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What Impact Will the Proposed EU Directive on Platform Work Have on the Italian System?

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1. The dialogue between EU institutions, national parliaments and scholars during the legislative process: A test for implementation. 2. The subjective scope and correct determination of the workers' status in the proposed Directive. 3. The function and uncertain destiny of the (rebuttable) presumption of employment status. 4. Final remarks and several aspects requiring deeper analysis.

Abstract

The European Commission's proposal for a Directive on improving working conditions for platform work is probably the most discussed and scrutinized draft of a potential European Union legislative act ever. Here, the Directive is analysed from the perspective of the Italian system. We assess the concrete impact at the national level and determine whether Italian lawmakers need to issue new statutes to comply with the Directive and, if so, how the Directive should be implemented properly at the national level. Possible impacts on the law's interpretations by judges/authorities are considered.

The analysis evaluates the Directive from the perspective of its effectiveness in reaching its main goal of "improving working conditions in platform work" in general and considering the Italian legal context in particular. This contribution focuses on Chapter II of the Directive on employment status.

Overall, the Directive could alter the traditional classification of working relationships and reinforce the EU embracement of a dichotomic approach, splitting the working relationships into employment and autonomous work. Thus, Italian legal interpreters should commit to connecting their interpretations to those of the Court of Justice of the European Union in all litigations concerning the correct classifications of working relationships. Moreover, lawmakers should avoid a situation in which some platform workers are classified as self-employed within the Italian system when they fall under the Directive's employment presumption.

Keywords: Platform work; Employment status; Self-employment; Transposition.

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1. The dialogue between EU institutions, national parliaments and scholars during the legislative process: A test for implementation.

The European Commission's proposal for a Directive on improving working conditions in platform work (hereafter, the Directive) is probably the most discussed and scrutinized draft of a potential European Union (EU) legislative act ever. The reasons for this are clear. First, the Directive comes at a time when platform work is at the centre of an intense academic, jurisprudential and political debate, which the European Commission has further ignited, intervening in the most challenging and discussed aspects of the subject.[1] Second, because the Directive will potentially impact on all EU member states, which represent a significant portion of the markets of digital platforms, it could influence businesses and other legal systems worldwide, conferring on the EU a leading global role in this field.

Even so, discussing a proposal for possible legislation is problematic from a legal perspective because of its precarious nature, particularly when, frustratingly, official and unofficial news about the ongoing legislative procedure suggests that the final version of the Directive, expected by the end of 2023, is likely to be revised.[2] Nevertheless, the analysis of the proposal by scholars is important as it can help (politicians, institutions and others) to evaluate: first, the current state of compliance of their national systems in respect of the legal instruments and solutions proposed and discussed at the European level; and second, the formal and substantive quality and efficiency of the draft Directive, with regard to the political/legislative aims.

In this contribution, the Directive will be analysed from the perspective of the Italian system. The goal is to assess the concrete impact of the Directive at the national level, including whether Italian lawmakers need to issue new statutes to comply with the Directive and, if so, how the Directive should be properly implemented at the national level. Possible impacts on the law's interpretations by judges/authorities will be considered. The analysis will also evaluate the Directive from the perspective of its capability or effectiveness in reaching its main goal of "improving working conditions in platform work" in general, and in the Italian legal context in particular.

Interestingly, at this stage of the legislative process, the opinions stated by the national lawmakers, in accordance with Protocol no. 1, which encourages the involvement of national parliaments in EU activities, provide support for such an analysis. The Protocol promotes dialogue between national and European legislators during the EU legislative processes and provide that the national parliaments can share opinions/suggestions and send them to their respective governments and the European institutions (the European Parliament and the EU Council). In Italy, this Protocol has been implemented by Art. 7 and Art. 9 L. 234/2012.

[1] The Italian and international literatures are massive. For key references, *see* Carinci M.T., Dorssemont F., *Platform work in Europe: Towards harmonization?*, Intersentia, 2021, and Perulli A., Bellomo S., *Platform work and work 4.0: New challenges for labour law,* Wolters Kluwer, Alphen aan den Rjin, 2021.

[2] The Employment and Social Affairs Committee's draft report (by the appointed rapporteur, Elisabetta Gualmini) proposes 163 amendments to the European Commission's proposal https://www.europarl.europa.eu/doceo/document/EMPL-PR-731497_EN.pdf. The draft report has been received with some reservations within the Committee, and almost 1,000 amendments have been tabled by the other members of the Committee: https://bit.ly/3OaJyZU.

Formally, these opinions should concern the respect of the principles of subsidiarity and proportionality governing the competencies conferred to the EU by the Treaties (Art. 5 Treaty on the European Union, TUE) because their effective application interferes with the members' competencies. However, in point of fact, it is not easy for a legislator to separate this perspective from others; hence, the Parliament's opinions usually consider the most politically tricky aspects of the EU legislative drafts from the more general view of implementation in a specific country. In this case, the Italian Chamber of Deputies has recently discussed the proposed Directive and it issued an opinion on 27 May 2022, which is a result of discussions and experts' hearings.[3]

The Italian Chamber of Deputies expressed a positive general assessment of the draft, offering seven observations,[4] which can be summarized in the following five points. First, the Directive should protect the work organized/controlled (remotely) by algorithmic platforms even if the service/task is not provided at the request of a recipient (as now prescribed by Art. 2 of the draft) (letter *a)*). Second, the Directive should connect the platform worker protections to the specific characteristics of the business and work performance instead of tying such protections to the formal contractual relationship. The Chamber of Deputies considered that the criteria specified by the Directive to determine workers' employment status are too vague to efficiently distinguish between the different employment statuses, and that they recall the awkward distinction between the so-called hetero-organization and hetero-direction,[5] which makes it crucial to indicate clearer and plain criteria (let. *b)* and let. *f)*). Third, the Directive should increase and empower the protections for genuine self-employed workers involved in platform work (let. *c)*). Fourth, the Directive should better promote social dialogue and industrial relations in the work organizations managed through digital platforms, explicitly referring to trade unions and their right to collective bargaining, recognizing forms of workers' representation at the firm level and modifying the EU competition law in so far as it encumbers the collective actions of workers because of the nature of their contractual relationships (let. *d)* and let. *e)*). Fifth, the responsibilities for the enforcement of the rights and obligations recognized by the Directive should be clarified, and the activities of the competent authorities (the privacy and labour authorities) at the national level should be better connected (let. *h)*).

Apart from the first and the last observations (let. *a)* and *h)*), the other opinions directly or indirectly deal with the dilemma of the workers' status and the characteristics of working relationships. For this reason, the analysis in this contribution focuses on Chapter II of the Directive on employment status. It will discuss the subjective scope of the Directive and the drafted rules on the correct determination of the work relationships (Section 2), as well as the legal presumption (Section 3). Some final remarks on these aspects are offered, and other relevant issues worthy of deeper consideration are highlighted, given the challenges and opportunities that Italy will face in implementing the Directive (Section 4).

[3] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_10065_2022_INIT&qid=1656939782019&from=EN

[4] One observation (let. *g)*) concerns the co-ordination of the draft with other legislative acts in force or under approval.

[5] On these concept *see* Pallini M., *Towards a new notion of subordination in Italian labour law?*, in *Italian Labour Law e-Journal*, 12(1), 2019, 1 ff. and the references provided.

2. The subjective scope and correct determination of the workers' status in the proposed Directive.

One of the most challenging aspects in the future transposition of the Directive concerns the qualification of working relationships. This aspect will obviously engage the attention of each EU member state because the matter of the workers' status has always been considered a member state's competence.[6] However, in Italy, it will rouse special attention because Italian lawmakers have recently faced the dilemma of classifying workers in the field of platform work.

Indeed, the problem of classifying the working relationship is not a novelty in the context of the EU legislation; it first became relevant in the matter of workers' freedom of movement and establishment, pursuant to Art. 45 of the Treaty on the Functioning of the European Union (TFEU),[7] and second, as a consequence of the EU Directives issued on social/labour matters, with the aim of establishing common and harmonized minimum standards to ensure a level playing field for businesses. However, in all these cases, the Court of Justice of the European Union (CJEU) or the EU legislator provided a definition of the worker only with the aim of defining the scope of the regulations delivered by the act itself.[8] By contrast, in the proposed Directive, the issue of classifying working relationships is developed in two different ways: i) as a reference for drawing up the subjective scope of the other provisions (see Art. 2 para 1 no. 4), and ii) as the object of a specific regulation. This means that the Directive not only prescribes substantive rules to apply within a specific scope (as usual), but it regulates *ab origine* the very process of classification of the workers' status, which the national actors are called on to manage (Art. 3 and Art. 4 of the Directive). Thus, the definition of worker, along with the definition of the "person performing platform work", which does not discriminate between different contractual relationships (Art. 2 para 1 no. 3), is both the tool to distinguish between the substantive rights/duties that the Directive connects to the employment relationships and the substantive rights/duties recognized by the Directive regardless of the nature of the working relationships (see Art. 10)[9] and the reference point to directly intervene in the process of determining the workers' status at the national level. Thus, this definition is a new and relevant step forward in the process of harmonization of the EU labour law, which requires specific reflection.

The two profiles (that of the definition of workers for identifying the Directive's scope and that of the process of determination of the workers' status) are connected not only for logical reasons, but also because the definition of platform worker (Art. 2 para 1 no. 4) and the rules on the correct determination of the employment status (Art. 3) rely on the same

[6] *See* Art. 151–153 TFEU, and Ales E., *Comment on Art. 153 TFEU*, in Ales E., Bell M., Deinert O., Robin-Olivier S., *International and European labour law: Article-by-article commentary*, Nomos/Hart Publishing, Baden-Baden, 2018, 156.

[7] Countouris N., *The concept of 'worker' in European labour law: fragmentation, autonomy and scope*, in *Industrial Law Journal*, 47(2), 2018, 192, Menegatti E., *The evolving concept of 'worker' in EU law*, in *Italian Labour Law e-Journal*, 12(1), 2019, 71.

[8] Rosin A., *Towards a European employment status: The EU proposal for a directive on improving working conditions in platform work*, in *Industrial Law Journal*, 4, 2022, https://doi.org/10.1093/indlaw/dwac011

[9] The directive distinguishes between workers and persons, whereas the literature usually distinguishes between employees and workers (Rosin A., nt. (8), 3).

referral. In fact, the Directive defines the worker in both cases as the "person performing platform work who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in the member states with consideration to the case law of the Court of Justice".

In the process of the Directive's transposition, at least two main problems can arise that must be addressed. The first and more general one concerns the lack of an EU legislative definition of "worker" because, curiously, the Directive only refers to the member states' definitions and the CJEU's case law definition. The second problem concerns the substantive set of rights/duties that the Directive considers mandatory in the case of the existence of an employment relationship.

We cannot review the overall evolution of employment status in EU law in depth here.[10] However, we highlight the fact that originally the EU lawmakers referred to the national definitions of worker, while the CJEU established a definition of worker progressively more specific (as discussed below). The resulting political pressure, mostly from the EU Parliament, and public opinion, for the settlement of the mismatch, led to an ambiguous compromise, according to which the member states refer to their national definition "with consideration of" (i.e., taking into account) the CJEU case law.[11] The result is a hybrid definition,[12] which testifies to the good intentions of the EU legislators in enlarging the labour law harmonization, but also the difficulties in moving forward on this crucial path in the absence of reform of the EU treaties.[13]

In fact, the rule is technically arduous to apply in the transposition to the national level, whereas the political *rationale* and the request by the EU legislator are clear: the member states (and to some extent their operators/interpreters) are requested to review their traditional definitions (and/or their respective interpretations - as we will discuss below) of working relationships in the light of the CJEU's definition of workers, at least in the area of platform work.[14] Because the national definitions/criteria cannot be ignored, we could say that the rule shall be followed "as far as possible", that is, respecting the core of the traditional definitions and their wording. In the end, it seems that the EU Directive calls for working on the (well-known and common) ambiguities characterizing the national definitions (which are more evident because of the digital and algorithmic revolution),[15] the application of the rule of law's interpretations and the national case law. Moreover, the Directive asks for

[10] Battista L., *L'evoluzione del concetto di lavoratore nel diritto dell'Unione Europea*, in *Argomenti di Diritto del Lavoro*, 3, 2021, 624 ff.

[11] This solution has already been used for Directive no. 2019/1152 on transparent and predictable working conditions in the European Union and Directive no. 2019/1158 on work–life balance for parents and carers.

[12] Battista L., nt. (10) 638, Rosin A., (8) 4.

[13] This definition is considered a step forward but also temporary (Battista L., nt. (10), 640). The European Parliament has recently adopted a resolution on the call for a Convention for the revision of the Treaties, which deal significantly on reviewing the social policy (https://www.europarl.europa.eu/doceo/document/TA-9-2022-0244_EN.html).

[14] In the draft report currently being discussed within the Employment and Social Affairs Committee (see note 2), the referral to the hybrid definition is deleted in Art. 3 on the correct determination of workers' status but confirmed in Art. 2 on the definitions for the purposes of the directive. Thus, given this situation, the elimination in Art. 3 could not have substantial effects.

[15] Digennaro, P., *Subordinazione o dipendenza? Uno studio sulla linea di demarcazione tra lavoro subordinato e lavoro autonomo in sei sistemi giuridici europei,* in *Labour & Law Issues*, 6, 2020, 1.

permanent consideration of the CJEU case law, given that it is not steady but fluctuates, as does every national jurisprudence.

These considerations appear to affirm that this part of the Directive addresses the legal actors, such as judges and administrative authorities who can better implement these components, and who can use their exegetic prerogatives coherently in the EU context,[16] while leaving the national legislators the freedom to fine-tune/restyle the national definitions.

From this perspective, it appears that the Italian legal framework is already compliant. As Italian scholars know well, Art. 2 d.lgs. 81/2015 (part of the so-called Jobs Act) prescribes the application of employees' protections in the grey area between subordination and self-employment, expressly mentioning (since the reform in 2019) platform work as an elective area of application for the new definition.[17] This Article has been interpreted in many ways.[18] One interpretation is that it embodies, in statute form, the Italian case law on employment relationships, as the case law is usually more flexible and realistic than the basic definition of the employment contract in Art. 2094 of the Civil Code (c.c.) (which was worded in 1942). In another interpretation, it encompasses bogus-autonomous or quasi-subordinate workers in the area of employment relationships. In any case, the Article matches the provision of the Directive to the extent that it has the effect of reviewing (i.e., expanding and/or clarifying) the scope of employment status and its protections in the light of the modern organization of work.[19]

In fact, the CJEU's current definition of an employee is broader, in general terms, than the Italian definition *ex* Art. 2094 c.c. As is well known, the traditional EU definition of a worker rests on the Lawrie-Blum case,[20] which establishes that "the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration". This definition is literally consistent with Art. 2094 of the Italian c.c., which focuses on the hetero-direction of the performances.[21] However, the CJEU has interpreted and fine-tuned its own definition, recognizing the existence of the entrepreneur's "direction", even in the

[16] Bronzini G., *La proposta di Direttiva sul lavoro nelle piattaforme digitali tra esigenze di tutela immediata e le sfide dell'umanesimo digitale"*, in *Lavoro Diritti Europa*, 1, 2022, 8.

[17] Art. 2 d.lgs. 81/2015 states that "the discipline of employment relationship is also applied to collaborations which take the form of mainly personal work performance, continuative and whose modalities of execution are organized by the client. The provisions referred to in this paragraph apply even if the modalities of execution of the service are organized through platforms, including digital ones". The literature on this topic is enormous; *see* the referrals in Biasi M., *Lavoro digitale*, in Bellomo S., Cian M., Ferri G. jr, Santosuosso D. (eds.), *Digesto delle discipline privatistiche – Sezione commerciale, Aggiornamento IX,* UTET, 2022, 267 ff.

[18] Cf. Biasi M., nt. (17).

[19] It is worth highlighting that Art. 2 d.lgs. 81/2015 has been interpreted as being based on a presumption mechanism (cf. Nogler L., *La subordinazione del d.lgs. n. 81 del 2015: alla ricerca dell'autorità dal punto di vista giuridico*, in *Argomenti di Diritto del Lavoro,* 1, 2016, 63) as if it matches Art. 4 of the Directive (*see* Section 3).

[20] CJEU, Case C-66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECLI:EU:C:1986:284.

[21] Ferrante V., *La nozione di lavoro subordinato nella dir. 2019/1152 e nella proposta di direttiva europea rivolta a tutelare i lavoratori "delle piattaforme"*, in *WP C.S.D.L.E. "Massimo D'Antona". INT*, 158/2022, 17.

case of tenuous elements of control and organization[22] that resemble, if only partially, the elements cited in Art. 2 d.lgs. 81/2015.[23]

From this perspective, the Directive could have two effects on the interpretation of Art. 2: it could be seen as pushing for an interpretation of the hetero-organized worker pursuant to Art. 2, which is coherent and commonly linked with the CJEU definition; and/or as rejecting interpretations that attempt to select and extend only certain employees' protections to the hetero-organized workers.[24] What is clear is that the implicit aim that supports the hybrid/ambiguous definition of worker in the Directive is the harmonization of the member states' labour laws, while no direct requests have been put forward to identify or promote a specific/customized definition of worker that better fits with platform work (but see Section 3 below).

Moreover, it should be noted that the member states' duty is not only matching, in the sense explained above, the respective definitions of workers but also putting in place "appropriate procedures" to verify and ensure the correct determination of employment status by giving crucial relevance to the facts.[25] We can infer, on the one hand, that the matching of the definitions of (platform) worker is not sufficient *per se* because specific measures are required to verify and ensure the correct determination of the relationships (e.g. an easier access to the court for platform workers). On the other hand, we highlight that Art. 3 does not concern the general value of the correct determination of legal/contractual relationships (as it could be), but only that of employment relationships. No measures are requested to protect genuine self-employed workers from the possible different classifications by third parties (such as public tax/labour/privacy authorities). This aspect represents one, although not the most important (see Section 3 below), sign of the EU *favouring* (or bias according to the critiques)[26] of employment status within platform work.

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[22] CJEU, Case C-232/09, *Dita Danosa v LKB Lizings SIA* [2010] ECLI:EU:C:2010:674, CJEU, Case C-47/14, *Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllesheim* [2015] ECLI:EU:C:2015:574, CJEU, Case C-428/09, *Union syndicale Solidaires Isère c. Premier ministre e altri* [2010] ECLI:EU:C:2010:612; CJEU, C-229/14, *Ender Balkaya c. Kiesel Abbruch-und Recycling Technik GmbH* [2015]; CJEU case C-413/13, *FNV Kunsten Informatie en Media c. Staat der Nederlanden* [2014]; CJEU, case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH c. Ruhrlandklinik gGmbH* [2016], CJEU ord., Case C-692/19, *B c. Yodel Delivery Network Ltd* [2020] paras 31, 32 e 45 (cf. Aloisi A., *'Time Is Running Out'. The yodel order and its implications for platform work in the EU*, in *Italian Labour Law e-Journal*, 2, 2020, 67).

[23] *See* Giubboni S., *Per una voce sullo status di lavoratore subordinato nel diritto dell'Unione europea*, in *Rivista del Diritto della Sicurezza Sociale*, 2, 2018b, 207 ff,

[24] Meanwhile, a selection of workers' duties/obligations can be compliant in so far as they are "ontologically" incompatible with the traditional idea of hetero-direction/subordination (cf. the first Italian decision by Cass. 24 January 2020, n. 1663, in *Rivista Italiana di Diritto del Lavoro*, II, 2020, 76).

[25] We do not delve deeper into the second paragraph of Art. 3, which calls for a procedure of qualification based on facts relating to the actual performance because it seems a generally accepted principle at the international level (ILO Recommendation no. 198, *Employment Relationship Recommendation*, 2006), as well as at EU and national levels. In Italy, cf. Art. 1362 c.c. according to which: 1) in the interpretation of a contract, the common intention of the parties shall be investigated, not only the literal meaning of the words; and 2) to determine the intention of the parties their comprehensive behaviour, even following the agreement, shall be considered. The principle has been recalled by the EU case law (cf. CJEU, C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, Trading as Protocol Professional and Secretary of State for Education and Employment* [2004] ECLI:EU:C:2004:18, para 71).

[26] Tosi P., *Riflessioni brevi sulla Proposta di Direttiva del Parlamento Europeo e del Consiglio relativa al miglioramento delle condizioni di lavoro nel lavoro mediante piattaforme digitali*, in *Lavoro Diritti Europa*, 1, 2022.

The second aspect concerns the substantive protections/regulations that the provision aims at ensuring by guaranteeing the correct classification of employment relationships. Art. 3 provides that the procedures for the correct determination of the employment status shall be put in place "with a view (…) to ensuring that the employees enjoy the rights deriving from Union law". This mention has perhaps not been stressed enough. Art. 3 is unanimously considered a gateway for protections.[27] However, at this point, it is often not exactly clear to what legal protections Art. 3 refers. One interpretation is that it implicitly refers to any protections whatsoever; another is that it leaves the member states to decide what substantive rights shall be recognized to the platform workers which are employees.[28] Literally, the draft refers only to the EU law. It is likely that the Commission limited the substantive goal with a view to formally respecting the distribution of legislative competences, but the very nature of the procedures requested of the member states makes it difficult to establish a national mechanism for guaranteeing protections derived only from the EU law because the procedures concern the preliminary process of classifying working relationships. In addition, considering that the procedures will rely on the national definition of the employment relationship, it seems obvious that the mechanism will cover the full national and EU set of employees' protections. For these reasons, the deletion of the referral to the rights only deriving from EU law proposed in the draft Report currently under discussion in the competent EU Committee (see note 2) is agreeable and welcome.

3. The function and uncertain destiny of the (rebuttable) presumption of employment status.

It has been already noted that the Directive shows a sort of *favour* for the employment status of the persons working through digital platforms by not protecting the correct classification in general, but only defending workers who want to be recognized as employees. In this sense, a more radical approach[29] is testified by the imposition at the national level of "a framework of measures", in accordance with each legal system, with the effect of legally presuming employment relationships for those whose performances are controlled by the labour platform (Art. 4). In fact, if Art. 3 protects the interest of workers in being recognized as employees (see Section 2), Art. 4 clearly pushes for the national systems in preferring such a classification.[30]

First, the provision is mandatory not only because of the nature of the Directive, but also because it does not admit alternative measures, in contrast to previous legislative acts[31]. The

[27] Alaimo A., *Lavoro e piattaforme tra subordinazione e autonomia: la modulazione delle tutele nella proposta della commissione europea*, in *Diritto delle Relazioni Industriali*, 2, 2022, 639.
[28] Ferrante, nt. (21) 19.
[29] It has been called a "bold posture" of the Commission by De Stefano V., Aloisi A., *European Commission takes the lead in regulating platform work*, in *socialeurope.eu*, 2021, https://socialeurope.eu/european-commission-takes-the-lead-in-regulating-platform-work (accessed 3 July 2022).
[30] Tosi P., nt. (26).
[31] Cf. Art. 11 of the Directive no. 2019/1152 on transparent and predictable working conditions in the European Union concerning "on-demand" contracts. This is why, before the issuing of the Directive on platform work, some scholars predicted that the legal presumption could have been just one possible measure

draft literally demands that the presumption of subordination is the ultimate effect, while technically each member state can put in place a set of specific measures in the light of each legal system. However, because the presumption will be "legal", it is not easy to make a distinction between the requested substantive effect and the different legal tools at the member states' disposal; the discretion of member states does seem to not be sufficiently broad (we provide some examples of room for discretion later in this section).

The key point is that benefiting from the presumption of employment status requires "control" by the labour platform, which differs from "direction" as the essential core criterion of subordination in the EU and several member states, and also differs from the current CJEU case law, which flexibly managed the original interpretation of "direction" made by the Lawrie-Blum case (see notes 19 and 21). In fact, the evaluation of the existence of "control" is not left to the interpretation of the individual member states (which could rely on such CJEU jurisprudence). Rather, the Directive lists five criteria.[32] Separately, they are considered merely as clues, indicating possible control of workers by the platform, but when two to five criteria are fulfilled, control shall be recognized and employment status presumed.

Considering how this mechanism will be implemented in the national systems, and specifically in Italy, at least two observations are worth making. The first has already been highlighted by several scholars, namely Art. 4 para 1 states that control should literally be understood as control of the performance. The idea of presuming employment status only in the case of platform "control" has already been criticized by the European Economic and Social Committee[33] as too strict a condition, which many of the current labour platforms will fall short of satisfying. Indeed, the proposal clearly interprets such a condition in a very flexible and open way. At least two of the five criteria, which are sufficient to trigger the presumption as noted, go substantially beyond the mere work performances, affecting the person involved regardless of his/her performances and/or his/her working time.[34]

This is why, by contrast, some scholars have noted how the criteria concretely imply a concept of control and, as a consequence, an idea of a (presumed) employment relationship

among others (Kullmann M. *'Platformization' of work: An EU perspective on introducing a legal presumption*, in *European Labour Law Journal*, 13(1), 2022, 76).

[32] Art. 4 para 2 states: "(a) effectively determining, or setting upper limits for the level of remuneration; (b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work; (c) supervising the performance of work or verifying the quality of the results of the work including by electronic means; (d) effectively restricting the freedom, including through sanctions, to organize one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes; (e) effectively restricting the possibility to build a client base or to perform work for any third party".

[33] Cf. para 4.2.1. of the opinion adopted on 23 February 2022, SOC/709-EESC-2022 (https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=PI_EESC%3AEESC-2022-00256-AC accessed 4 July 2022).

[34] Cf. (b) Restricting the discretion to choose one's working hours or period of absence, to accept or to refuse tasks; part of (c) verifying the quality of the results; and (e) restricting the possibility of building a client base or performing work for any third party.

that is broader than the concepts of the member states and even the CJEU[35]. It has been referred to as both slack[36] and omnivorous.[37]

Attempting to be more precise about this aspect, the possibility of presuming an employment relationship without looking at the performance or focusing on the time of work could be groundbreaking for several national systems, including Italy's, because it implies presuming employment status even when a strict and circumstanced duty to work and obey the entrepreneur's request to perform specific tasks does not exist. In fact, both Art. 2094 c.c. on subordination/hetero-direction and Art. 2 d.lgs. 81/2015 on hetero-organization are traditionally interpreted as essentially linked with an obligation to perform (and to be paid for that performance).[38] From this perspective, the Directive seems to confirm the (nowadays) widespread opinion that subordination should be recognized not only in the case of a minimum duty to perform a task, but also in the case of a duty simply to be available at the entrepreneur's call.[39] Second, such criteria seem to revitalize, to some extent, the lesser followed Italian interpretations of subordination based on the "double alienness"[40] or integration in the business organization[41], which do not focus on the necessary duty of performance and give relevance to obligations/status not directly connected with the performance. The fourth criterion (Art 4 para 2 let. *d)*) confirms this inference because it finds a clue of control in the "restrictions" by labour platforms that affect the freedom to work, without legally removing it from the contractual program.

Another inference that influences the concept of presumed employment status underlying Art. 4 (although perhaps to a lesser degree than that discussed above) concerns the requirement for the continuity/duration of the working relationships.[42] The traditional CJEU definition of the employment relationship refers to the condition of a "certain period of time" in relation to the employer's direction and the worker's performance; instead, no criteria in the Directive appear to directly or strictly imply that idea. Examining the overall set of criteria, the Directive could propose the idea that the concept of *performance* continuity is overtaken by a broader concept of *relationship* continuity. This latter could mean that even when the tasks are performed occasionally, the working relationship can be characterized by subordination when other obligations or a status of subjection last for a "certain period of time".

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35 Alaimo A., nt. (27) 648 (*see* also Bronzini G., nt. (16) 6, which considers the personal scope of Art. 4 as referring to the "communitarian" definition of workers but with a smoother and more inclusive technique).
36 Giubboni S., *La proposta di direttiva della Commissione europea sul lavoro tramite piattaforma digitale*, in *Menabò di Etica ed Economia,* 164, 2022, https://www.eticaeconomia.it/la-proposta-di-direttiva-della-commissione-europea-sul-lavoro-tramite-piattaforma-digitale/ (accessed 3 July 2022).
37 Alaimo A., nt. (27), 648.
38 Perulli A., *Il rider di Glovo: Tra subordinazione, etero-organizzazione, e libertà*, in *Argomenti di Diritto del Lavoro*, 1, 2021, 58.
39 Bavaro V., *Sul concetto giuridico di "tempo del lavoro" (a proposito di ciclo-fattorini)*, in *Labour,* 6, 2020, 671.
40 Double alienness in the Italian literature means "the exclusive destination to others of the result whose attainment the work is finalized to, and of the productive organization in which the activity is inserted". Cf. Mengoni L., *Lezioni sul contratto di lavoro. Contratto di lavoro e impresa,* Celuc, Milan, 1971. For a recent reflection on that proposal, cf. Pietrogiovanni V., *Between sein and sollen of labour law: Civil (and constitutional) law perspectives on platform workers*, in *King's Law Journal*, 31(2), 2020, 313.
41 Napoli M., *Contratto e rapporti di lavoro, oggi*, in Aa.Vv., *Le ragioni del diritto. Scritti in onore di Luigi Mengoni*, Giuffrè, Milano, 1995, 1057.
42 Barbieri M., *Dell'inidoneità del tempo nella qualificazione dei rapporti di lavoro,* in *Labour & Law Issues*, 8(1), 2022, 15 ff.

In Italy, in an apparent paradox, the condition of continuity is not expressly mentioned by Art. 2094 c.c., but some interpretations of this article implicitly involve continuity; but it is expressly cited in Art. 2 d.lgs. 81/2015. Even from this perspective, the Directive should boost the interpretations of the concept of continuity/duration as referring not only to the performance of tasks but also the compliance with other obligations linked to the work, including being monitored, evaluated and awarded/sanctioned in the case of (non-)compliance with the organizational needs/requests of the labour platform.[43]

The second observation is connected to the first and concerns the concrete way to transpose the Directive in the national system. The first comments on this part of the Directive seem to conceal Art. 4, as if the "two out of five criteria" mechanism was mandatory at the national level. However, considering the wording of Art. 4 and the characteristics of the overall set of the criteria—which are clearly a sort of "collage" of criteria derived from different national traditions—it can be argued that the legal presumption can be established at the national level by selecting some of the five criteria according to each legal tradition. This interpretation can prevent reliance at the national level on a volatile/floating conception of a (presumed) employment relationship and promote a more affordable and cautious path of harmonization between the EU and the national system. The Parliament and/or the Council could amend the draft to clarify this aspect of the implementation.

Considering the Italian system, several combinations of the "two out of five criteria" match Art. 2094 c.c. on subordination or Art. 2 d.lgs. 81/2015 on hetero-organization but other combinations do not fulfil their essential elements. The Italian case law has often been open to broader interpretations of Art. 2094 c.c. (and something similar could happen with the new Art. 2 d.lgs. 81/2015) by using the so-called typological method instead of the more orthodox method of "subsumption".[44] The typological method helps to classify as employees those workers involved in ambiguous relationships, which are not easy to classify, because it relies on sociological and common conditions that are usually existent in employment relationships and which are used by judges to presume the subordination described in Art. 2094 c.c.[45] This practice is clearly familiar with the mechanism of presumption in the Directive; however, it probably cannot go sufficiently far to include all of the possible "two out of five" combinations. Thus, certain types of platform workers who should be eligible for the employment presumption could be considered self-employed workers in the Italian system. These exclusions could be challenging because these platform workers can only be

[43] This is the interpretation discussed and developed in Falsone M., *Lavorare tramite piattaforme digitali: Durata senza continuità*, in *Giornale di Diritto del Lavoro e delle Relazioni Industriali,* 2, 2022, forthcoming.

[44] "Subsumption" means that judges observe the reality of the relationship as it occurs between the contractual parties, and then connect it to the abstract provision of the law to determine whether to classify it as an employment relationship.

[45] Specifically, the typological method of classification is the approximation of the reality of the relationship and the abstract provision through the identification of indexes of subordination not expressly mentioned by the provision (cf. Nogler L., *Metodo tipologico e qualificazione dei rapporti di lavoro subordinato*, in *Rivista Italiana di Diritto del Lavoro*, I, 1990, 182 ff. and Lunardon F, *L'uso giurisprudenziale degli indici di subordinazione*, in *Rivista Italiana di Diritto del Lavoro*, 1990, 403 ff). The main points are observance of a working schedule; fixed and constant remuneration; the absence of risk concerning the result and therefore the productivity of the work; the insertion of the worker in the organization of the enterprise; and the continuity or duration of the work performance.

protected in the Italian system by the guarantees provided for by Capo V-bis d.lgs. 81/2015, which is dedicated to autonomous workers carrying out goods delivery activities in urban areas using bicycles or motor vehicles, or by d.lgs. 81/2017, which has been issued for all autonomous workers. However, these guarantees are far from being equivalent to those provided for Italian employees.

This intricate situation,[46] which is surely not unique in Europe, is the basis of the rapporteur's amendments tabled in the competent Committee of the EU Parliament, calling for a radical change of Art. 4 (see note 2). The amendments are not proposed to restrict the scope of the presumption or coherently co-ordinate it with the usually stricter national definitions of the employment relationship. Instead, they are aimed at extending the presumption of employment to all kinds of platform work. This proposal is technically agreeable but politically almost provocative (or at least very ambitious).

Technically, the amendments convert the mechanism provided by Art. 4 into a real and theoretically pure presumption. Indeed, the actual mechanism looks like a mere special regulation of the burden of proof because the workers should inevitably offer evidence on at least two out of the five criteria (or the criteria selected by the national lawmakers), while the entrepreneur should rebut the presumption to demonstrate the non-existence of the criteria and/or the autonomous nature of the working relationship[47]. The mechanism proposed by the rapporteur to the competent Committee of the EU Parliament implies, instead, that the worker shall just demonstrate that he/she works through a digital platform, so that the entrepreneur (the owner of the platform) will be required to give any evidence about the autonomous nature of the working relationship.[48] The proposal is agreeable because it creates a clearer and plain presumption, which cannot vary greatly during the implementation in each national context, and that cannot be eluded by the entrepreneurs by simply changing the formal aspects of the algorithms governing the platform to deliberately elude the presumption while substantially maintaining the same control over/influence on the workers.[49]

Politically, however, the proposal is ambitious and almost provocative in that it applies a (rebuttable) presumption of employment status without distinguishing among platforms digitally programmed to control/direct workers, and platforms established to respect and guarantee the freedom and will of self-employed workers. The current situation is clearly characterized by a strong tendency for digital platforms to subliminally control their workers; nevertheless, the digital tools and algorithms contain the potential power to expand liberties for all within the working organizations in the future. In this sense, the legal system should not promote the current invasive tendency of digital platforms, but it should allow room for

[46] Ponterio C., *La direzione della direttiva*, in *Lavoro Diritti Europa*, 1, 2022, 11.
[47] Refer to the speech by Maria Barberio during the seminar held in Modena on 24 June 2022, organized by Marco Biagi Foundation, the University of Modena and Reggio Emilia: (https://www.youtube.com/watch?v=TGn_EGwfl04&t=6296s); cf. Tosi P., nt. (25), 3.
[48] The EESC proposed to identify only one clear index of control (cf. para 4.2.3.).
[49] Donini A., *Alcune riflessioni sulla presunzione di subordinazione della Direttiva Piattaforme*, in *Labour & Law Issues*, 8(1), 2022, 38. It should be clarified that the provision of specific criteria could push the platforms towards an exercise of powers that is effectively more respectful of the autonomy of workers. In my view, it is not correct to affirm that the platforms' changes aimed at avoiding the presumption should be considered always and necessarily abusive.

more autonomy and freedom within contractual relationships, while recognizing the need for proper protections for those workers who are effectively (and also subliminally) controlled/directed through the new digital tools. Even when one agrees with these amendments, it should be noted that they collide with the statements and political approaches promoting genuine self-employment in the digital work context (cf. recital 3, 23, 25) if platform work is presumed to be subordinated work that benefits from the protections provided in the Directive for self-employed workers (see Art. 10).

4. Final remarks and several aspects requiring deeper analysis.

In the process of the discussion and the possible approval of the draft Directive, it is likely that more aspects will change. However, one idea seems to deeply characterize the draft Directive, the amendments and the underlying political approaches: that is, the idea of promoting a dichotomic system at the EU level, with subordinate and autonomous workers at two opposite poles, without promoting the creation of a third (or even fourth) category of workers, who require dedicated partial or special protections.[50] More generally, it can be said that the whole Directive (like all the most relevant EU and national legislative acts) revolves around the workers' status as the preliminary condition for the application of the regulations and protections, even when it extends some rights/duties to autonomous workers. This is why dealing with the problem of the workers' status as a starting point is relevant not only for political reasons but also for legal/technical purposes. From this perspective, the Italian Parliament's suggestion of connecting the workers' protections to the specific characteristic of the business and performances instead of tying them to the formal characteristics of the contractual relationship ((let. *b)* of the opinion; see note 3) is abstractly appealing but perhaps naïve, considering that the whole history of labour law at the national and EU level rests on the idea of connecting protections to a specific classification of working relationships. A more realistic approach is that taken by the Italian Chamber of Deputies when they called for extension of the protections for self-employed workers (let. *c)*) and clarification of the mechanism of presumption (let. *f)*).

More specifically, the inclusive CJEU definition of workers mentioned in Art. 3 suggests that the Italian legal interpreters should, more than ever, commit themselves to connecting their interpretations to the CJEU interpretation in every kind of litigation concerning the correct classification of working relationships. The wider notion obtainable under the presumption of employment status in Art. 4 suggests that lawmakers should be mindful of avoiding a situation in which some platform workers could be classified as self-employed workers within the Italian system when they satisfy the EU presumption of employment and qualify for protection under this presumption. To this end, particular attention should be paid to the implementation process, for example, taking care to adapt the presumption mechanism to Art. 2 d.lgs. 81/2015, leveraging the relative discretion recognizable in the

[50] Alaimo A., nt. (27) 646, Ferrante V., nt. (21) 17 and 19, *contra* Valente L., *Tra subordinazione e autonomia: la direttiva sui rider,* 2021 https://www.lavoce.info/archives/91594/tra-subordinazione-e-autonomia-la-direttiva-sui-rider/ (accessed 3 July 2022).

Directive. Furthermore, serious reflection should be given to Capo V-bis d.lgs 81/2015 on autonomous riders/drivers; for example, consideration should be given to whether reform of its scope is required, given that it refers to platforms fixing the compensations and determining the performance conditions and methods (see Art. 47-bis co. 2 d.lgs. 81/2015) of these workers. These aspects clearly match at least two of the proposed Directive criteria ((a) and (b)) for the employment presumption.

Conversely, the opposite case—of workers being considered employees according to the Italian system but falling under the EU category of self-employed workers—seems to be unlikely.[51] This case can be problematic theoretically because the Directive's "more favourable" clause (Art. 20 para 2) provides that any more favourable regulations cannot prevail on the rules for the functioning of the internal market, which means that the member states cannot provide more favourable treatments for workers who are self-employed workers according to the EU law because these workers are traditionally considered as undertakings. This limit on improving autonomous workers' conditions implies that favourable treatments provided by national laws could be considered as state aids under Art. 107 TFEU.

Then, a complete application of employees' protections to autonomous workers (according to the EU law) could infringe the Directive. However, something different can be said for the collective dimension of the self-employed protections. The "more favourable" clause should be read together with the draft Guidelines on collective agreements regarding the working conditions of solo self-employed people, which was published on the same day as the Directive on platform work.[52] The Guidelines propose and promote a wider interpretation of the mandatory exemptions provided for by Art. 101 TFEU,[53] which considers the agreements among undertakings as incompatible with the internal market. In fact, the Commission interprets these exemptions as if collective agreements for (*inter alia*) "solo self-employed persons working through digital labour platforms" fall outside the scope of Art. 101 TFEU even when this type of workers has not been reclassified as employees by national authorities/courts. These announcements mean that Italian lawmakers are allowed to recognize (as they already do, at least in part)[54] the collective rights/prerogatives of platform workers in so far as they are functional to a currently admitted collective bargain. To provide a simple example, it is permissible to extend information and consultation rights pursuant to Art. 9 of the proposed Directive to the platform workers who do not have an employment relationship, even if they fall outside the scope of the provision of the Directive (see Art. 10). However, it shall be considered that the Guidelines are not mandatory and the

[51] Ferrante V., nt. (21), 17 highlights this possible kind of mismatch in discussing Directive no. 2019/1152 on transparent and predictable working conditions in the EU, in so far as Italian lawmakers have extended the protections for employees beyond a rigorous concept of hetero-direction.

[52] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6620 (accessed 3 July 2022). The consultation period on the draft finished in February 2022. The final version of the Guidelines was expected in the second quarter of 2022. However, it is likely that the Commission has delayed the final version because of the uncertainties concerning the draft Directive on platform work.

[53] Art. 101 para 2 TFEU establishes what can be considered as compliant with the internal market: "any agreement or category of agreements between undertakings (…) which contributes to improving the production or distribution of goods or to promoting technical or economic progress".

[54] For example, Art. 28 of L. 300/1970 on the repression of anti-union practices protects only employees' trade unions.

CJEU is not obliged to follow this interpretation; on the other hand, member states, businesses and trade unions shall be sure that the Commission will not use its power of control and sanction against this kind of agreement (at least until new guidelines will be delivered in the future).

Several other issues not related to those of classification exist. Although we cannot explore them in depth here, they are worthy of mention. First, there is the problem of matching the material scopes of the EU and the national regulations. The material scope of the Directive is set by the definition of the labour platform (Art. 2 para 1 no. 1). On the one hand, it properly includes online and on-location digital platforms, excluding only platforms with services that do not involve the organization of work as their main component (such as Airbnb). On the other hand, it excludes platforms with services that are not provided at the request of a recipient (such as the digital platforms adopted in the logistics industry, such as Amazon).[55] The Italian legislation relies on a different approach. On the one hand, the scope of Art. 2 d.lgs. 81/2015 is completely general and it expressly applies to all kinds of digital platforms (including those applied within warehouses, etc.); on the other hand, Capo V-bis d.lgs. 81/2015 only considers digital platforms that provide services at the request of a recipient and services delivered by bicycle or motor vehicle. It is clear that a common scope, even in the case of different rules, should be sought. Achieving this it is a matter of direct and productive communication among different but osmotic legal systems.

Another urgent problem concerns the proceedings activated on behalf of persons performing platform work (Art. 14). It prescribes, *inter alia*, that representatives of persons performing platform work, or other legal entities that have a legitimate interest in defending the rights of platform workers, may act on behalf of a platform worker or several platform workers, with the approval of those persons. This provision, reminiscent of the American class action, urges a careful transposition in the Italian system because of a recent reform on that subject. Italian procedural law is based on the principle that the claimant shall be the person entitled to exercise the (infringed) right; thus, any exceptions to this rule will be strictly interpreted. In Italy, pursuant to L. 31/2019 (which entered into force on 19 May 2021 because of the Covid-19 pandemic), Art. 840-bis c.p.c. now provides that an organization or a non-profit association whose statutes include the protection of individual homogeneous rights can protect these rights through class actions. This new Italian class action thus has a wider scope than that of Art. 14 of the Directive, which concerns only platform workers.

However, only organizations and associations listed in a public register established at the Ministry of Justice can propose such a class action. In a literal sense, trade unions seem to be eligible for such registration. Notwithstanding this, the government regulation on the public register appears to exclude trade unions and other similar organizations.[56] It is likely that the Ministerial Decree will be challenged in front of a judiciary court for being too restrictive compared with the law. In this case, the possible approval of the Directive should function

[55] Kelly-Lyth A., Adams-Prassl J., *Proposed platform work directive: A promising step*, in *VerfBlog*, 2021, https://verfassungsblog.de/work-directive/ (accessed 2 July 2022).
[56] Cf. Decreto ministeriale 17 febbraio 2022, n. 27.

as a trigger for a more inclusive reform of the regulation for the registration of trade unions as possible actors of class actions.[57]

On the other hand, it should be noted that this procedure permits action on behalf of a class of persons without their approval, whereas Art. 14 of the Directive imposes the requirement for such approval. This observation suggests that a specific regulation for platform workers could be provided because the elimination of the condition of individual approval does not appear to be a more favourable measure than that admitted by the Directive itself.

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[57] For a possible extented interpretation, cf. Razzolini O., *Azione di classe e legittimazione ad agire del sindacato a prescindere dall'iscrizione nel pubblico elenco: prime considerazioni,* in *Lavoro Diritti Europa*, 4, 2021.

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