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## **The employee paradigm towards proof of work via digital platforms: The situation of Italian platform workers**

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### **Abstract**

Recent developments in legal decisions have highlighted the directive power exerted by platforms, leading to a preference for an employee scheme for qualification purposes. However, work platform control mechanisms are part of larger, more complex systems of algorithmic power that threaten the identities of individuals. Workers become subject to manipulation even before they begin work, rendering the protections associated with employee recognition inadequate. One possible solution to safeguard the dignity of workers and right to self-determination is to align labor law with the right to personal data protection.

### **Key words**

Digital platforms; work; employee; data protection; governmentality

### **Resumen**

La evolución reciente de las decisiones judiciales ha puesto de relieve el poder directivo que ejercen las plataformas, lo que ha llevado a preferir un régimen de empleados a efectos de cualificación. Sin embargo, los mecanismos de control de las plataformas de trabajo forman parte de sistemas más amplios y complejos de poder algorítmico que amenazan la identidad de las personas. Los trabajadores se convierten en objeto de manipulación incluso antes de empezar a trabajar, lo que hace que las protecciones asociadas al reconocimiento de empleado resulten inadecuadas. Una posible solución para salvaguardar la dignidad de los trabajadores y el derecho a la autodeterminación es alinear la legislación laboral con el derecho a la protección de datos personales.

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### Palabras clave

Plataformas digitales; trabajo; empleado; protección de datos; gobernabilidad

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## 1. Introduction

The purpose of this article is to analyze the characteristics of work control on digital platforms. Specifically, I will examine the Italian legal decisions surrounding the classification of platform workers, with a focus on riders and drivers. Recent decisions have emphasized the dominant power wielded by platforms, tending to support the employee scheme for the purpose of classification. However, I will explore how the proliferation of “soft control” strategies employed by platforms threatens the identities of individuals, forming complex systems. The individual is at risk of becoming a manipulated object long before entering the workforce, rendering even the protections afforded to recognized employees inadequate.

The terms “on-demand economy” or “gig economy” are commonly employed to refer to the phenomenon of work services being provided through digital platforms.<sup>1</sup> These platforms serve as intermediaries between individuals seeking a service and those who offer to fulfill that need. Due to the vast range of work platforms available, classification can be challenging. Some platforms offer digital support for work that can be done entirely online, while others simply connect workers and customers, with the actual service being performed elsewhere.

The range of work platforms available has expanded from those offering standard services, such as ride-hailing (Uber, Lyft) and food delivery (Deliveroo, Glovo), to those facilitating more creative services (Heiland 2019, Dagnino 2019) provided by teachers, architects, graphic designers, and other professionals (Upwork), as well as skilled manual labor (ProntoPro). In the realm of “crowdworking”, which is also known as “crowdsourcing”, there are platforms dedicated to the completion of micro-tasks, which are typically simple and repetitive tasks aimed at training algorithms to perform specific functions.<sup>2</sup> Common tasks on these platforms include labeling images, transcribing texts, assigning filters to audiovisual material and evaluating search accuracy (Pirone and Rebeggiani 2019, 228).

Workers providing platform services are often classified as self-employed due to the increased level of freedom they enjoy (Todolí-Signes 2017). However, this classification leaves users solely responsible for risks, both occupational and social (De Stefano 2016, Schreyer 2021). Despite their perceived freedom, work platforms are dominated by algorithms that enforce control, often with pervasive effects. In this article, I will analyze these strategies, highlighting how they fit into complex systems designed for algorithmic control, in which individuals’ identities and behaviors are targeted for orientation. My focus will be on the work of riders and drivers. I will compare this analysis with existing labor law and Italian legal decisions, in order to assess the potential and limitations of solutions adopted to protect workers from the impacts of algorithmic control.

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<sup>1</sup> For a general overview of the phenomenon see De Stefano 2016, Vecchi 2017, Armano *et al.* 2017, Bodini *et al.* 2018, Chicchi *et al.* 2020, Rouvinsky 2023.

<sup>2</sup> To learn more about this topic, see Casilli (2020). One of the most well-known platforms of this type is Amazon Mechanical Turk (Bergvall-Kåreborn and Howcroft 2014). Such platforms employ numerous crowdworkers who perform micro-jobs in front of their computers to facilitate the operation and evolution of artificial intelligence. By examining these processes, it is possible to uncover a hidden aspect that platforms tend to conceal: the human labor required to ensure their maintenance and functionality. This labor is subject to specific regulations and dynamics of fragmentation.

In the first paragraph, I will examine Italian legal decisions concerning the qualification of platform workers, specifically riders and drivers. In the second paragraph, I will analyze the strategies used by platforms to manage their workforce, focusing on the pervasive impact of "soft control" techniques. I will relate these techniques to the broader forms of control exercised by digital platforms, which operate within complex systems. I will then evaluate how these systems impact the identity and work conditions of platform workers. I will consider the advantages and limitations of using an employee model to categorize workers on platforms. From the analysis, it will emerge that one possible solution to ensure the dignity and right to self-determination of workers is to coordinate labor law with the right to personal data protection. Through this coordination, it would be possible to restore individuals' sovereignty over their personal data.

## 2. Legal decisions on riders and drivers in Italy

The law has been addressing the issue of work mediated via digital platforms for a number of years. Legal decisions have focused on the conditions established by platforms through their algorithmic infrastructures, which determine the concrete nature of working relationships. While riders and drivers have received greater attention at the legal level, the world of crowdworking has remained largely overlooked by the law. However, the work of riders and drivers has been the subject of numerous national and international disputes. These disputes reveal several "access routes to job protection", including the classification of workers, anti-discrimination legislation, compliance with health and safety standards and the protection of privacy (Spinelli 2022, 68).

Rather than examining the path that led to such decisions, I am interested in highlighting the way in which employment relationships have been evaluated, based on the level of autonomy granted to the worker. The questions of a qualifying order are of particular interest in this regard (Pacella 2021). The legal system has undergone significant evolution towards a "demystification of the narrative of autonomy" (Spinelli 2022, 68).

The first Italian court judgments on riders working via digital platforms date back to 2018. The Courts of First Instance of Turin (No. 778) and Milan (No. 1853) ruled that delivery workers were not to be categorized as employees given their ability to choose whether and when to work. As a result, the legitimacy of "coordinated and continuous collaboration" contracts were acknowledged.

However, in the Court of Milan's judgements on the classification of Glovo riders, it was pointed out that certain factors, such as refusing or not accepting delivery orders, requesting a change in order assignment, or failing to connect during the communicated availability time slot, could decrease the "loyalty" of the worker. This had various consequences, including a reduction in the ability to book slots and thus, potential job assignments (Biasi 2018).

Similarly, in judgment No. 26 of 4 February 2019, the Court of Appeal of Turin ruled that Foodora delivery riders were not covered by the employment contract scheme due to the freedom of the riders to accept or refuse the various shifts (slots) offered by the company (Novella 2019, 90).

The Court's judgment regarding the employment relationship of the riders placed them within the category of "hetero-organized collaborations", which is regulated by Article 2 of Legislative Decree No. 81/2015. The Court interpreted this provision as identifying a third category between the employee relationship defined in Article 2094 of the Civil Code and collaboration as outlined in Article 409 No. 3 of the Code of Civil Procedure. This interpretation sought to provide greater protection for emerging forms of work resulting from the rapid introduction of new technologies.<sup>3</sup>

In essence, the rule proposes a concept of hetero-organization that gives the client the power to determine the methods, times and places of the collaborator's work performance, without creating a relationship of employed work. Consequently, according to the Court, the hetero-organized worker remains technically "independent" but, in all other respects – including safety and hygiene, direct and deferred remuneration (and therefore professional classification), time limits, holidays, and social security – the relationship is regulated as an employee.

In judgment No. 1663 of 24 January 2020, the Supreme Court of Cassation upheld the decision of the Court of Appeal regarding the application of protections provided for by Article 2, paragraph 1, of Legislative Decree No. 81/2015. However, the Court arrived at its decision based on different arguments,<sup>4</sup> which are not the focus of this paper.<sup>5</sup> It is sufficient to mention that the Court adopted a different interpretation of Article 2, paragraph 1, of Legislative Decree No. 81/2015. According to the Court, "hetero-organized collaborations" do not correspond to a "*tertium genus*". The Court adopted a "remedial" approach<sup>6</sup> (Spinelli 2022), which, quoting the judgment, "finds in some regulatory indicators the possibility of applying a 'strengthened' protection against certain types of workers (such as those of digital platforms considered 'weak'), to which the protections of employees can be extended".

In 2020, both the Court of Florence and the Court of Bologna made judgments on appeals presented by Just Eat and Deliveroo riders, respectively, in which they requested the provision of personal protective equipment during the COVID-19 pandemic (Orciani 2021). The decrees of the Court of Florence, dated 1 April 2020 No. 886, and the Court of Bologna, dated 14 April 2020 No.745, required food delivery companies to provide protective equipment against the risks associated with the ongoing COVID-19 epidemic. The Court of Bologna emphasized that there was no doubt regarding "the need to extend to these workers, regardless of the *nomen iuris* used by the parties in the employment contract, the entire employment discipline, and, in particular, as far as the subject of interest is concerned, the discipline concerning the protection of health and safety conditions in the workplace, which includes all the rules that provide for the employer's obligation to continuously supply and maintain Personal Protective Equipment".

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<sup>3</sup> According to the Court of Appeal's judgment, an "intermediate category" between employed work and self-employment would be created under the law, to which Foodora riders could be assigned (Rainone 2022, 139).

<sup>4</sup> The decision sparked extensive debate in labor law circles. As Spinelli notes, "the Cassation's decision has garnered more criticism than appreciation for its hermeneutical approach, which, while clearly pragmatic, glossed over certain contentious issues" (Spinelli 2020, 91).

<sup>5</sup> For further reading on this topic, refer to Carabelli and Fassina 2020, Martelloni 2020, Spinelli 2022.

<sup>6</sup> The remedial approach seeks to close the gap between rights and actions by establishing forms of protection that address individuals' fundamental needs (Di Majo 2005).

With decree No. 886, the Court of Florence also addressed the classification of the employment relationship of the appellant, who was registered on the Just Eat platform. Despite being classified as self-employed, the Court deemed the relationship to be governed by Art. 2 of Legislative Decree No. 81/2015, meaning that the protections of the employment relationship applied both preventatively and remedially. This decision was later confirmed by the Court of Florence's order of 5 May 2020 No. 886. Similarly, the Court of Bologna confirmed that the Deliveroo riders, even though their work was formally classified as self-employed, were entitled to the protections of employees for rules concerning safety and hygiene, under the provisions of Article 2 of Legislative Decree No. 81/2015.

Both the judgments of the Court of Florence and the Court of Bologna are based on the interpretative framework of judgement No. 1663 of the Court of Cassation, which upheld the decision of the Court of Appeal of Turin regarding the application of Art. 2, paragraph 1, Legislative Decree No. 81/2015 to the employment relationships of Foodora riders (Spinelli 2020, 91).

However, following these judgments, there seems to have been a shift in the legal interpretative attitude towards platform work. With decree No.9 issued by the Court of Milan on 27 May 2020, Uber Italy s.r.l. was found guilty of the crime of illicit intermediation and labor exploitation under article 603-bis of the criminal code. The charges were brought against five managers of Uber Italy s.r.l. and the intermediary companies Flash Road City and FRC s.r.l. The latter were linked to Uber through a "technological performance contract", under which they were responsible for selecting and managing fleets of riders (Barberio and Camurri 2020).

The decree established the measure of "amministrazione giudiziaria"<sup>7</sup> against Uber Italy s.r.l., as provided for by Article 34, Paragraph 1, Legislative Decree No. 159/2011, to investigate existing relationships with other companies in the Uber system, including workers in the home delivery sector, in order to identify any other forms of exploitation of external workers. It was noted that all contractual provisions on self-employment were violated, effectively constituting an "altered employment relationship". Subsequently, there appeared to be a new orientation in legal decisions, with employment emerging as a possible scheme through which to classify employment relationships in platform work (Pacella 2021, Ghiani 2022).

The crucial turning point came with judgment No. 3750 dated 24 November 2020, in which the Court of Palermo ordered the reinstatement of rider employed by Foodinho, a Spanish multinational company operating under the Glovo brand. In this judgment, the court deemed it necessary to first examine the characteristics and legal nature of digital platforms to determine the nature of the employment relationship. Specifically, the Court sought to establish whether the platform's objective was simply to connect users acting as an intermediary, or whether it constituted "a business of transporting people or distributing food and drinks at home".

The Judge stated that the appellant's work was solely managed and organized by the platform, and subject to its rules. The "directive" nature of the algorithm, which assigned

<sup>7</sup> "Amministrazione giudiziaria" is an Italian legal principle, established to ensure the uninterrupted production cycle of assets seized from criminal organizations within a criminal proceeding.

deliveries based on criteria unrelated to the worker's preferences and interests, was affirmed. Despite the rider's apparent freedom, the employer had disciplinary and organizational power over them. Furthermore, the reward systems implemented by the platforms should be interpreted as atypical disciplinary sanctions.

Ultimately, the platform deprived the worker of the ability to decide when to work, and its infrastructure remained unclear. As a result, the court determined that a full-time and permanent employment relationship existed between the parties, with the duties of a rider pursuant to level VI of the Tertiary, Distribution, and Services National Collective Labor Agreement.

This decision was followed by another judgment from the Court of Bologna on 31 December 2020. This judgment was the result of an appeal filed by Italian trade unions FILCAMS, CGIL, NIDIL CGIL and FILT CGIL against Deliveroo Italia s.r.l.<sup>8</sup> It emphasized the discriminatory effects of the platform due to the constant control of the production and work cycle, including the use of reputational systems based on algorithms.<sup>9</sup>

More recently, on 18 November 2021, the Court of Turin issued a judgment in response to an appeal brought by Uber Eats riders against Uber Italy s.r.l., which had already been subject to judicial administration with decree No. 9 issued by the Court of Milan on 27 May 2020. The Turin labor section determined that an employment relationship existed between the workers and Uber Italy s.r.l. This decision was later confirmed by the Turin Court of Appeal on 13 September 2022.

Between March and November 2021, several Italian courts (Milan, Bologna, Palermo, and Florence) issued judgments on appeals filed by trade union groups led by CGIL and UIL. The aim of these appeals was to determine whether certain platforms had engaged in anti-union conduct by forcing riders to join trade unions aligned with employers' interests (Milan), or to accept the application of collective agreements signed with unions of similar orientation (Bologna, Palermo, and Florence).

It is worth noting that the courts' judgments reinstated the workers' status under Article 2, Paragraph 1 of Legislative Decree No. 81/2015.<sup>10</sup> For example, with its judgment No. 781 of 24 November 2021, the Florence court addressed an appeal brought by FILCAMS, NIDIL, and FILT against Deliveroo Italia. The court traced the riders' activities to hetero-organized collaborations and affirmed the legitimacy of the "special action taken by the trade unions" with regard to the reported conduct. The judgment relied on an

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<sup>8</sup> For an analysis of the case in question, within the context of legal challenges associated with addressing algorithmic discrimination, refer to Caielli (2022).

<sup>9</sup> For a more in-depth examination of the key issues implicated in the decision, see Borzaga and Mazzetti (2022). According to the authors, "the judgment by the Bologna Court is significant because it removed the veil of apparent neutrality regarding new technologies applied to labor management" (Borzaga and Mazzetti 2022, 228). To read an analysis of the judgment, in the broader context of the relationship between algorithmic management and anti-discrimination law, cfr. Barbera 2021.

<sup>10</sup> I refer, in particular, to the decree of the Court of Milan of 28 March 2021; the decree of the Court of Bologna of 30 June 2021; the judgment of the Court of Appeal of Palermo of 23 September 2021 and the judgment of the Court of Florence of 24 November 2021.

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evolutionary interpretation of Article 28 of the Workers' Statute,<sup>11</sup> which extends beyond traditional employee schemes, to ascertain Deliveroo's anti-union conduct. The subject of the judgment was specifically the application of the collective agreement signed by Assodelivery and UGL, a union considered close to employer interests.

The Courts in Milan and Bologna also found anti-union conduct by platforms, using argumentative frameworks similar to the one mentioned (Pellacani 2021, Spinelli 2022, Rainone 2022).

Meanwhile, the Palermo Court of Appeal ruled on the conduct of Social Food S.p.a. in its 23 September 2021 decision, which confirmed the previous judgment of the Court of Palermo. The Court of Appeal determined that the platform had engaged in an act of "indirect discrimination" by offering workers the immediate termination of their existing contract if they did not agree to sign a new contract. This conduct was found to have severely restricted the freedom of negotiation of collaborators, forcing them to accept new contractual conditions or risk losing their employment relationship. The court found that the anti-discrimination regulations were applicable not only to employees or "hetero-organized" work but also to self-employed workers or "to the relationship in question" under Article 47-*quinquies* of Legislative Decree No. 81/2015.

The Court of Milan judgments No. 1018 of 20 April 2022, on the status of Deliveroo riders found that they were in a permanent and full-time employment relationship with the platform. In February 2023 the Court of Appeal upheld the decision.

On 15 November 2022, the Court of Turin recognized the work performed by a rider on the Foodinho platform (Glovo) as employment in its nature. The judge ruled that the rider's entire shift while logged into the platform should be considered as working time, irrespective of the number of deliveries made.

Recent court decisions seem to center around recognizing that platform work is evolving within relationships marked by a strong power asymmetry, albeit in different ways than the traditional Taylorist-Fordist model. The platform exercises a directive power that, in the absence of the protections associated with employment schemes, can take on discriminatory characteristics and exacerbate the dynamics of control<sup>12</sup> and exploitation. The same orientation was reflected in the judgment of the Court of Turin on 20 July 2023, which recognized the application of the National Collective Contract for the Tertiary, Distribution, and Services sector for two riders of the Foodinho group (Glovo).

In this context, legal decisions are increasingly recognizing the evolution of forms of dependence and hetero-direction<sup>13</sup> which is being incorporated into the organizational modules of the platform, blurring the distinction between "hetero-direction" and

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<sup>11</sup> Article 28 provides for the suppression of anti-union conduct by the employer. This conduct occurs when there are behaviors that obstruct or restrict the exercise of the freedom of union activities as well as the right to strike.

<sup>12</sup> For further information on the use by platforms of GPS as a rider control tool, well beyond its contractual identification as a "work tool", as well as on the related provisions issued by the Italian Data Protection Authority, see Ingraio (2021).

<sup>13</sup> According to Raimondi, it is becoming increasingly common for hetero-management to be expressed through rigid organizational constraints, rather than specific and precise instructions on how to perform the service. However, the mere occurrence of hetero-management within the organizational and technological platform models is not sufficient to classify workers as independent (Raimondi 2019).

“hetero-organization”<sup>14</sup> (Ballestrero 2020). In light of this, the judiciary has focused on the consequent need for protection for platform workers, generally considering them comparable, if not stronger, than industrial workers. Thus, in the last two years, the paradigm of employment has made a comeback.

In recent times, a similar trend has taken place internationally, with some cases shifting towards employment schemes more decisively (Bidetti *et al.* 2022). Indeed, as early as 2015, the first US court decisions favored the employment nature of the relationship for Uber drivers (Cagnin 2018). Then, on 28 October 2016, an Employment Tribunal based in London defined the Uber platform not as an intermediation algorithm but as a private transport company. It also recognized Uber’s power of control over its drivers, resulting in the classification of drivers as “workers” instead of self-employed (Pacella 2017). This decision was a significant turning point,<sup>15</sup> as it directed the focus of the law to the directive power exercised by the platform, which cannot be attributed to a mere technological intermediation activity.<sup>16</sup> This influenced other legal systems within Europe to re-examine platform relationships.

A review of recent international judgments shows a consistent trend towards recognizing the dependence of providers on digital platforms, particularly in European countries (Alifano 2021). The Supreme Courts of Spain and France have also demonstrated this trend in their judgments.<sup>17</sup> These cases have shown a preference for analyzing the actual methods in which services are performed, rather than the initial phase of the relationship, resulting in a clearer recognition of the characteristics of employee scheme.

The EU Court of Justice holds a different stance. Already in a judgment dated 20 December 2017, the Court had observed that Uber was not an “information society” but a transportation company. In a passage reiterated in a ruling on 10 April 20 (CGUE Judgement of 10 April 2018, C-320/16), it noted that Uber exerts a decisive influence on the conditions of service for the hired drivers (Cosio 2019). However, on 22 April, The Court issued an order regarding the employment relationship between a rider and Yodel Delivery Network, ruling out the possibility of classifying the rider as a “worker”.<sup>18</sup> In particular, according to the Court, this qualification is excluded when a rider is afforded discretion to use subcontractors or substitutes to perform the service, to accept or not accept the various tasks offered by his putative employer, to provide their own services to any third party and to fix their own hours of work.

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<sup>14</sup> Specifically, from a legal perspective, within a “hetero-organizational” model, the client can define the methods of integrating work performance into the organization. “Hetero-direction” includes the presence of the employer’s directive power, which can determine the executive methods of performance.

<sup>15</sup> However, it should be considered that subsequent judgments of the English courts on the qualification of platform workers have gone in directions that are anything but uniform. For a more in-depth analysis, see Pietrogiovanni 2019, Pacella 2019, 2020.

<sup>16</sup> For a comparative analysis of regulatory (or jurisprudential) responses adopted in European countries to regulate the platform work phenomenon, see De Minicis *et al.* (2020).

<sup>17</sup> For a more in-depth analysis on the topic, see Donini 2020, Rainone 2022.

<sup>18</sup> For further information see Pacella 2020, Aloisi 2020.

### 3. The exploitation of labor on platforms

The question posed is whether classifying platform workers as employees is enough to ensure their protection. Specifically, it is questioned whether this classification can safeguard the identity and personal attitudes of workers. The protection of this personal sphere is crucial for workers to make informed decisions and exercise their fundamental right to self-determination, as enshrined in Constitutional provisions even before Article 8 of the Italian Workers' Statute. However, this sphere is often the target of algorithmic control strategies employed by digital platforms. In this paragraph, I will examine the control methods utilized by platforms through the use of algorithms, considering empirical studies on the phenomenon. I will focus on the manipulative strategies employed through predictive algorithms and recommendation functions, which constitute a complex system of "soft power".

Platforms utilize algorithms to optimize worker performance control and management strategies. These algorithms function as "work designers" (Parent-Rocheleau and Parker 2021), fulfilling roles typically carried out by managers or human resources professionals (Caruso *et al.* 2019). Their primary purpose is to improve the ability to record and assess specific factors, typically linked to worker productivity.

Furthermore, the use of algorithms that autonomously make decisions based on pre-programmed instructions is increasing. Decision algorithms are employed to determine shift schedules, select personnel, disincentivizes the worker from "logging in", and more. Through this method, objectives associated with boosting work rates can be achieved (Leonardi 2020, 213).

In the context of algorithmic management, control objectives are achieved through a differentiation of algorithms used. This includes the use of recommendation functions (Bano 2021) alongside predictive algorithms (Tullini 2016) to induce behaviors, improve performance, and flexibly manage the workforce (Sprague 2015, King and Mrkonich 2016).

Empirical research conducted by Alex Rosenblat from 2014 to 2018 on the work of Uber and Lyft drivers reveals how Uber uses its technologies to push or force driver behavior. Rosenblat highlights the contrast between the rhetoric used by Uber and platforms, which aims to increase the desirability of the status associated with participation in "flexible working", and the actual dynamics implemented. The rhetoric employed by Uber and similar platforms often portrays drivers as independent contractors who are motivated by their entrepreneurial spirit. However, the reality is that these platforms operate through the analysis of vast amounts of data related to traffic patterns, user requests, and driver behavior. This data is then used to implement various strategies aimed at directing the workforce.

Uber's algorithmic system serves as an "automated manager" (Rosenblat 2018) that determines drivers' pay, work locations and schedules, and eligibility requirements for employment. The system can arbitrarily terminate or suspend drivers without the possibility of appeal, or penalize them if they fail to follow the platform's "suggestions". For instance, drivers with low ride acceptance rates are frequently terminated or suspended.

Moreover, a range of techniques is implemented to achieve an “algorithmic manipulation” of behavior. For example, automatic detections of increases in ride prices in a particular area, recommendations to move to more profitable locations and invitations to extend shifts are some of the tactics employed for this purpose. These functions are presented as neutral observations of certain situations, while, in reality, they are the result of recommendation systems designed to direct behavior. These “soft power” strategies are particularly effective when the platform needs to obtain non-standardized performances, valuing subjective initiative. They enable decisions to be guided without being explicit. Furthermore, the use of these strategies allows platform managers to exercise their employer power while concealing the normative framework of their actions.<sup>19</sup>

The use of algorithms to regulate job performance is often hidden from workers, who may not fully understand the extent to which their actions are being directed by the platform. This is due in part to the automation of the implementation of regulations, which allows rules to be applied immediately and monitors individual behavior. As a result, the gap between prescriptive norms and the effective methods of receiving and understanding those norms is canceled, and the dualism between fact and norm is forgotten (Ferrari 2021, 20–21). The platforms exploit this by associating the conditions imposed on workers with the operating methods of the network, without properly clarifying them in the contract (De Stavola 2020, Briziarelli 2020).

Workers are typically not aware of the algorithmic decisions that determine their conditions, which can be subject to continuous variations.<sup>20</sup> These conditions become apparent during the concrete performance of their services, taking shape within an extremely dynamic disciplinary context.

In most platforms, work performance is evaluated by the users themselves who provide feedback on the performance. This feedback contributes to the structuring of a ranking system based on the scores obtained by each worker. A better ranking position provides various kinds of advantages. In most cases, it increases the possibility of receiving new job assignments from users and enables the worker to enjoy the reward mechanisms activated by the platform. Higher scores also entitle the worker to prizes and rewards and, in some cases, to further contract opportunities.

Platforms determine the metrics by which worker performance is judged and the consequences for the worker through decision algorithms. Based on the obtained ranking, the algorithm can deactivate a worker’s account, reduce the possibility of a

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<sup>19</sup> As Fabrizio Bano has aptly summarized, measures of algorithmic regulation of work “can be understood more clearly as elements of a regulatory process which, according to the nudge theory, acts through ‘gentle pushes’ to condition the worker’s choice while still maintaining formal freedom” (Bano 2021, 306). To gain a deeper understanding of the “nudge theory”, see Thaler and Sunstein (2008), Sunstein (2014), Harambam *et al.* (2018), Savadori (2020).

<sup>20</sup> Dominika Polkowska’s qualitative research on ten Uber drivers in Poland, conducted in November 2018, reveals that they may not be aware of the work style, rules, standards, and norms imposed by the app. According to the author, this may be because most of the interviewees view their employment with Uber as temporary and are more focused on their work “after Uber” (Polkowska 2019).

contract, or downgrade their “status”.<sup>21</sup> Incentives and sanctions such as rewards and punishments contribute to orienting the worker’s performance and behavior in a soft way towards meeting customer expectations. In this framework, workers compete in a potentially unencumbered terrain and are evaluated solely on their ability to meet customer expectations. The absence of guarantee mechanisms to protect the worker and his total exposure to the judgment of customers make reputational systems capable of fueling self-exploitation<sup>22</sup> (Dagnino 2019, 136–137).

The availability of workers is often considered as a parameter for their evaluation, contributing to their ranking on the platform. This raises questions about how to frame waiting time, especially for drivers and riders who are logged in to the platform but not currently on a trip or delivery (Aloisi 2016, Bano 2019).

Similar to other platforms, Uber also employs a reputational rating system. At the end of each ride, the platform prompts the customer to rate the service on a scale of one to five stars. The rating is based on specific parameters provided by the platform, such as the cleanliness of the car, the driver’s friendliness, their willingness to assist with luggage, and the speed of the journey (Ingrao 2019). The driver’s rating contributes to their ranking, and if it falls below a certain threshold, Uber America may schedule a training meeting or deactivate the driver’s account if the rating remains low.

In general, there is an increasing overlap between working time and personal time (Scillitani 2022), resulting in a wider range of dimensions being evaluated. As a result, there is growing interest in the concept of “emotional work” performed by some platform workers (Raval and Dourish 2016, Rogers 2017, Marquis *et al.* 2018, Chan and Humphreys 2018). Workers are often expected to contribute at an emotional level, utilizing their cognitive and behavioral abilities, and drawing upon their own life experiences, identity, cultural background, and more. For instance, Uber drivers must quickly assess whether a passenger is outgoing and open to conversation or prefers silence.

Reputational systems also serve to mask the regulatory nature of platform operations. Through rewards, sanctions, and ranking progressions, which are the outcomes of automated decisions, the platforms present them as a “natural” consequence of the worker’s conduct, creating the illusion of a causal relationship between customer feedback and outcomes. This facilitates unilateral regulation of worker behavior, by portraying normative relationships as mere descriptions. Consequently, the platforms can establish their own rules without being subjected to democratic scrutiny that legitimizes their actions (Cremona 2021).

Reputational systems enable platforms to hold workers accountable for their job performance, even in standard jobs such as driving. The worker’s reputation depends

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<sup>21</sup> Alessandra Ingrao effectively summarizes, “Uber uses the customer feedback-based evaluation system as a tool that allows it to enforce specific work directives to Uber drivers, monitoring their performance through third-party evaluation and activating disciplinary power” (Ingrao 2019).

<sup>22</sup> Ménessier reads some dynamics present in the “algorithmic society” through the lens of “voluntary servitude”, in the terms proposed by Étienne de La Boétie. According to Ménessier, at the core of the phenomenon, there is a fundamental ambiguity linked to the fact that individuals use digital tools starting from a desire for freedom. However, this desire turns into its opposite due to their lack of mastery of these tools and services, which are characterized by extreme opacity (Ménessier 2022).



on various behavioral aspects that they activate to improve their position in the ranking. These strategies obscure the disciplinary power of the platforms, contributing to the establishment of a relationship structure where individual decisions become infinitely manipulable trajectories.<sup>23</sup>

The observed phenomena highlight a general ability of digital platforms to guide users' actions by manipulating their attitudes and identities. The effectiveness of these strategies lies in their development without the worker's awareness, as their decisions are coerced through "soft power" techniques. Central to these techniques are algorithmic recommendations and reputational performance evaluations, which directly affect the worker's expectations and desires, touching the deepest spheres of their personality.

Furthermore, each device of power operates within the broader structure of the platform economy, which is dominated by algorithmic strategies. This has led to the concept of "algorithmic governmentality" to describe the complexity of control strategies employed by digital platforms.<sup>24</sup> At the core of this control system is the user's identity, regardless of whether they act as a consumer or a worker. Work platforms are integrated into this complex system and contribute to the intensification of these strategies through their devices.

#### **4. The employee paradigm as a horizon of protection**

The preceding legal decisions highlights the gradual erosion of platform workers' autonomy, leading to a reassessment of the employee paradigm, especially for drivers and riders. Initially, resistance to categorizing these workers as employees stemmed from the belief that doing so would result in rigid scheduling and limited opportunities for workers to exercise initiative. However, as Antonio Aloisi and Valerio De Stefano point out, "shielded from this narrative, it is important to note that flexible organizational models are perfectly compatible with employment contracts, as demonstrated by decades of business innovations and legal precedent" (Aloisi and De Stefano 2020, 150). Furthermore, the "employee crisis" is not a recent development; it has been ongoing in legal doctrine and jurisprudence since the late 20th century, prompted by the realization of a gap between the "legal representation and the 'sociological' representation of working activity" (Salento 2003, 159).

Qualifying platform workers as employees is crucial to addressing the urgent need for worker protection, without necessarily compromising their autonomy and freedom in executing their work. This move does not necessarily entail the loss of autonomy, especially when the characteristic organizational structure of the digital production process requires it (Bavaro 2021, 148). Moreover, this effort is consistent with the modern evolution of labor law, which seeks to balance employer powers and the respect for human dignity, essential for upholding equality in a democratic society (Aloisi and De Stefano 2020).

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<sup>23</sup> Federico De Stavola, based on an empirical research conducted in Mexico City on Rappi, a leading food delivery platform, has argued for the existence of a disciplinary mechanism that can be defined as "algorithmic panopticism". For further details, see De Stavola (2020).

<sup>24</sup> This category was coined by Antoniette Rouvroy and Thomas Berns and is from several years at the center of a vast international debate. For further information see Rouvroy and Berns (2013).

However, platform work presents unique challenges that may not always fit within the traditional boundaries of self-employment or employed work.<sup>25</sup> As noted, unfavorable conditions for riders often stem from market relationships that result in a contractual dominance in favor of the platform, even outside the confines of technical-legal employee scheme (Perulli 2021).

The ambivalence that characterizes platforms provides considerable scope for autonomy, which many workers are unwilling to give up. Within the variegated populations inhabiting platforms, there are subjectivities that seek to take advantage of the margins of autonomy and mobility available, known as “digital nomads” who are always in search of autonomy and better conditions (Cuppini *et al.* 2022, 119). The employee paradigm does not suit these workers, who oscillate between dependence and autonomy, moving in an unscrupulous manner within the interstices of algorithmic power relations.

As discussed, the choice to enhance Article 2, paragraph 1, Legislative Decree No. 81/2015 in numerous judgments responded to the need to extend some of the protection of employed work to platform workers, bypassing the classification within the dichotomy of autonomy and employee. This article was akin to a “picklock” (Carrà 2020, 117) used to expand labor law discipline beyond employed work.

On the other hand, the power of platforms often surpasses the protections provided by the employee paradigm, expanding into new dimensions for labor law. These dimensions involve personal aspects that require additional protection beyond that offered by traditional labor law. A promising solution that has emerged in the discourse is to extend the protection of platform workers beyond the boundaries of employed work.<sup>26</sup> This approach would establish a labor law “without adjectives”,<sup>27</sup> that prioritizes the protection of workers in the platform economy, without necessarily adhering to traditional classification systems.<sup>28</sup> In this context, it is essential to focus on the individual’s condition rather than solely on their employment relationship. This is particularly urgent due to the extensive governmental control mechanisms employed by platforms.<sup>29</sup> These strategies contribute to an already existing power imbalance that extends beyond the workplace,<sup>30</sup> impacting the worker’s personality and ability to make informed decisions.

<sup>25</sup> In light of the blurring of the traditional dichotomy between self-employment and employed work, Daniel Halliday proposes to establish a certain number of guarantees for the freedoms relinquished by workers on a case-by-case basis. A fair regulation of platform work can, in fact, only be achieved by establishing a just compromise between the freedom and security of workers. Such a proposal would have the advantage of reconciling with an extremely diverse market, as well as adapting to workers’ preferences (Halliday 2021).

<sup>26</sup> For further insight, see Razzolini (2020), Aloisi and De Stefano (2020).

<sup>27</sup> For contextualization of the proposal, see, at least, D’Antona 1996.

<sup>28</sup> On the topic, see Voza (2017, 2018), Fabozzi and Bini (2019), Scacchetti and Fassina (2019). In the perspective of valuing social security, see D’Onghia (2017).

<sup>29</sup> Extensive research has also been conducted on how the labor discipline strategies implemented by platforms constantly risk exceeding the employer’s prerogatives. Regarding the strategies applied by employers during the pre-employment phase to collect candidates’ data, as well as on the attraction of extra-work contexts and behaviors in the employment relationship and the case law concerning the phenomenon, refer to Dagnino 2019, 147-160.

<sup>30</sup> As Annamaria Donini pointed out, “the application of big data analytics systems involves significant risks of compressing the personal identity of the worker, as well as that of any other web user (...). When

Empirical research in recent years has highlighted that control and orientation devices of this nature do not only affect the working sphere.<sup>31</sup> Indeed, as previously mentioned, the very practicability of platforms by users is conditioned by their dependence on devices that influence their autonomous decision-making capacity. The algorithmic strategies adopted by work platforms are part of more complex orientation systems that target a person's identity.

In this regard, the approach of algorithmic systems to "classification" has been emphasized. Data only acquire meaning within significant relationships that allow people to be classified into groups. Algorithmic strategies do not target individual subjects, but specific "classes" of individuals obtained through statistical inferences. Specifically, the way in which subjects relate to each other is examined in order to obtain common characteristics that allow prediction and behavior orientation strategies to be calibrated for entire groups or populations.<sup>32</sup>

For example, algorithms can infer that there is a high probability that someone who regularly attends basketball games also buys Nike shoes. The person will then become part of the group that shares a passion for basketball, which will become the target of common algorithmic strategies. The importance of an individual's data lies not only in its effect on them but also on others. As a result, the control exerted on the individual is the outcome of the intersection of various strategies aimed at each of their classified groups. This "classification" approach to algorithmic systems often perpetuates power asymmetries at a societal level and hinders an individual's self-determination based on their group membership.<sup>33</sup>

In the context of the platform economy, the threat to an individual's identity extends beyond their job performance and is heightened by governmental control measures that operate outside the gig worker-client agreement. The safeguarding of an individual's autonomous decision-making capacity can only be achieved by extending regulatory proposals beyond the workplace and toward the level at which the person's right to self-determination is presently jeopardized (Zaccaria 2021).

The employee paradigm was a crucial protective measure in the 20th century, not only in terms of work performance but also in upholding social relations. However, within the platform economy, protective measures limited to the working relationship between service providers and clients would be insufficient in safeguarding the autonomy of individuals, which is threatened across various dimensions. It is necessary to intervene at a level that goes beyond the employment contract and addresses the overall structuring of the platform economy in order to achieve a compromise between the dignity of the worker and the powers of the employer. In essence, ensuring the dignity

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automated profiling concerns the worker, the improper projection of their characteristics could, on the one hand, violate that part of their personal identity that relates to professionalism and other relevant elements in the employment relationship, and on the other hand, jeopardize the 'most personal' components of the intellectual and moral assets of the worker, which should not be available to the employer, but are instead provided in an imprecise and partial manner" (Donini 2017, 41).

<sup>31</sup> For a deeper analysis, refer to Zuboff 2019, Pisani 2023.

<sup>32</sup> For a more in-depth analysis, see Viljoen (2021). On the topic, with particular reference to the implications of the phenomenon on labor law, also refer to Donini (2017).

<sup>33</sup> Kate Crawford argues that the "classification policy" is a fundamental component of the functioning of artificial intelligence. For more detailed information on this topic, see Crawford (2021).



and freedom of workers requires the existence of democratic conditions on the web that guarantee fundamental rights.

## 5. Conclusions

On 9 December 2021, the European Commission released its proposal for a directive on digital platform work,<sup>34</sup> which addresses some of the main challenges posed by ongoing transformations.<sup>35</sup> The directive's scope of application is broader than that of Italian laws regulating work on platforms and judicial decisions. At the legislative level, only law No. 128/2019 attempted to regulate the phenomenon, focusing solely on riders. Even judgments pertained solely to riders and drivers. The Commission directive expands its focus, encompassing the entire range of digital work platforms, including crowdworking.

Particularly interesting is the fact that the directive highlights the importance of the obligations under the General Data Protection Regulation (GDPR) for job platforms. Article 8 of the directive, declining the principles contained within Article 22 of the GDPR, "establishes the right for platform workers to obtain an explanation from the digital labour platform for a decision taken or supported by automated systems that significantly affects their working conditions. For that purpose the digital labour platform should provide the possibility for them to discuss and clarify the facts, circumstances and reasons for such decisions with a human contact person". Where the explanation obtained is not satisfactory or where platform workers consider their rights infringed, "they also have the right to request the digital labour platform to review the decision and to obtain a substantiated reply". Furthermore, Article 9 "requires digital labour platforms to inform and consult platform workers' representatives or, if there are no representatives, the platform workers themselves on algorithmic management decisions, for instance if they intend to introduce new automated monitoring or decision-making systems or make substantial changes to those systems".

The directive implicitly acknowledges that qualification is insufficient to guarantee worker autonomy and rights given the depth of governmental control devices adopted by the platforms. Algorithmic control strategies exceed the protections offered by the employee scheme. Therefore, individuals need tools to exercise sovereignty over their data use and oppose automated treatments that infringe upon their rights.

The opaqueness of algorithmic strategies that aim to shape behavior reveals the power wielded by platforms, which unites control of work with control of social relations. In this context, the right to an explanation can structurally reverse the asymmetry upon which the complexity of social relations established on the platform is based. This right is particularly relevant, as proposed, even within work platforms.

Radicalizing the proposal for a directive, I argue that, given the forms of power inaugurated by algorithmic governmentality, guaranteeing workers' rights is contingent

<sup>34</sup> Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work (COM/2021/762 final).

<sup>35</sup> For an in-depth analysis of the contents of the directive, see Barbieri (2021). For an analysis of the main issues involved in the directive from a labor law perspective, see the focus of issue 2/2022 of *Lavoro Diritti Europa* titled "Platform Work. Individual and Collective Protections, also in the Perspective of the Proposed Directive".

upon granting individuals control over their own data within the complex network of relational areas marked by digital platform intermediation.

In this context, a more comprehensive coordination between labor law and personal data protection is needed. In short, protecting individuals' autonomous decision-making capacity requires a regulatory proposal that extends beyond the workplace and aligns with the level at which the right to self-determination is currently threatened.

It could be interesting for users, whether individually or collectively organized, to engage in collaborative efforts with institutions aimed at regulating the digital landscape. This collaboration would serve the purpose of safeguarding fundamental rights. The application of the principle of "horizontal subsidiarity" could potentially offer a viable legal model.<sup>36</sup> In this model, individuals and groups would be empowered to actively participate in discussions concerning the utilization of their personal data. This engagement would not only enable them to contribute to the establishment of regulations governing data usage and handling but also facilitate their involvement in the overall decision-making process.

Only by granting users the possibility of contributing to the regulation of the platform economy, where the use of data conflicts with the right to self-determination, can we lay the foundations for a democratization of the digital horizon.

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<sup>36</sup> For more comprehensive insights on this topic, see Pisani (2023).

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