioned decree does not formally qualify the "nature of "workers*.The exceptions referred to in the 2nd paragraph of art. 2, Legislative Decree no. 81/2015: art. 47-bis, second paragraph, Legislative Decree no. 81/2015, is aimed, in fact, at riders that are literally not hetero-organized, "substantially" hetero-directed[8], recipients, too, of the set of rights referred to in Chapter V bis, Legislative Decree no. 81/2015 (instead of the guarantees prerogative of hetero-direct, i.e. subordinate, employment).

It should not be forgotten that art. 47-*quater* of the aforementioned decree, regarding remuneration, favours the determination of the compensation of the riders by the "collective agreements stipulated by the comparatively most representative trade unions and employers at national level", which "may define criteria for determining the total remuneration that take into account the methods of performance of the service and the organization of the client ".Lastly, the second paragraph of art. 47 quinquies, Legislative Decree no. 81/2015 prohibits "exclusion from the platform and reductions in job opportunities attributable to non-acceptance of the service". Having clarified this, Article 47-septies, third paragraph, Legislative Decree no. 81/2015, establishes compliance by the

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[6] Chapter V-bis of Legislative Decree no. 81/2015 regulates, together with insurance and preventive protection, the form of the employment contract (with the information to be provided to workers), the minimum remuneration, the prohibition of discrimination and the protection of personal data.

[7] M. Tornaghi, *"Universalismo vs. selettività della tutela prevenzionistica: brevi spunti sul caso dei rider",* in DSL, 2021, 2, p. 65.

[8] M. Magnani, *"La disciplina legislativa del lavoro tramite piattaforma"*, in Boll. Adapt, 9 settembre 2019, 31, 3.

client (the company that uses the platform) towards the riders, of Legislative Decree n. 81/2008[9].

The 2019 legislator, referring to Legislative Decree no. 81/2008, started from the assumption (and the purpose) of extending the rights of cycle-messengers in terms of safety. However, if we look at the obligations placed on both the employer / client and, secularly, the worker, the complete extension of the provisions of Legislative Decree no. 81/2008 is hardly compatible as a work performance, "nominally" autonomous, such as that of the riders referred to in Chapter V-*bis*[10].

It is precisely in a similar context that in September 2020 Assodelivery, the association representing the Italian food delivery industry, and UGL signed the first National Collective Labor Agreement in Europe "for the regulation of the delivery of goods. on behalf of others, carried out by self-employed workers, so-called "*rider"*.

This collective agreement, as a preliminary, qualifies the agreements between platforms and riders as self-employment contracts pursuant to art. 2222 of the Italian Civil Code or pursuant to art. 409 c.p.c. It has a twofold objective: to apply the discipline of the new chapter V-bis introduced by Legislative Decree n. 101 of 03.09.2019, converted with Law no. 128 of 02.11.2019, as well as to take advantage of the delegation provided for by paragraph 2 letter a) of art. 2 of the Legislative Decree. 81/15.

3. RESEARCH OBJECTIVE

The fundamental goal is to improve the protections offered to this group of workers. It can be accomplished by redesigning "Reputational Control" in order to eliminate any possibility of direct or indirect discrimination. To this aim, the principles of non-discrimination of European origin, common to all types of workers, can also be applied. In order to prevent discrimination or harm to the worker, new rights must also be developed when using algorithms to evaluate workers. Through the newly proposed Directive No. 414/2021 and the 2021 ILO Report, the goal may also be accomplished at a supranational level. Both tend to establish several minimum rights as well as a wide range of social and labor rights that are applicable to all workers who conduct work through digital platforms in the European Union, independent of the qualifying data.

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[9] P. Pascucci, *"Note sul futuro del lavoro salubre e sicuro … e sulle norme sulla sicurezza di rider & co"., in* Dir. Sic. Lav., 2019, 1, 48; L.M. Pelusi, *"Il lavoro tramite piattaforme digitali: la l. n. 128/2019 di conversione del d.l. 101/2019",* in Boll. Comm. Cert. Unimore, 7 novembre 2019, 3, 11-12.

[10] M. Persiani e V. Maio, "*Nuove tecnologie e crisi della subordinazione: il caso rider",* in www.air.unimi.it, 2020

4. THEORETICAL AND METHODOLOGICAL FRAMEWORK

Platform work can be related to on-call labor without the requirement to respond in a technologically advanced variation or intermittent subordination, which are inherently exempt from the subjective and objective standards outlined by this regulation.[11].

A similar mechanism is governed by algorithms: these feed on data thanks to which they change and evolve incessantly in a sort of technological loop, favored by the increase in computational power to which the possibility of storing more data is connected[12]. Considering this, on the one hand, the platform plays an active role in the meeting between demand and supply of work: it, in fact, performs a labor mediation activity, since it realizes a segment of an entrepreneurial activity. On the other hand, the difficulty of framing the work generated by these platforms is considerable: the unilateral power to dictate the contractual conditions, the fee, the controls on the performance of the service, the disconnection from the platform, are not uniquely able to identify a subordinate employment relationship but only show a contractual imbalance compatible with self-employment. Having clarified these preliminary aspects, and regardless of legal / qualifying considerations, it does not seem disputable that riders, and platform workers in general, find themselves forced to live in a condition of extreme precariousness[13].

In a reality in which digital capitalism feeds the exploitation of workers[14], the problem consists in the search for new tools offered by labor law itself.

An interesting approach can be found by overturning what is one of the main problems of riders, namely the so-called "Reputational control".

The reputational rating, even if useful and apparently neutral, cannot constitute a cause of justification for direct or indirect discrimination, even if in order to satisfy customer satisfaction[15].

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[11] P. NICASTRO, *"Lavoratori delle piattaforme evidenze su dati Inapp-plus",* in INAPP, 2019. Sull'inquadramento ex art. 13 ss., d.lgs. 15 giugno 2015, n. 81, cfr. R. DEL PUNTA*, "Sui riders e non solo: il rebus delle collaborazioni organizzate dal committente"*, in Riv. it. dir. lav., 2019, I, p. 360.

[12] A. PERULLI*," Il diritto del lavoro "oltre la subordinazione": le collaborazioni etero-organizzate e le tutele minime per i riders autonomi",* in WP C.S.D.L.E. "Massimo D'Antona", 2020, p. 70; F. CAPPONI*, "Lavoro tramite piattaforma digitale: prima lettura del d.l. n. 101/2019 convertito in l. n. 128/2019"*, in Dir. rel. ind., 2019, p. 1231.

[13] Cfr. J. DRAHOKOUPIL-A. PIASNA, Work in the platform economy: *Deliveroo riders* in Belgium and the SMart arrangement, in Working Paper ETUI, 2019, n. 1.

[14] A. SOMMA, *"Il diritto del lavoro dopo i Trentagloriosi",* in Lav. dir., 2018, p. 307 ss.; ID*., "Caso Foodora: la Cassazione difende i rider, la politica i loro padroni"*, in http://temi.repubblica.it/micromega-online/ caso-foodora-la-cassazione-difende-i-rider-la-politica-i-loro-padroni.

[15] P. De Petris, *"La tutela contro le discriminazioni dei lavoratori tramite piattaforma digitale",* in www.dirittifondamentali.it, 2020, p.1105.

Basically, it is essential to limit the risk of excessively discretionary judgments, coming from subjects external to the work activity.

These judgments may result in a lower chance of receiving calls for digital workers, if not the same disconnection from the app, without the possibility of replying to them. And this occurs regardless of the legal qualification of the relationship, be it autonomous, hetero direct or subordinate[16].

A possible solution is to consider the platforms as administration agencies, requesting prior public authorization for digital intermediation, and possibly requiring the registration of all relationships (business and financial) that exist between the platform and the worker[17].

Also on the supranational level, different perspectives have emerged, aimed at overcoming the great dichotomy between subordinate work and self-employment.

In the first instance, with the Directive 414 of 2021, a series of measures have been proposed aimed at improving the working conditions of those who perform work through digital platforms, and at the growth of companies in the gig economy. To this extent, it is possible to stem the precarious conditions experienced by the workers of the platforms, as well as to regulate the ability of the latter to exercise forms of control and hetero direction of workers' performance[18]. To overcome the challenge of qualification, the proposal provides, in the first instance, a relative legal presumption of subordination, operating where at least two of the criteria provided for therein exist, which can be defined as Euro-unitary indices of presumption of subordination[19].

The rationale of the proposed Directive consists in the prospect of protecting all workers who perform work through platforms.

Persons carrying out work through digital platforms in the Union should enjoy several minimum rights aimed at ensuring the correct determination of their employment situation, promoting transparency, fairness and accountability in algorithmic management, as well as improving the transparency of work through digital platforms, including in cross-border situations. The second regulatory perspective is endorsed by the 2021 ILO Report, coordinated by the economist Uma Rani, entitled *"World Employment and Social Outlook. The role of digital labor platforms in transforming the world of work (2021)*".

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[16] Per la disamina completa di quanto esposto, si veda M. Mocella,*" RIDERS E LAVORO IN PIATTAFORMA: UN PROBLEMA (IR)RISOLTO? RIDERS AND PLATFORM WORK: A (IR)SOLVED PROBLEM",* in www.massimariogiurisprudenzadellavoro.it, 2020, pp. 145-150.

[17] N. LETTIERI-A. GUARINO-D. MALANDRINO-R. ZACCAGNINO*," Platform Economy and Techno-Regulation – Experimenting with Reputation and Nudge"*, in Future Internet, 2019, n. 11, p. 163.

[18] L. Zampieri, *op. cit*., p. 2.

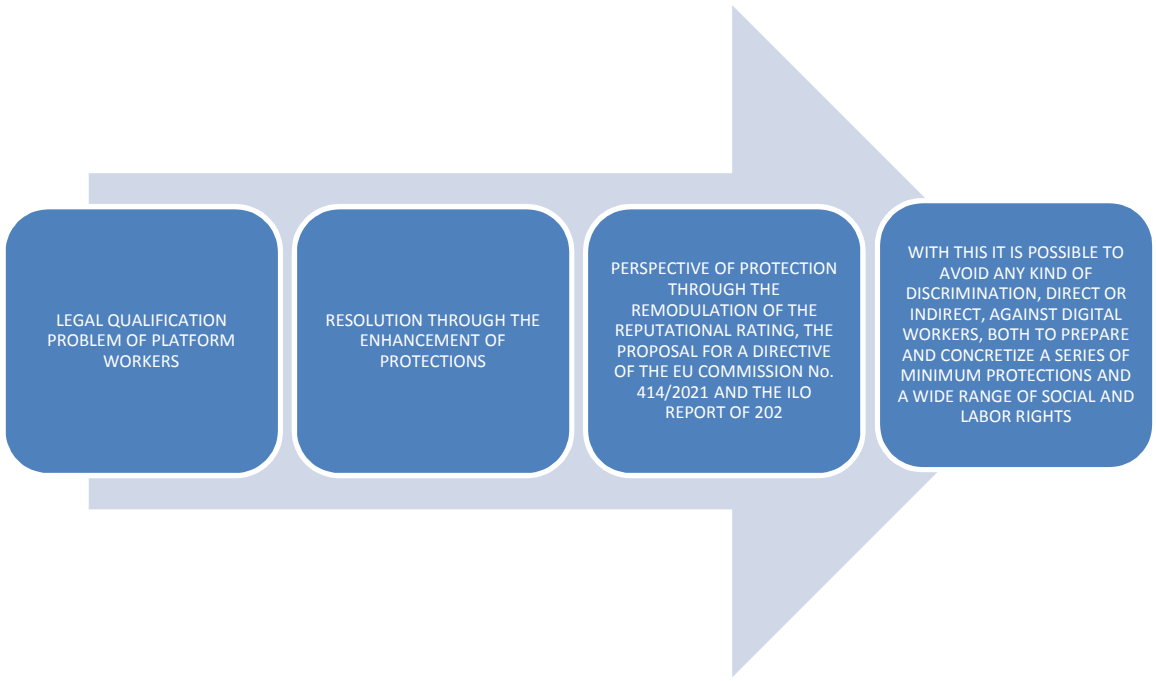
[19] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work, n. 414/2021, in www.lavorosi.it, p. 20.

Finding a broad range of social and labor rights related to "decent work through platforms" that may be applied regardless of the legitimacy of the interactions is the main challenge It is a long series of protections in the field of remuneration, dismissal, data processing, conditions of employment, freedom of professional mobility, dispute resolution.

The Report ultimately makes a point on the so-called "Algorithmic management of production processes and work performance" that is of essential relevance. It must be assumed that the job is credited to an algorithm that makes use of several factors, including, in the case of home delivery platforms, client feedback and the worker's readiness to accept offers. These indicators, however, raise several issues, from data processing privacy to user judgment-based indirect performance control to the employment of disciplinary measures like account disconnections to actual discrimination.

Especially from the latter point of view, it is necessary, on the one hand, to apply the principles of non-discrimination, of European origin, which concern all workers, both subordinate and self-employed. On the other hand, there is a need to establish new rights to prevent the use of algorithms in the evaluation of workers from discriminating or harming the worker. In this perspective, the rule referred to in art. 47-quinquies, previously cited: the platform, therefore, will no longer be able to sanction the worker by excluding him from access to subsequent job opportunities or deny him access to reward levels, or exclude him from priority access due to statistics on the absence rate.

5. RESEARCH DESIGN



6. EXPECTED RESULTS

Beyond the qualifying factors, the starting point for the study that has been done thus far is the perspective relating to the strengthening of the protections. On the one hand, it is conceivable to prevent potential direct or indirect discrimination by the remodeling of reputational control as proposed above, even when the EU's anti-discrimination principle is correctly applied. The chance of the digital worker getting kicked from the platform, missing out on client calls, or even instigating racial hatred is reduced by keeping the possibility of extremely arbitrary judgments by outsiders to the work activity.[20] On the other hand, it is possible to create new and effective tools of protection through the proposed Directive and the ILO Report of 2021, through which it will be possible to guarantee a number of minimum rights, as well as a wide range of social and work rights, which apply to all workers who perform their work through digital platforms in the European Union.

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[20] Within the social network platforms, for some years now, there has been a strong growth in the diffusion of the cd. hate speech, that is, speech inciting hatred, of race and gender in particular, which spread, in a viral way, worrying stigmatizations and prejudices in (virtual) society. P. De Petris, "The protection against discrimination of workers through the digital platform", in www.dirittifondamentali.it, 2020, p. 1105.

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