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Individual and collective protection challenges in digital work: the case of crowdwork.

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1. Platform work: a brief overview on the origins and the current state of the debate.

Chronologically, the first digital platforms appeared in the early 2000s, and geographically it is the American continent that can "claim authorship", while the phenomenon also began to spread to Europe in 2008.

The first digital platforms to emerge have been those equipped with a business model that allows clients (small and large companies or individuals) to formulate the request for a "task" that is carried out instantly and entirely online by workers belonging to an indistinct "crowd" of individuals who have access to the Internet and can be allocated anywhere in the world.

Due to the global success of this complex phenomenon, a rich literature committed to the effort of understanding its many aspects has begun to be published.

These studies show that at least two basic aspects of this type of work should be considered. The first relates to the core of the business model, which is shown to be common to all digital platforms as they seem to base their architecture on a common organizational frame built on the crowdsourcing model[1] which, then, is customized to meet the needs of individual platforms. According to this model the requests for work by clients (*crowdsourcers*)

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[1] Howe J., *The rise of the crowdsourcing*, in *Wired*, 2006, available at https://www.wired.com/2006/06/crowds/ (last access 20 December 2022).

are managed by an intermediary (the digital labour platform, or *crowdsourcing platform*) and offered by the same to a "crowd" of workers (*crowdworkers*).[2]

The second reveals that, subject to the basic architecture, the work that is performed on – or through – the digital platform is suitable for taking on different methods of execution.

On the basis of these findings, a part of the scholars has proceeded to divide the work that can be performed through digital platforms into two macro-categories, "crowdwork" and "on-demand work via app", respectively.[3]

In the case of "on-demand work via app" activities are performed offline by workers, and the digital platform manages and allocates work opportunities among them through special mechanisms that form an integral part of its design, namely algorithms.

In the first cited form, work activities are carried out entirely online on the digital platform, which, at least apparently, carries out the mere task of putting clients in contact with the "crowd" of workers registered with it. Such an approach, which requires as a *condicio sine qua non* a connection to the Internet network and a registration on the website of the relevant digital platform – accompanied by an acceptance of the contractual terms and conditions unilaterally dictated by it – ensures that the connections that are established between the two groups of users have a potentially global reach.

The interest of scholars, court judgments, and the intervention of the Government and social partners are directed towards the "on-demand work via app", particularly towards the figure of riders.

Courts have played a key role in reconstructing a clearer picture of the protections to be granted to these workers. In fact, these have intervened, firstly, on the issue concerning the legal classification of such workers,[4] then, also on cases of collective discrimination,[5] health and safety at the time of the Covid-19 health emergency, digital illegal employment[6] and, more recently, on issues concerning the application of collective agreements.[7]

At the same time, in a non-remedial perspective, the search for protections by these workers is pursued, primarily, due to the pressure exerted by coalitions of riders (grassroots movements),[8] which have spontaneously arisen in response to the declared difficulty that

[2] Prassl J., Risak M., *Uber, Taskrabbit, & Co: platforms as employers? Rethinking the legal analysis of crowdwork*, in *Comparative Labor Law & Policy Journal*, 37, 3, 2016.
[3] De Stefano V., *The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gigeconomy"*, in *ILO Working Papers 994899823*402676, International Labour Organization, 2016.
[4] Trib. Torino 07 maggio 2018, n. 778, in *GiustiziaCivile.com* 15 ottobre 2018, *see* Senatori I., *Subordinazione e autonomia alla prova della gig-economy: la parola ai giudici*; Trib. Milano 10 September 2018, n. 1853, in *Diritto & Giustizia*, 12 October 2018; App. Torino 04 February 2019, n. 26, in *Diritto delle Relazioni Industriali* 2019, 3, 936; Cass. 24 January 2020, n. 1663, in *Guida al diritto* 2020, 9, 40.
[5] Trib. Bologna 31 December 2021, in *Rivista Italiana di Diritto del Lavoro* 2022, 2, II, 247.
[6] Trib. Misure Prev. Milano 27 May 2020, n. 9, in *Rivista Italiana di Diritto del Lavoro* 2020, 3, II, 546.
[7] Trib. Firenze 9 February 2021, in *Rivista Italiana di Diritto del Lavoro*, 2021, 1, II, 130; Trib. Bologna 30 June 2021, in *Rivista Italiana di Diritto del Lavoro*, 2021, 4, II, 788.
[8] For details, *see*, among others, Marrone M., *Rights against the machines! Food delivery, piattaforme digitali e sindacalismo informale,* in *Labour & Law Issues*, 5, 1, 2019, I.3 ff.; Martelloni F., *Individuale e collettivo: quando i diritti dei lavoratori digitali corrono su due ruote*, in *Labour and Law Issues*, 4, 1, 2018, 18 ff.; Purificato I., Scelsi A., with the supervision of Senatori I., Spinelli C., *Representing and Regulating Platform Work: Emerging Problems and Possible Solutions. National report on Italy*, pp. 41-52, available at https://irel.fmb.unimore.it/archive/research-output/national-reports/.

traditional trade unions have in intercepting these workers and making themselves adequate spokespersons for their requests for protections.

The protests organized by these groups of workers have had the effect of encouraging and soliciting the concrete intervention of local administrations[9] and the Government[10] in regulating the phenomenon and, more recently, the trade unions in stipulating[11] and integrating collective agreements.[12]

2. Objectives of investigation.

The recent initiatives of the European Commission[13] have relaunched the open and widespread debate on the correct legal status of platform workers and other controversial aspects of their relationship with digital platforms.

As seen above section 1, this debate has long been focused exclusively on the "work on-demand via apps". Conversely, this contribution focuses on "crowdwork".

The study aims, firstly, to show how crowdworkers also need protections and, secondly, to identify the rights that should be guaranteed to them, starting from the reconstruction of the spread of the phenomenon and the analysis of the way in which models of crowdwork platforms function in practice.

The analysis of aspects related to the protection of such workers is conducted by taking into special consideration the contribution provided by the recent set of measures proposed by the European Union to improve the working conditions of platform workers. Indeed, this intervention has introduced measures to regulate crowdwork where certain conditions are met. In particular, the study highlights the limitations of the Proposal for a Directive on improving working conditions in platform work that could appear in the stages of implementation of crowdwork, in the event it is adopted. In the author's opinion, the action of the European Union, although remarkable, should not be considered completely satisfactory in its approach, which is governed by the autonomy-subordination dichotomy

[9] "Charter of fundamental digital workers' rights" signed in Bologna on 31 May 2018 and "Charter of Rights for Riders and Gig Economy Workers" signed in Naples in early 2020.
[10] Law Decree no. 101 of 3 September 2019, converted by amendment of Law no. 128 of 2 November 2019. It has modified the Legislative Decree 15 June 2015, no. 81.
[11] National Collective Agreement for riders signed by UGL and Assodelivery.
[12] On 2 November 2020, Filt Cgil, Fit Cisl and Uil Trasporti and the employer associations already signatories to the CCNL Logistics, Transport of Goods and Shipments as well as the Protocol of 18 July 2018 signed a new protocol by which the protections related to both work performance and economic and normative treatment provided by the Protocol of 2018 and related to the NCA Logistics were extended to workers under Article 47 bis et ff. of Legislative Decree 15 Junes 2015, n. 81.
[13] The reference is to the package of measures published on 9 December 2021 by the Commission aimed at improving the working conditions of platform workers and supporting the sustainable growth of digital platforms. Specifically, reference is made to: Communication on Better Working Conditions for a Stronger Social Europe: harnessing the full benefits of digitalisation for the future of work; draft guidelines on the application of EU competition law to collective agreements of solo self-employed people (adopted by European Commission on September 29, 2022) and the proposed directive on improving working conditions in platform work.

and focuses little on the effects of the transnational nature of crowdwork. It also presents critical issues of detail, as in the regulation of worker participation.

As a consequence, in the final part, starting from the approach that advocates the allocations of rights to workers in consideration of their legal status, the paper identifies a core set of protections that are deemed to be recognised for all platform workers. It is believed that the functioning of these platforms using algorithmic mechanisms can violate some of their fundamental rights. Such a solution, on the one hand, requires the extension of already existing rights and, on the other hand, implies the introduction of *ad hoc* rights to consider the peculiarities of these forms of work, which are constantly changing.

3. Crowdwork: an underestimated phenomenon in terms of its spread and the issues it can raise.

The category of crowdworkers records numbers that are high enough to be taken into consideration. As well as operating modes of crowdwork infrastructures that are capable of giving rise to situations where workers need to be protected.

With reference to the first point, a recent study on the diffusion of platform work in Italy[14] estimated that there are 570,521 people performing platform work in the population aged 18 to 74, of whom 35 percent work entirely online. This statistic is a sign of the establishment of this kind of platform-based work in Italy as well, which has increased significantly in response to the social and labour restrictions caused by the pandemic, also at the international level.

Other significant information that emerges from the same study concerns payment methods,[15] performance evaluation systems[16] and the effects that such evaluation can have on work activity,[17] to be understood primarily in terms of job opportunities. These factors are useful in order to understand the importance of including online work on a digital platform among the forms of work that needs to be regulated. This trend is also confirmed by international data.[18]

[14] INAPP, *Lavoro virtuale nel mondo reale: i dati dell'indagine Inapp-Plus sui lavoratori delle piattaforme in Italia*, in *Inapp Policy Brief*, January 2022, no. 25.

[15] For about 30 percent of crowdworkers, the digital infrastructure makes the fee payment, while about 60 percent said they receive the fee directly from the client, not considering that about 10 percent said they are paid by an external party.

[16] According to the data, the following are the evaluation criteria applied by crowdwork platforms that gain importance: client rating (44.8%), time of performance (16.4 %) and number of completed assignments (55.2%).

[17] Negative evaluations mainly result in a reduction in the amount of the most profitable assignments (49.7%) and a worsening of the hours in which to perform the assignment (23.8%)

[18] *See* The Online Labour Index (available at the following link: https://ilabour.oii.ox.ac.uk/online-labour-index/) and other studies, as Urzì Brancati C., Pesole A., Fernández-Macías E., *Digital Labour Platforms in Europe: Numbers, Profiles, and Employment Status of Platform Workers*, EUR 29810 EN, Publications Office of the European Union, Luxembourg, 2019; Berg J., Furrer M., Harmon E., Rani U., Silberman S., *Digital labour platforms and the future of work: Towards decent work in the online world*, International Labour Office, Geneva, 2018; Huws U., Spencer N.H., Syrdal D., Holts K., *Work in the European Gig Economy*, FEPS, UNI Europa, University of Hertfordshire, 2017.

In addition to the evidence provided by the data, the real functioning modalities of digital platforms also pave the way for a reflection on the protections that crowdworkers may need. First of all, it is necessary to ascertain whether, in accordance with what is declared by the platforms themselves in their terms and conditions of service, they are authentic mere intermediaries or whether they have a different and more active role in the stages of organizing, managing and controlling the work.

The definition of intermediary, *i.e.* information society, is derived from the notion of information society service established in Article 1(1)(b) of Directive (EU) 2015/1535, according to which it is "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". Subsequent interventions of European case law have been helpful in providing a clearer interpretation of the notion, from which it follows that in order for one to qualify as an information society, not only must the four requirements of Article 1 above be found, but it is also required that the mediation service does not constitute "an integral part of an overall service whose main element is a service to which a different legal qualification should be accorded".[19]

Thus, for example, the Court of Justice of the European Union in the *Uber* case[20] issued that what the platform performed could not be defined solely as an information society service, but that, rather, the intermediation activity was an integral part of an overall service in which transport was the main element.

Another element used by the Luxembourg judges in support of their argument is that the platform would have created an offer of services (i.*e.,* that of urban transport "carried out by non-professional drivers using their own vehicle"), which are accessible through an application that represents the IT tool without which drivers would not be "induced"[21] to carry out their activity and passengers would not be able to use their services.

In crowdwork platforms, there cannot be a disjunction between activities provided electronically and activities provided non-electronically as there is in most cases an overall dematerialization of the service provided. At the same time, by the mere fact that the activity is performed entirely online, one cannot infer the presence of an information society service.

As for Uber drivers, if there were no digital infrastructure, even some crowdworkers would not be enabled to perform that activity. Consider, for example, those digital platforms whose work organization model proposes jobs that are even complex in their entirety, but which become simple to perform once they are broken down, thus enabling a number of even low-skilled people to perform them.[22]

Consequently, it is those crowdwork platforms which, not being mere intermediaries, manifest a more intrusive interference in the organizational model of work, raise the main critical issues.

[19] ECJ, *Asociacion Profesional Elite Taxi contro Uber Systems SpainSL*, C-434/15, EU:C:2017:98; ECJ, 19 November 2019, C-390/18, ECLI:EU:C:2019:1112.
[20] ECJ, *Asociacion Profesional Elite Taxi*,nt. (19).
[21] ECJ, *ibid.*
[22] Clickworker (https://www.clickworker.com) is an example.

4. Some critical aspects of the phenomenon: algorithmic management, transnational nature, and heterogeneous models.

Algorithmic management

As a rule, crowdwork platforms are designed and implemented in such a way as to be autonomous "ecosystems" capable of acting without human intervention, albeit emulating them.

Therefore, there is a dissociation of some managerial practices from human know-how and their concomitant reliance on artificial intelligence mechanisms.[23] Thus, even in the more strictly executive phases of the job, the platforms, albeit engaging in different conducts, implement more or less intense and more or less direct forms of work control intended to produce essential information for the algorithms.

Examples include evaluation by controllers at the end of the micro-job, compliance with the execution time of the work and quality standards set by the platform itself, as well as the determination of the remuneration to which the worker is entitled and the automatic elimination of the worker's profile upon the occurrence of certain circumstances. The criteria used by the algorithm (to be understood generically, as a finite sequence of instructions, which, starting from an input, take elementary steps, and arrive at producing an output, a result) to make decisions are unknown. Therefore, the programming codes remain unknown and, apparently, so impenetrable that they are referred to in terms of "black boxes".[24] In other words, the mechanisms behind the functioning of crowdwork platforms tend to trace those theories that in the organizing literature propose to investigate the role played by the algorithm in the ways of managing the employment relationship, among which the algorithmic management[25] gains importance.

In summary, the algorithm would act as an integrated tool in the organizational model of the digital platform, which monitors and supervises the activities that are performed through the platform, making use of the reputational systems and supported by the design features of the digital platform itself. In this way, it ensures an effective system but at the same time has the power to influence aspects related to the worker's participation in the platform such as, but not limited to, job opportunities and the remuneration due to the worker. The risks that workers face are manifold, starting with the possibility of being passively subjected to

[23] De Stefano V., Aloisi A., *Il tuo capo è un algoritmo. Contro il lavoro disumano*, Editori Laterza, Bari, 2020, 84, where the Authors describes it as "An algorithmic analysis system that, using large amounts of data, is able to extract patterns and make predictions in ways that humans associate with their own intelligence".
[24] Pasquale F., *The Black Box Society: The Secret Algorithms That Control Money and Information*, Harvard University Press, Cambridge, 2015.
[25] Rani U., Furrer M., *Digital labour platforms and new forms of flexible work in developing countries: Algorithmic management of work and workers,* in *Competition & Change*, 2020.

discriminatory judgment and "biases" which, voluntarily or not, can be incorporated into the programming of the algorithm by those who are responsible for preparing its architecture.[26]

Transnational nature

Another element that distinguishes crowdwork is the global nature of the work performed online on the digital infrastructure.

The virtuality of the work activity, as well as of the result it produces, means that the workforce suitable for carrying out such activities potentially coincides with Internet users around the world, provided that they comply with the conditions established in the contractual terms.

Essentially, crowdwork accomplishes such a removal of spatial barriers that a worker established in any part of the globe can realize on the digital infrastructure the request of another user, also located anywhere.

If, on the one hand, such a feature has the positive implication of translating into concrete job opportunities for individuals normally at the margins of or excluded from the labour market, on the other hand, it also requires weighing the critical issues that may result from it, including the risk of a race to the bottom regarding working conditions,[27] leading to real forms of social dumping.

In view of the transactional nature of the relationships that can be established on digital platforms, the absence of regulations governing work on digital platforms at the global level becomes a significant issue and potentially capable of undermining the recognition of basic human rights with respect to crowdworkers.

Indeed, in a context in which the relationships established between the parties are naturally characterized by elements of internationality, such a legislative gap creates, first of all, a problem of identifying the law designed to regulate the relationship as well as the appropriate criteria for determining the competent court to rule on any disputes that may arise between the parties.

Heterogenous model

The last factor is the variety of organizational and management models of the crowdwork platforms. As also emerged in the above paragraphs, digital infrastructures operate on the basis of procedures that are very different from one another, which, therefore, make it difficult to develop standardized reflections that can be applied with respect to all operators.

For example, different strategies may be adopted for defining working hours, as well as those that determine the remuneration due to the worker for completing the task and, again, the mechanisms for monitoring performance and evaluating the work performed. Nevertheless, all digital platforms unilaterally set their contract terms, leaving no bargaining

[26] *See,* Matescu A., Nguyen A., *Algorithmic Management in the Workplace*, in *Data&Society*, February 2019, available at https://datasociety.net/wpcontent/uploads/2019/02/DS_Algorithmic_Management_Explainer.pdf (last access 20 December 2022); De Petris P., *La tutela contro le discriminazioni dei lavoratori tramite piattaforma digitale*, in *dirittifondamentali.it,* 2, 2020.

[27] Brino V., *Lavoro dignitoso e catene globali del valore*, in *Lavoro e Diritto*, 2019, 3, 552 ff.

power to the worker. In the same way, in most cases, the terms and condition of the digital platforms, directly or indirectly, qualify workers as self-employed.[28]

5. The Proposal for a Directive on improving working conditions in platform work: approach and proposed regulatory measures.

In recent times, the open issue of work through digital platforms has seen a new step added in its path toward regulation across national borders. The reference is to the proposal for a Directive published on 9 December 2021, by means of which the European legislator decided to intervene by preparing a special discipline in favour of workers on digital platforms.[29] In particular, the proposed directive, aims to improve working conditions through a series of interventions aimed at ensuring the correct legal classification of workers, as well as greater transparency in the management and provision of work through algorithms.

The proposed directive acquires relevance in the present study because it explicitly states that workers who carry out their activities on digital platforms that are entirely online fall within its scope and that the objectives it aims to achieve also involve cross-border work situations.[30] As a result, its detailed provisions can also apply to crowdworkers, providing them with higher levels of protection.

Workers Classification

It is necessary to specify that the proposed directive keeps the distinction between self-employment and employment, and it reserves the recognition of stronger protections for those workers who can be classified as employees. In the text of the proposal this distinction is given by the use of the terms "platform workers" to refer to those workers who have 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",[31] and "persons performing platform work" for "any individual performing platform work, irrespective of the contractual designation of the relationship between that individual and the digital labour platform by the parties involved".[32]

According to the Article 4 an employment relationship exists between the work platform and the individual performing the work when certain requirements are met, without prejudice to evidence to the contrary that may be provided by the parties. In other words, the cited article introduces a presumption of subordination which is occur when two of the following criteria take place at least:

(a) effectively determining, or setting upper limits for the level of remuneration;

[28] For instance, *see* Clickworker, nt. (22), and 99Designs platform, https://99designs.it (last access 20 December 2022).
[29] For in-depth analysis of issues related to the proposed directive, s*ee*, among others, papers published in the section "theme" of *International Labour Law e-Journal*, 15, 1.
[30] Art. 2, para 1, no. 1, lett. C).
[31] Art. 2, para 1, no. 2.
[32] Art. 2, para 1, no. 3.

(b) requiring the person performing platform work to comply with specific rules governing 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 obtained from the work, also carried out electronically;

(d) effectively restricting the freedom of workers, also through sanctions, to organize their work, in particular the freedom to choose their working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;

(e) effectively limiting the possibility to build a clientele or to perform work for third parties.[33]

Algorithmic management

Many typically managerial prerogatives are transferred from human beings to digital procedures that are part of the design of digital platforms. As a result, the use of algorithms and other software essential for their operation has shaped the ways in which organizational control is exercised, which is eventually expressed through the automation of managerial functions, the evaluation of work performed and of workers as well as the exercise of "disciplinary" activities against the latter.

With reference to this aspect, the directive aims to make transparent the ways in which control is implemented by the digital platforms and, at the same time, to keep workers informed about these operations. Thus, Article 6, which also applies to genuinely self-employed workers whose activity is nonetheless organized by the digital platform,[34] establishes that workers must be given adequate information about the automatic monitoring systems that the infrastructure uses to monitor performance, supervise and evaluate the outcome of performance, and specifies that by means of a document which may also be in electronic format, the worker must be informed of the automatic monitoring systems used or about to be used as well as the type of actions that the algorithms implement to monitor, supervise and evaluate the work. The law prohibits digital platforms from processing workers' personal data that are not strictly necessary and related to the performance of the work.

In Articles 7 and 8, forms of *ex post* human control of the actions of automated systems are introduced. Provisions that apply with respect to all workers on digital platforms (except as provided for in Art. 7, para. 2 on health and safety).

Specifically, Article 7 requires digital platforms to periodically conduct monitoring and evaluation of the effects of decisions made by automated monitoring and decision-making

[33] Art. 4, para 2.

[34] *See* what Art. 10 establishes and the information given in the "context of proposal" about this article. Here it is clarified that art. 10 "ensures that the provisions on transparency, human monitoring and review of Articles 6, 7 and 8 – which relate to the processing of personal data by automated systems – also apply to persons performing platform work who do not have an employment contract or employment relationship, *i.e.* "the genuine self-employed".

systems on working conditions through the actions of persons with the necessary skills, training and authority.

Article 8 provides a procedure to ensure that the worker has the opportunity to understand, discuss and clarify the facts and reasons behind the automated decisions that impact him or her. Again, platforms are required to have "contact persons" who have the necessary skills, training and authority.

Transnational nature

The proposed directive addresses the issue of transnationality of digital platform work in some of its provisions. Indeed, as argued by the Commission itself,[35] the transnational nature of online platforms makes it particularly difficult to identify the parties performing the activity and where they are established. Therefore, in these circumstances, the lack of information that makes it possible to estimate the spread of the phenomenon at the national level, the types of contracts predominantly concluded between the parties as well as the content of the terms and conditions that are imposed by the digital platforms, accentuate the difficulty faced by the national authorities in ensuring the proper application of national rules, both in terms of working conditions and taxation.

The provisions referred to are Articles 11 and 12 of the Proposed Directive under consideration.

Article 11[36] provides for a general obligation on digital platforms to declare the work being performed by workers on the digital infrastructure and to share data relating to these activities with the competent labour and social protection authorities in the respective Member States. Given the transnational nature of most digital work platforms, the proposed directive also establishes the criterion on the basis of which the competent authorities are to be determined and, consequently, the Member State whose rules must be applied. Therefore, in order to avoid – or, at least, reduce – the risk of the incorrect application of the provision, this criterion is identified in the place where the activity is carried out by the worker, thus depriving the parties of any discretion in the choice.

With the same ratio and relying on the same criterion for choosing the place, Article 12[37] stipulates that a series of information, expressly listed, must be provided by digital work platforms to the competent labour and social protection authorities, to other national authorities as well as to the workers' representatives. The function is to check that the former complies with their obligations established by law to protect workers on the platform due to their employment status.

[35] *See* what the Commission has said on pages 2 and 3 in the text of the Proposed Directive cited above.

[36] Art. 11: "Without prejudice to Regulations (EC) No 883/200419 and 987/200920 of the European Parliament and of the Council, Member States shall require digital labour platforms which are employers to declare work performed by platform workers to the *competent labour and social protection authorities of the Member State in which the work is performed* and to share relevant data with those authorities, in accordance with the rules and procedures laid down in the law of the Member States concerned".

[37] Art. 12 par. 2: "*The information shall be provided for each Member State in which persons are performing platform work through the digital labour platform concerned.* […]".

As is evident – and as, moreover, was clearly stated by the Commission in the proposed directive[38] – the choice was motivated by a desire to grant relevance only to the criterion of the place of performance of the activity, thereby limiting the scope of the directive to all those digital work platforms that are "simply" active in a Member State.

Collective dimension

The set of measures presented by the Commission on 9 December 2021 also addresses issues related to the collective rights of workers on a digital platform. To the provisions of the proposed directive, the Commission has added the Draft Guidelines on the application of EU competition law,[39] aimed at clarifying the correct interpretation of Article 101 of the TFEU. Indeed, this article can be a limitation to the recognition of collective rights with respect to many platform workers as they are qualified as self-employed.

With regard to the proposed directive, references to workers' representatives and their prerogatives can be found on several occasions. As far as this paper is concerned, the focus is on the main measure proposed to allow workers' representatives to be involved in algorithmic management.

The rights to information and consultation are the form of participation chosen by the proposed directive.

In particular, Article 9 recognizes the right of these workers' representatives to be informed and consulted on a number of aspects which, consistent with the nature of this instrument, are likely to cause, primarily, a change in the organization of the digital platform.[40] Article 9 establishes that the information and consultation of workers' representatives must be ensured in relation to those decisions that may involve the introduction of automated monitoring[41] and decision-making[42] systems, as defined in Article 6(1), or a substantial change in them. However, this provision should only apply to workers on digital platforms who have a contract of employment or an employment relationship with the digital platform, as it is not included in the list of Article 10.

5.1. Critical issues.

Workers Classification and algorithmic management

[38] Recital no. 17 of the proposed directive.
[39] On 29th September 2022 the Commission has approved the Guidelines (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI_COM%3AC%282021%298838).
[40] Art. 4, para. 1, let. C), Directive 2002/14/CE.
[41] Art. 6, para. 1, lett. A): "automated monitoring systems which are used to monitor, supervise or evaluate the work performance of platform workers through electronic means".
[42] Art. 6, para. 1, let. B): "automated decision-making systems which are used to take or support decisions that significantly affect those platform workers' working conditions, in particular their access to work assignments, their earnings, their occupational health and safety, their working hours, their promotion and their contractual status, including the restriction, suspension or termination of their account".

The mechanism of presumption of subordination, as presented in the proposed directive, presents some critical issues regarding its application to crowdwork.

Firstly, the likelihood that the legal presumption of the existence of a subordinate employment relationship may become a reality also for crowdworkers are quite limited.

The reason is to be found mainly in the impossibility that most of the conditions set by Article 4 can occur for this type of workers.

Indeed, it has been argued that crowdwork platforms are hardly referable to the criteria relating to the limitation of the "possibility for the worker to create a clientele or perform work for third parties" and the freedom of the same to organize their own work, as well as the one requiring the worker to comply with rules governing their appearance during performance and regulating their behaviour towards the client.

As a result, the provision of criteria predominantly shaped based on known experiences in the field of on-demand work via application means that most crowdworkers cannot access the protections that the proposed directive associates with the recognition of the status of employed person.

Secondly, situations could arise such that the same digital platform could ideally adopt different organizational schemes depending on the type of service selected by the client. This would imply that there could be instances in which a crowdworker's work could satisfy at least two of the control criteria listed in the proposed directive if he or she performs his or her activity following a particular model adopted by the digital platform and does not fulfil any of them if he or she acts to accomplish a task for which the same digital infrastructure uses a different organizational scheme.

As a consequence, a worker could find himself in the ambiguous condition of having a double "treatment" regime with the same digital platform since, in one case, the condition referred to in Paragraph 1 of Article 4 would be fulfilled, regardless of the legal classification of the worker, by reason of the control carried out by the digital platform, while in the second case, since none of the forms of control listed in Paragraph 2 of the above-mentioned article are carried out, the same condition could not be said to have occurred.

In addition to these considerations, digital platforms, from the very beginning, have built their business models so that existing regulations could not be applied to them. Consequently, it cannot be excluded that, in the event that the proposal is adopted, digital platforms may shape their schemes while waiting for the entire approval process to take place, so that they can continue to control workers in new ways which, as such, are not taken into account by the directive.[43]

Another controversial aspect of digital platform work in general and, even more so in crowdwork, concerns working hours. It happens that, theoretically, it is not the platform that requires the worker to connect at certain times or to accept all job proposals; in practice, however, most of the time the freedom granted to the worker to make his own choices is merely apparent since whatever decision he makes will have repercussions on future job

[43] *See* also Barbieri M., *Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni di lavoro nel lavoro con piattaforma*, in *Labour & Law Issues*, 7, 2, 2021.

opportunities, on the possibility of continuing to use the digital platform to work as well as on the quantum he is granted for the accomplishment of the task. The contribution offered by the proposed directive does not serve to resolve doubts in this regard since the issue of "working hours" become relevant only as a criterion to be evaluated for the recognition of the presumption of subordination. On the other hand, crucial issues such as the right to disconnect, the issue related to time zones and, again, how to consider the hours used by the worker in the search for or expectation to receive a job opportunity are not addressed.

The application of Articles 7 and 8 may also face critical issues. A first one could be found in the identification of individuals who can receive the assignment from the digital platform, which is intrinsically linked to the second critical issue, namely compliance with the requirements of competence, training and authority.

Based on the provisions of the last sentence of paragraph 3 of Article 7,[44] it can be inferred that these human figures must be workers included in the context of the organization of the digital platform for which they already perform their main activity. Then the references in both provisions about the necessary levels of competence, training and authority suggest that appropriate training should be provided for such workers. However, mainly due to the high turnover and low-to-medium levels of education of the workers operating on the platforms, such pathways lend themselves to be both essential and difficult to implement, consequently, making it difficult to identify the person to whom the monitoring and evaluation functions should be assigned and more generally can be a reference for the workers.

Another critical issue is related to the circumstance that the automated decisions and processes on which human intervention is required do not only pertain to data protection profiles, but also, for example, to aspects concerning the programming of the algorithm and its operation.

Finally, in some hypotheses, such as those of online work, the implementation of such measures is difficult to achieve, due to the complexity that could already be found simply in identifying the worker to whom to assign the various roles.

Transnational nature

If the articles outlined in the previous paragraph were to be implemented, they would conflict with the criterion established by the Rome I Regulation that gives primacy to the law freely chosen by the parties.[45] They would impose compliance with the criteria of the place

[44] "They shall enjoy protection from dismissal, disciplinary measures or other adverse treatment for overriding automated decisions or suggestions for decisions".

[45] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations. Art. 8 of the Regulation establishes that "1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law which, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.
2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

where the worker performs his activity, at least with reference to the transparency requirements.

Nevertheless, to respond effectively to the challenges arising from cross-border platform work and in order to prevent the absence of international hard law from undermining the enforcement of basic human rights, as highlighted by the European Union bodies themselves, regional legislative interventions can no longer be considered sufficient, important as they may be.

In the Communication accompanying the publication of the proposed directive, the Commission, in response to the circumstance that many work platforms have a global nature (estimated to be about one-third), sets out the urgency of coordinated action across jurisdictions to establish global labour standards that can, at the same time, spread greater transparency and certainty in the application of the law and foster sustainable growth of digital platform work. For these reasons, the Commission calls on policymakers to make an effort to adopt global governance tools[46] that are able to cope with the fact that digital platforms operate in multiple jurisdictions.[47] In this sense, the Commission's commitment to promote the improvement of working conditions for platform workers is appreciable, also thanks to the intensification of international cooperation relations with the United States and Canada, which represent two of the main non-European countries with the highest concentration of digital platforms and crowdworkers.

The Commission's goal, that is, to ensure, on a global level, decent working conditions for platform workers, however laudable and appreciable, is believed to be difficult. As declared by the Commission itself, such an intervention would require the collaboration of the International Labour Organization. However, it is well known that the Constitution of this organization does not establish that the principles and rules promoted by it have binding effect on the States. It is equally well known that the legislative instruments available to the ILO do not have binding force and, with reference to the Conventions, understood as the main means of introducing international labour standards, only their ratification translates into a constraint for States to comply with the regulatory provisions laid down by them.

Collective dimension

In the opinion of the writer, Article 9 of the proposed directive does not make any innovative contributions with regard to the collective instruments available to workers since there is already a directive at the European level regulating the right to information and

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.
4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply".

[46] For more on governance, *see* Brino V., *Diritto del lavoro e catene globali del valore. La regolazione dei rapporti di lavoro tra globalizzazione e localismo*, Giappichelli Editore, Torino, 2020.

[47] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work, Brussels, 9.12.2021, COM (2021) 761 final, p. 14.

consultation of employees[48] which could well have been applied also with regard to workers on a digital platform regardless of an express regulatory reference in the proposed directive.

The legislator's choice to attribute two different regimes to workers on the basis of their different legal status may be relevant in the specific context of crowdwork since, in the light of the provisions contained in the proposed directive under consideration, it is possible that part of the relationships existing between crowdworkers and digital work platforms do not have at least two of the indices required for the presumption of subordination to operate. Beyond this consideration, it is necessary to assess the potential that these forms of participation may play in the context of online platform work and to identify any limitations.

First of all, it can be observed that while, on a general level, technological transformation can benefit from such an institution in that it allows workers to participate collectively in the decisions that the decision-making authority of the company must make on organizational and strategic aspects in order to safeguard their interests, on a "micro-level", such a participatory model can also play a significant role in the process of recognizing better working conditions for digital platform workers and, in particular, crowdworkers. Indeed, insofar as it is stipulated that information and consultation procedures may concern decisions made by the company that are likely to entail significant changes to the organizational structure of work and labour contracts, the foundations are laid for including in the subject of these procedures various mechanisms typical of digital infrastructures.

Actually, the potential for such practices must be considered high in view of the concrete architecture of digital platforms, in which almost any mechanism is functional for the control of workers or the 'making of significant decisions for them.

Furthermore, the importance of such practices can also be considered in relation to the inclination of such digital platforms to change their organizational models very quickly. This is a practice that could intensify along with the introduction of regulatory changes affecting the phenomenon of digital platform work. In other words, digital infrastructures that are willing to change their operating mechanisms in order to avoid the application of any regulations that provide for more stringent and onerous regulatory mechanisms in their regard – such as, for example, the introduction of a presumption of subordination upon the occurrence of certain criteria governed by the forms of organization and control practiced by the same – will be required to make extensive use of such forms of worker participation so as to guarantee workers the opportunity to safeguard their interests. When these rights are declined in a working reality such as crowdwork, it is possible that their scope will encounter limits due to both the dematerialization of the workplace and the uncooperative spirit typical of most digital platforms.

With reference to the first order of limitations, one must start from the consideration that the experiment of information and consultation rights, as a rule, takes place according to procedures that require compliance not only with suitable timelines, but also with the availability of places for meetings between the relevant levels of management and representation.

[48] Directive 2002/14/CE.

Due to the completely virtual nature of crowdwork, the idea is proposed that it is necessary to adapt the traditional methods of implementing the procedures in question to the unprecedented characteristics of digital platforms. According to the European framework, for the procedure to be usefully completed, it is required that employee representatives be given the opportunity to meet with the employer. Therefore, first of all, one should think of adequate ways to reproduce in a virtual environment a procedure that is normally practiced on company premises. In this regard, one solution could be to equip digital platforms with special digital spaces, which can only be accessed by employee representatives and those acting on behalf of the digital platform by entering appropriate credentials. Such spaces should be equipped, for example, with mechanisms that can ensure visual contact between the parties and with tools that can ensure compliance with the necessary timelines.

As anticipated above, it is possible to imagine that the effectiveness of the procedures under consideration may be limited by the uncooperative attitude typical of most digital platforms. Indeed, in order for information and consultation rights to achieve their effectiveness, it is necessary that during the procedure the parties operate in a "spirit of cooperation"[49] so as to reconcile the interests of the workers and those of the company. However, the behaviour of most digital infrastructures seems to be oriented solely toward safeguarding their own economic interests. As a consequence, the expected effectiveness of these rights in a more complex process of improving the working conditions of workers on digital platforms is significantly limited.

6. A possible solution: a core set of minimum protections for all digital platform workers.

The analysis conducted poses a finding, namely, that even work that is performed entirely online by Internet users who could potentially be anywhere in the world is also a phenomenon that can raise significant issues in terms of worker protections.

In summary, it has been observed that the organizational models adopted by digital infrastructures are manifold. It has also been noted that the same crowdwork platform can be equipped with both organizational models that are highly restrictive of the worker's freedom and operations that allow it to act as a mere intermediary, leaving the choice between the two up to either the client or the worker.

The European lawmaker's choice to dedicated express attention not only to offline but also to Internet-based work platforms is the same as declaring that regulatory efforts need to be catalysed on both subspecies of this form of work since both pose the same dilemmas originating from the peculiar organizational models adopted and the technology through which the work is conveyed.

However, the *modus operandi* adopted by the European institutions it is not considered very receptive to the typical needs of crowdworkers. In fact, on the one hand, if the set of

[49] Art. 1 para. 3 Directive 2002/14/CE.

measures were to be issued in its entirety, its articulation could prove to be suitable for a reduction in legal disputes for those workers who carry out their work offline and on-site, in respect of whom, in any case, the Member States are already gearing up to guarantee them the necessary protections.

On the other hand, it is argued that the regulations in question do not adequately take into account the typical needs of crowdworkers because they do not evaluate a fundamental characteristic of this type of work, namely its global reach.

Certainly, the challenges presented by digital platforms and, in general, digitalization require the collaboration of all social partners and interventions that will not be depleted in the short term and will have to be flexible due to the rapidity of change that characterizes these models.

In any case, in order to preserve this type of work which, for many people, represents the only opportunity to access the labour market, it is necessary to balance the protection needs of workers – who must be able to take part in it safely – and the freedom of economic initiative of digital platforms.

In the opinion of the Author, a solution to provide the necessary protections for platform workers is not one that conditions the recognition of labour rights on the legal classification of the worker as an employee, but rather one that puts workers at the center and provides them with an essential core of rights, thus, including those who perform their work online, such as crowdworkers, regardless of their legal status.[50]

To this end, it is necessary, first of all, to select the rights that should be granted to these workers in any case and then, to identify the sources present at the various levels that might be suitable for establishing compliance with these protections. With reference to the first element, the concrete ways in which the digital platform operates do not allow to guarantee the synallagmatic nature of the agreement; therefore, it might be desirable to have a legislative intervention that could define the minimum contents of the employment contract and, as a result, ensure that the worker's interests are protected. Then, as regards the issue concerning the identification of the law designated to regulate the contract, the legislation provided for in the Rome I Regulation would theoretically be suitable for regulating this aspect, provided that the most favourable regime provided for employees by Article 8 of the aforementioned Regulation could be applied "simply" to workers, without adjectives.

With regard to working hours, two aspects should be considered with reference to which regulatory intervention is most urgent. The first relates to the failure to set maximum limits to working hours, a factor capable of causing negative effects on the health of workers as well. The second, then, concerns the qualification that should be given to the time during which the worker is not engaged in performing work, but nevertheless is logged on the platform waiting for job offers to be posted.

For example, these could provide the digital infrastructure with special timers programmed to determine the worker's automatic exit from the platform once a predetermined number of hours of connection has been exceeded. Such a measure should

[50] Gyulavári T., *Floor of Rights for Platform Workers*, in Gyulavári T., Menegatti E. (eds.), *Decent Work in the Digital Age. European and Comparative Perspectives*, Bloomsbury Publishing, London, 2022, where the Author identifies a set of minimum rights of platform workers, drawing on "classic" rights e introducing new ones.

not be designed as a tool to expel the worker from the platform, albeit momentarily, but rather as warning tools for the worker. As regards, then, the question of the correct qualification that should be attributed to the time spent by the worker on the platform waiting to view job proposals on his screen, it is believed that this should be the subject of a specific regulatory intervention aimed at establishing that the time interval that occurs between the execution of a task and a new assignment should be considered on the same par as the time that the worker uses to perform the work activity and, therefore, should be remunerated.

Finally, the freedom of trade union associations and the right to collective bargaining should be guaranteed to all platform workers.

Regarding the regulatory technique that should be used, it is not possible to identify an unambiguous answer. Instead, it would be necessary for the different legislative levels to coordinate with each other in order to ensure total and homogeneous coverage of these elements of the relationship. Moreover, collective bargaining should intervene to regulate detailed aspects relating, for the most part, to the relationship with the individual digital platform. As well as voluntary self-regulatory tools that digital platforms may have at their disposal, such as codes of conduct could play an important role in the pursuit of the proposed goal of protections. Lastly the role of the collective dimension will be important, at least in the form of workers' participation.