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The Rebuttable Presumption of Employment Subordination in the US ABC-Test and in the EU Platform Work Directive Proposal: A Comparative Overview

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Abstract

The contribution provides a comparison between the regulatory solutions of the ABC-Test in the US and of the EU Directive Proposal on platform work. The Authors underline the significant differences between the two models at stake, despite the common recourse to the rebuttable presumption of employment subordination technique.

Keyword: Platform work; Rebuttable presumption of employment subordination; Prop 22; EU Directive Proposal; Comparison; ABC test.

1. Introduction.

Despite the progressive extension of labor protection towards self-employment, it is hard to deny that employment subordination is still the access gate to the bulk of labor protections.[1]

Even when it comes to platform workers, a preliminary concern is thus to ascertain whether they are (or ought to be) classified as either employees or self-employed workers.[2]

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[1] Davidov G., Freedland, M., Kountouris, N., *The Subjects of Labor Law: "Employees" and other Workers*, in Finkin M.W., Mundlak G. (eds.), *Comparative Labor Law, Research Handbooks in Comparative Law*, Edward Elgar, 2015, 115 ff.

[2] Dau-Schmidt K.G., *The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law*, in *The University of Chicago Legal Forum*, 2017, 63 ff.; Delfino, M., *Work in the Age of*

Although labor law scholars gave account of a "tendential acknowledgement of the subordinate nature of the employment relationship",[3] the classification of platform workers remains a "dilemma" in every jurisdiction.[4] In fact, the epilogue of any dispute in matter is not easily predictable (like in any other classification case), as there have been a significant number of cases where platform workers were not classified as employees.[5]

It is interesting to note that, when platform workers did not qualify for the employment status, the Courts often called on the legislator to fill the regulatory gap and to provide workers with a basic protection regardless of their legal classification as employees.[6]

Not by chance, in many jurisdictions the focus has ultimately started to shift from legal classification to labor protection(s), in furtherance of a holistic tension which inspired also the ILO's Decent Work Agenda of 1999 and other subsequent initiatives launched at both the international level[7] and at European level.[8]

Still, the avenues of a universal approach to labor protections may vary considerably.

Collaborative Platforms Between Innovation and Tradition, in *European Labour Law Journal*, 9, 4, 2018, 346 ff.; Prassl J., *Humans as a Service. The Promise and Perils of Work in the Gig Economy*, Oxford University Press, Oxford, 2018.

[3] Carinci M.T., Dorssemont F., *Platform Work in Europe. A Comparative Perspective*, in Carinci, M.T., Dorssemont, F. (eds.), *Platform Work in Europe. Towards Harmonization?*, Intersentia, 2021, 230, weighting in on the classification cases in Europe; *compare* the extensive analysis by Hießl C., *Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions*, in https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839603, 13 December 2021.

[4]Keeton R.B., *An Uber Dilemma: The Conflict Between the Seattle Rideshare Ordinance, the NLRA, and For-Hire Driver Worker Classification*, in *Gonzaga Law Review*, 42, 2017, 207 ff.; Dau-Schmid K.G., *The Problem of "Misclassification" or How to Define Who is an "Employee" Under Protective Legislation in the Information Age*, in Bales R., Garden C. (eds.), *The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century*, 2019, https://ssrn.com/abstract=3143296). As observed by Justice Vince Chhabria in Cotter v. Lyft, Inc., 176 F. Supp. 3d 930 (N.D. Cal. 2016), while discerning whether Lyft drivers are employees or independent contractors the jury is "handed a square peg and asked to choose between two round holes".

[5] *Compare* Rosin A., *Towards a European Employment Status: The EU Proposal for a Directive on Improving Working Conditions in Platform Work*, in *Industrial Law Journal*., 51, 2, June 2022, maintaining that Courts tend to be more willing to classify as employees those performing on-location platform work (especially taxi drivers and food couriers) rather than those in exclusive online platform work.

[6]In the words of the Tribunal of Amsterdam (Trib. Amsterdam, 23 July 2018, Sytze Ferwerda v. Deliveroo), "if the independent work contracts like those arranged by Deliveroo were considered socially undesirable by the legislator, the latter should intervene with a new regulation in matter"; compare Australian Fair Work Commission, 21 December 2017, *Kaseris v Rasier* Pacific: "Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied"; *see* also Trib. Torino 7 maggio 2018, holding that the "complex issues of the gig economy" could be neither addressed nor solved in a single classification case.

[7] ILO DG Report 87th Session ILC 1999; Declaration on Fundamental Principles and Rights at Work del 1998: Sen A., *Work and rights*, in *International Labour Review*, 139, 2000, 119 ff.; Hepple B., *Equality and Empowerment for Decent Work*, in *International Labor Review*, 140, 1, 2001, 5 ff.; as stated in the ILO, Report IV – ILO Centenary Outcome Document, 2019, "All workers, regardless of their employment status or contractual arrangements, should be guaranteed respect for their fundamental rights".

[8] *See* Principle 5 of the European Pillar of Social Rights of 2017: "Regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training": Garben S., *The European Pillar of Social Rights: Effectively Addressing Displacement?*, in *European Constitutional Law Review*, 14, 1, 2018, 210 ff.

As elsewhere claimed,[9] policy makers may choose among – or potentially combine: see *infra*, par. 3. – three main techniques of protection:

a) the assimilation, which occurs when self-employed workers are treated as if they were employees or when they are presumed to be employees (unless otherwise proven);

b) the isolation of a sub-category within the area of self-employment or the introduction of an intermediate category between employment and self-employment, with the aim of conferring upon this class of workers a set of special rights which do not entirely replicate the full employment standards;

c) the creation and/or the promotion of collective bargaining mechanisms for non-employees.

The aim of this contribution is to compare two solutions – the US ABC-Test (par. 2) and the EU Platform Work Directive Proposal (par. 3) – which come under the technique a) of the above-mentioned scheme, as they are both based on a rebuttable presumption mechanism.

Yet, the analysis will show that, despite the common recourse to the rebuttable presumption of employment subordination technique, the two solutions vary significantly in their scope of application and in their operating mechanism, as a consequence of a very different – indeed, almost opposite – approach of the relevant policy makers towards labor law and social security protections in general (par. 4).

2. The ABC-Test in the US.

Just as the ridesharing cases were coming to court and obtaining their first test with the companies unsuccessfully claiming their drivers were independent contractors,[10] the Supreme Court of California in *Dynamex* Operations *West, Incorporated v. Superior Court of Los Angeles County* held that the relatively convoluted and litigation producing common law test for resolving such issues should be replaced by a relatively simple ABC test in California.[11] Said the Court:

> A number of jurisdictions have adopted a simpler, more structured test for distinguishing between employees and independent contractors – the so-called "ABC" test – that minimizes these disadvantages.
> The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the

[9] Biasi M., *Beyond Employment: the Protection of Platform Workers in a Holistic Perspective*, in Lo Faro A. (ed.), *New Technology and Labour Law. Selected Topics*, Giappichelli, 2022, forthcoming.
[10] *O'Connor v. Uber Techs, Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015). The British Supreme Court similarly found control in characterizing Uber drivers as workers within the meaning of minimum wage, statutory leave, and vacation and holiday pay. *Uber BV v. Aslam*, (United Kingdom Supreme Court, Feb. 19, 2021); Editorial, *Uber Judgment is Set to Reshape the Gig Economy,* in *Financial Times*, Feb. 22, 2021, at 16.
[11] *Dynamex v. Superior Court*, 416 P.3d 1 (Cal. 2018).

> worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[12]

The Court reasoned, in part, that the ABC test was more appropriate for two principal reasons: (1) the role that misclassification was playing in increasing inequality in our society; and (2) the fact that the public treasury was denied taxes that would be collected for the collective good of society by the increase of independent contractor workers.[13]

With regard to the first *Dynamex* consideration, the Court said:

> [T]the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled.[14]

The California Supreme Court was unanimous in its conclusion and the Legislature soon followed in its wake with the enactment of so-called AB 5 (enacted in 2019, effective January 1, 2020) which codified *Dynamex* in the sense that it resolved all doubts about the extension of its rationale to not only wages and hours litigation involved in that case but also to the benefits noted above like unemployment compensation, workers compensation, etc. In this process, AB5 created exemptions, for the most part preserving independent contractor status for workers who were professional or viewed to be self-sufficient as well as other areas which

[12] *Ibid.* at 34. *See generally*, Deknatel A., Hoff-Downing L., *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, in *University of Pennsylvania. Journal of Law and Social Change,* 18, 2015, 53 (evaluating the many state jurisdictions have a place for a common law test with more simplified standards, which allow for less evasion than the common law test that was substituted for *NLRB v. Hearst*, 322 U.S. 111 (1944); *compare* Roadway Package System, Inc 326NLRB842 (1998) (Chairman Gould concurring); Dial A Mattress 326NLRB884 (1998) (Chairman Gould dissenting).

[13] With regard to the latter, University of California scholars have concluded that if Uber and Lyft had "…had treated workers as employees the two companies would have paid $413 million into the State's Unemployment Insurance Fund between 2014 and 2019": Jacobs K., Reich M., *What Should Uber and Lyft Owe to the State Unemployment Insurance Fund?*, UCB Institute For Research On Labor And Employment (IRLE) (May 2020).

[14] *Dynamex*, 416 P.3d 1.

were viewed to be idiosyncratic – and more exemptions in subsequent legislation enacted later in 2020.[15] The exemptions have produced litigation, most prominently in connection with the exemption for freelance journalists, the Court of Appeals for the Ninth Circuit concluding that the regulation of them does not violate the First Amendment to the U.S. Constitution.[16] In another ruling, however, the district court concluded that the coverage of truckers by AB 5 was unconstitutional inasmuch as it was preempted by the Federal Aviation Administration Authorization Act of 1994 which, as part of the deregulation policy of the federal government, prohibited states from enforcing any law relating to the price, route, or service of a motor carrier on the grounds that it would interfere with Congressional deregulation, an opinion reversed by the Ninth Circuit.[17]

On the merits itself, not only has AB 5 applied the ABC test to unemployment compensation, but also two cases have emerged in connection with other states' enforcement of unemployment compensation statutes involving eligibility for gig workers, the Court of Appeals of New York (New York's highest court) and the Supreme Court of Pennsylvania holding that drivers are eligible.[18] As the New York court said: "Although the Unemployment Insurance Law was passed decades before the digital age, today's app-enabled gig worker is subject to the same devastating financial 'insecurity' faced by prior generations of unemployed wage earners and which initially motivated legislators to act".[19]

But because states like California and other states did not immediately require the companies to adhere to AB5's ABC standards, enormous confusion arose when special pandemic unemployment compensation was made available to independent contractors as well as employees, the states acceding to positions of companies like Uber and Lyft and categorizing such workers as independent contractors even though as a matter of state law they were employees. This had the effect of creating enormous confusion because gig workers calculated their earnings without deductions for expenses for which they cannot get reimbursed as independent contractors.

Again, *Dynamex*, cited favorably by the New York Court of Appeals, and AB 5 influenced the lawmaking in jurisdictions like Massachusetts, New Jersey, and Connecticut, adopting the "ABC Test" which is weighted in favor of a presumption of employee status. Although a few jurisdictions hardly represent unanimity throughout all 50 States and, needless to say,

[15] These exempt occupations would include, among others, licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, commercial fishermen, workers providing licensed barber or cosmetology services, and others performing work under a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry.

[16] *American Society of Journalists and Authors, Inc. v. Bonta*, No. 20-55734 (9th Cir. Oct. 6, 2021).

[17] *Cal. Trucking Ass'n v. Becerra*, 433 F.Supp.3d 1154 (S.D. Cal. 2020), *rev'd sub nom. Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644 (9th Cir. 2021). *Cf.* the Court of Appeals' decision, *Am. Trucking Ass'n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1051 (9th Cir. 2009); *Schwann v. FedEx Ground Package System, Inc.*, 813 F.3d 429 (1st Cir. 2016); *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 648 (9th Cir. 2014). Yet, the two mentioned Ninth Circuit Court decisions were appealed to the US Supreme Court, which refused to hear both appeals.

[18] *In re* Vega Postmates Inc., Commissioner of Labor, 35 N.Y.3d (2020) NY slip op. No. 02094 (Mar. 26, 2020); *Lowman v. Unemployment Comp. Bd. of Review*, 235 A.3d 278 (Pa. 2020) LEXIS 3935, No. 41 EAP 2018 (July 24, 2020).

[19] *In re Vega*, nt (18), slip op. at 18.

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California Law is not strictly biding on other States, the "Sunshine State" have long had an outsized reputation in leading the Country.[20]

The CARES Act enacted by Congress to provide both wide pandemic unemployment assistance to supplement state unemployment compensation law, conceding the likelihood that many jurisdictions would not provide such payment on the grounds that the workers were independent contractors has specifically included unemployment compensation to them on a federal level (though the administration and payment of these monies has been slow and difficult to obtain).[21]

Proposition 22 throws all drivers for delivery and ride hailing companies into the independent contractor status category, meaning they could not enjoy the employee benefits California provides. The argument was that this was necessary because employee status would mean the elimination of the business model taking the form of increased labor costs which would both diminish their business and require them to only employ 40 hour a week drivers, displacing all of those workers who want to work for a relatively short period of time. This hardly seems likely given the fact that the companies need to employ more drivers during so-called "surge" periods when the demand is heavy and when rates are increased and the company seeks to attract and encourage workers to cover these periods. Moreover, Professor Michael Reich has pointed out that labor cost increases do not necessarily translate into price increase in this industry given that "... companies can absorb a substantial proportion of the cost increases through increased utilization of their drivers, through reduction in trip times because of reduced traffic congestion, and through reductions in driver turnover costs." They also have ample opportunity to reduce their commissions (i.e., the fees they collect from each ride) which now average about 25%.[22] As Professor Reich has pointed out, while the ride hailing companies take 25% of the fare, local jurisdictions like Los Angeles and San Francisco "...have already capped commission rates at 15% for restaurant and meal delivery companies, including UberEats, GrubHub, and others...these companies continue to be active in the business of meal delivery, despite the reduction of commissions from 30 to 15%".[23] Further, a series of scholarly papers have weighed in on the side of an exploitation conclusion[24] though there has been some pushback by studies financed by Uber.[25]

[20] Conversely, a few States have taken steps to make it easier to conclude that workers are independent contractors: for instance, Alabama and Georgia have new laws that are very beneficial to App-based transportation and delivery companies. Conclusively, the US approach to worker classification is diverse.
[21] *Islam v. Cuomo*, 475 F. Supp. 3d 144 (E.D. N.Y. 2020). *Cf.* Noam Scheiber, *Uber and Lyft Drivers Win Ruling on Jobless Benefits,*" in *New York Times*, July 29, 2020, at B1 and 4.
[22] Declaration of Michael Reich in support of the People's Motion for Preliminary Injunction, *People of the State of California v. Uber Technologies* (Aug. 6, 2020).
[23] *Ibid.* at 20-21.
[24] Parrott J.A., Reich M., *A Minimum Compensation Standard for Seattle TNC Drivers, Report for the City of Seattle,* The New School Center For New York City Affairs, July 2020; Parrott J.A., Reich M., *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment, Report for the New York City Taxi and Limousine Commission,* The New School Center For New York City Affairs, July 2018.
[25] Hyman L., et al., *Platform Driving in Seattle,* Cornell University ILR School (July 6, 2020).

In Proposition 22 on the California ballot in 2020, the companies put forward an argument for a so-called "third way"[26] by proposing a series of benefits for the drivers, notwithstanding their independent contractor status. This took the form of (1) what purported to be more than the minimum wage but calculated on the basis of a limited amount of time in which the drivers would be compensated, i.e., no compensation for so-called "waiting time" for rides; (2) it provided for workers who are employed and average 25 hours a week providing them with 100% employer contribution or 82% of the total insurance cost; (3) insurance for on-the-job injuries providing for 66% of the average weekly earnings when the driver cannot work for up to two years (workers compensation does not provide a time limit); (4) reimbursement of expenses at about 50% of what employees are provided; (5) drivers will not have unemployment compensation, sick pay (employees have three or up to 10 days in some cities), family leave, disability insurance, overtime pay, or employer contributions to Social Security and Medicare.[27]

The outcome of Proposition 22, providing an overwhelming victory at the ballot box for the platform companies, is momentous. "While the victory may have led to soaring share prices for Uber and Lyft, it is a loss not only for workers but also for good policymaking".[28] True, AB 5 and Dynamex retain their viability outside of ride hailing and driver delivery sectors.[29] But the fact of the matter is a substantial part of the statute's impetus came from abuses from companies like Uber and Lyft and this is why the Seattle ordinance which gave rise to the above-referenced Ninth Circuit litigation, only covered ride hailing. Other employers will be tempted to take the same route as these companies.[30] Other companies would like to have exemptions for themselves.[31]

Meanwhile, there has been legislation and litigation aplenty in other American jurisdictions. For instance, the Massachusetts Attorney General has sued Uber and Lyft for failing to adhere to that state's ABC standards, the companies thus far unsuccessful in an attempt to submit this issue to ballot initiatives.[32]

The New Jersey Supreme Court has held that a slightly more relaxed ABC test is applicable to platform companies doing business in that state.[33] And in the state of

[26] Harris S.D., Krueger A.B., *A Proposal for Modernizing Labor Laws for the Twenty-First Century Work: The "Independent Worker"*, Hamilton Project at 23 n. 31 (Dec. 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf .
[27] One of the best surveys of proposition 22 was provided in Carolyn Said, *What Measure Does for Driver, Gig Companies*, in *San Francisco Chronicle*, Oct. 19, 2020, at A1.
[28] *A California Setback for Gig Economy Workers*, in *Financial Times*, Nov. 6, 2020, at 16.
[29] Carolyn Said, *AB5 Still Has Bit Despite Prop. 22*, in *San Francisco Chronicle*, Nov. 10, 2020, at C1, C3. *Compare* Editorial, *Uber Has Taken Half a Step on Workers' Rights*, in *Financial Times (London)*, Mar. 18, 2021, at 18.
[30] Park J., Wiley H., *Initiative Blew a Hole in Landmark Labor Law*, in *San Jose Mercury News*, Nov. 15, 2020, at B1.
[31] Gerstein T., *What Happened in California is a Cautionary Tale*, in *New York Times*, Nov. 16, 2020, at A23.
[32] *Koussa v. Attorney General*, No. SJC-13237, 2022 WL 2128312, at *1-2 (Mass. June 14, 2022). Prior to this litigation The Court of Appeals in the First Circuit had held the Massachusetts ABC test unconstitutionally preempted. *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016).
[33] *Hargrove v. Sleepy's, LLC*, 106 A.3d 449 (2015).

Washington, an approach close to that adopted in Proposition 22 which creates a third classification distinct from employees and independent contractors has been adopted.[34]

Beyond these judicial and legislative initiatives, there is a sprawl of different approaches, *i.e.*, classifying workers as either employees or independent contractors in a wide variety of different jurisdictions throughout the 50 states.[35] This fact, along with the promise of new decisions by the Biden Board in the collective bargaining arena and policies not yet provided on wage and hour legislation, promise policy disputation and litigation for a number of years to come.

3. The rebuttable presumption of employment subordination in the EU Platform Work Directive Proposal.

Last 9 December 2021, the European Commission advanced a Proposal for a Directive on improving working conditions in platform work.[36]

The draft took into consideration the opinions of the social partners, which were deeply involved in the draft of the proposal.[37]

On the one hand, EU employer associations have displayed their skepticism on the initiative and manifested their preference for a State-regulation of platform work.

On the other hand, EU unions have been favorable to a European approach on platform work and they have strongly supported the regulatory solutions advanced in the proposal and, in particular, the rebuttable presumption of employment subordination, as an alternative to the introduction of a third category between employment and self-employment.

Yet, two preliminary aspects should be kept in mind for the purposes of a comparison with the US ABC-test.

At first, the EU proposal is far from being extant law and it is likely subject to amendments and changes during its discussion at the EU Parliament and it might take a – relatively – long time before the Directive is eventually approved.[38]

Secondly, contrary to the ABC Test (at least, in the aftermath of Prop-22), the scope of application of the EU proposal encapsulates the "*persons performing platform work*"[39] and not anyone who personally carries out a working activity.[40]

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[34] *See* https://news.bloomberglaw.com/daily-labor-report/lyft-uber-washington-drivers-get-benefits-no-employee-status. *See also* Cherry M.A., Aloisi A., "*Dependent Contractors" in the Gig Economy: A Comparative Approach*, in *American University Law Review*, 66, 3, 2017, 635, 688.

[35] Cunningham-Parmeter K., *From Amazon to Uber: Defining Employment in the Modern Economy,* in *Boston University Law Review,* 96, 2016, 1673, 1683-84, 1688.

[36] EU Commission, Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, 9 December 2021, COM (2021), 762 final.

[37] Pisani F., *La proposta di direttiva UE per i lavoratori delle piattaforme digitali e i Real Decreto-Ley 9/2021 spagnolo*, in *Lavoro e Previdenza Oggi*, 1-2, 2022, 66 ff.

[38] *Compare* Alaimo A., *Lavoro e piattaforme tra subordinazione e autonomia: la modulazione delle tutele nella proposta della Commissione europea*, in in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 2, 2022, 641 ff.

[39] *See* the "Definition" under art. 2 of the EU Directive Proposal.

[40] Yet, the meaning of platform work for the purposes of the directive is rather wide, as it comprises both on-demand workers (such a Uber drivers) and crowd-workers (such as Amazon Turk workers). *Compare* Giubboni S., *La proposta di direttiva della Commissione europea sul lavoro tramite piattaforma digitale*, in *Menabò di Etica ed Economia*,

Most importantly, the proposal addresses those who work for o through a platform as employees ("*platform workers*" in a strict sense[41]) as well as those who carry out the same working activity as independent contractors, whilst the conferral of "ad hoc" rights to self-employed workers by Prop-22 was a radical alternative to the threat (or, better, the utmost certainty) of the reclassification of platform workers as employees in application of the ABC-Test.

According to the early version of the proposal, the presumption of employment subordination would be triggered by the fulfillment of at least two of the following five indicators, which is upon the claimant to prove:[42]

(a) the platform effectively determines or sets upper limits for the level of remuneration;

(b) the platform requires the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;

(c) the platform supervises the performance of work or verifying the quality of the results of the work including by electronic means;

(d) the platform effectively restricts the freedom, including through sanctions, to organize one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;

(e) the platform effectively restricts the possibility to build a client base or to perform work for any third party.

Pursuant to article 4 of the Proposal, Member States should ensure the possibility for any of the parties (and especially for the platform) to rebut the legal presumption, even if all five indicators were met.[43]

As noted by many scholars, the mentioned indicators are extremely heterogenous.[44]

The indicators sub a), sub b) and sub e), are typical features of on-demand work,[45] but they can be compatible with a genuine self-employment relationship.

On the contrary, the circumstances sub c) and sub d) mirror two "classic" indicia of employment subordination, considering how they refer to the exercise of the "control" by the platform.[46]

164, 16th January 2022, 1; Capponi, F., *Lavoro mediante piattaforma digitale e qualificazione del rapporto di lavoro: la Commissione europea tenta la via della presunzione di subordinazione*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 2, 2022, 656.

41 *See* art. 2, n. 4, of the Directive proposal.

42 Valente L., *Tra subordinazione e autonomia: la direttiva sui rider*, in *lavoce.info*, 15th December 2021.

43 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, C-14.

44 *Compare* Alaimo A., nt (38), 648.

45 See especially the connection between the reference to the presence of "specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of work" and Uber case. *Compare* E.C.J. 20th December 2017, C-434/15, Asociación Profesional Élite Taxi, par. 39: "Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion".

46 See the reference to the "control" by the platform under article 4, par. 1, of the proposal. Compare Orrù T., *Brevi osservazioni sulla proposta di direttiva relativa al miglioramento delle condizioni di lavoro nel lavoro mediante piattaforme*

Hence, one might argue that, when the platform constantly supervises the working performance (especially through electronic tools), restricts the freedom – or, better, the liberty[47] – of the worker to organize her work and to choose her working periods or periods of absence, the worker would be arguably entitled to be directly classified as an employee in almost any jurisdiction.[48]

The fact that the same elements are part of a rebuttable presumption mechanism might thus complicate rather than simply the classification process and it might also generate further controversies, as the Courts would be asked to simultaneously address the "classic" circumstances of the employment subordination tests and the various indicia which qualify for the rebuttable presumption of employment subordination according to the directive proposal on platform work.

Conversely, as correctly pointed out by Rosin, "a legal presumption should ease the process [of classification], and therefore the criterion of control incorporated in the Proposal should be easier to prove than the criteria regularly used by Courts to determine subordination". [49]

Accordingly, the European legislator should rethink the list of the circumstances under article 4 of the proposal and/or consider to move the latter into the – non-strictly binding – section of the recitals, rather than in the actual content of the directive.[50]

Needless to say, a solution akin to the ABC-Test, where the bulk of the burden of proof is upon the employer and the employee has only to demonstrate that she carries out a personal working activity for the client, would surely simplify the classification "dilemma".

However, considering that it would lead to the almost automatic classification of any platform worker as an employee, such a solution would most likely face the opposition of the platform companies, whose harsh reaction could hinder the chances of success of the initiative, as the history of the ABC-Test in California shows.

4. Comparative remarks.

digitali, in *giustiziainsieme.it*, 8 February 2022, Ponterio C., *La direzione della Direttiva*, in *Lavori Diritti Europa*, 1, 4, 2022; Di Nunzio P., *Piattaforme digitali: la proposta di Direttiva del Parlamento europeo e del Consiglio*, in *Lavoro Diritti Europa*, 1, 2022.

[47] Biasi, M., *An Essay on Liberty, Freedom and (Decent) Work*, in , in *International Journal of Comparative Labour Law and Industrial Relations*, 38, 3, 2022, forthcoming, (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4115957).

[48] Court of Appeals of New York 9th June 2017, Uber; Cass. Fr. 28th November 2018, Take Eat Easy; App. Paris 10th January 2019, Uber; Employment Trib. Gijón 20th February 2019, Glovo; Employment Tribunal of Madrid 3rd February 2020, Glovo; Amsterdam Court of Appeal, 16th February 2021, Deliveroo; Australian Fair Work Commission, 16th November 2018, Klooger v. Foodora; Employment Tribunal of Buenos Aires, 29th March 2020; Cass. Fr. 4th March 2020, Uber; Tribunal Supremo of Spain, 25th September 2020, Glovo; Trib. Palermo 24th November 2020, Foodinho; Court of Appeal of Concepción (Chile), 15th January 2021, Pedidos; Trib. Milan 20th April 2022, Uber Italy.

[49] *Compare* Rosin A., nt (5).

[50] *Compare* Recital 25 under the Draft European Parliament Legislative Resolution of 3rd May 2022 (so called "Gualmini Report"): https://www.europarl.europa.eu/doceo/document/EMPL-PR-731497_EN.pdf.

It is hard to deny that the main goal of the ABC-Test is to debunk the cases of misclassification of workers, which deprive the latter of the statutory (and collective) rights deriving from the status of employee.

As clarified by the Californian Courts in the Gig-economy cases, "the misclassification of workers as independent contractors deprives them of the panoply of basic rights and protections to which employees are entitled under California law, including minimum wage, workers' compensation, unemployment insurance, paid sick leave and paid family leave"[51].

Therefore, the alternative offered by the Prop-22 of an "*ad hoc*" solution (*i.e.* a bundle of rights) for the self-employed platform workers

> does not promote the right to work as an independent contractor, nor does it protect work flexibility, nor does it provide minimum workplace safety and pay standards for those workers…it appears only to protect the economic interests of the network companies in having a divided, ununionized workforce, which is not the stated goal of the legislation.[52]

Conversely, in the EU Directive proposal there is no prejudice against self-employment per se, which could potentially be the "correct employment status" of a platform worker.[53]

The EU initiative aims at contrasting false self-employment, which occurs (only) "when a person is declared to be self-employed while fulfilling the conditions characteristic of an employment relationship".[54]

Indeed, the main goal of the Directive is to improve the working conditions in platform work in general, including the cases of genuine self-employed work: in fact, the initiative pursues the same holistic approach of the European Pillar of Social Rights[55] in extending a significant part of the provided protections (see the right to be informed on the automated monitoring and decision-making process under artt. 6-8) "beyond employment".[56]

Still, the EU initiative addresses only the – either employed or self-employed – workers of the platforms, thus showing the preference for a selective rather than for a truly universal approach.

As a consequence, if part of the current forms of platform work is replaced by the technological developments (*i.e.* the food delivery riders by drones and for-hire drivers by…drive-less cars) the scope of application of the EU directive would significantly shrink,

[51] California Supreme Court 10th August 2020, *People v. Uber Technologies*, Inc. et al., *see* nt. (22).
[52] Alameda County Superior Court 20th August 2021, *Hector Castellanos, et al. v. State of California, et al.*
[53] V. Recital No. 19; *compare* Ferrante V., *La nozione di lavoro subordinato nella dir. 2019/1152 e nella proposta di direttiva europea rivolta a tutelare i lavoratori "delle piattaforme"*, in *WP C.S.D.L.E. "Massimo D'Antona".INT*, 2022, 158, 20; Boot G., *Platform Work in Europe: The Need for a Multilevel Solution to Protect the so-called Self-Employed*, in *European Labour Law Journal*, 2021, 1 ff.
[54] *See* Recital No. 20. *See* also the reference to the primacy of fact under art. 3, par. 2, of the Proposal: *compare* Aloisi A., De Stefano V., *European Commission takes the lead in regulating platform work*, in *Social Europe*, 9th December 2021 (https://socialeurope.eu/european-commission-takes-the-lead-in-regulating-platform-work).
[55] *Compare* Starcevic J., *The EU proposal for a Directive on Improving Working Conditions in Platform Work*, in *Comparative Labour Law and Policy Journal*, Dispatch n. 40/2022, 6.
[56] Del Frate M., *Lavoro tramite piattaforma digitale e politiche europee*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 2, 2022, 662 ff.

whilst the new forms of work, unless the parallel initiative of an Artificial Intelligence Act takes off,[57] would be left unregulated (at least, in their work-related aspects).

As to the US, the Pandemic has clearly shown that labor law should be entirely reconstructed, considering how the American workers lack many fundamental (or, better, basic) guarantees (ranging from free speech to dismissal protection, without mentioning a complete health insurance coverage) in the very area of employment subordination.[58]

In this sense, the attempt to offer with Prop-22 specific guarantees to self-employed workers as an alternative to the employment status deriving from the application of the ABC-Test reasonably appeared as a poisoned pill to the labor movement.[59]

In a nutshell, when it comes to labor protection (not only for platform workers), the distance between the two sides of the Atlantic Ocean seems at present unbridgeable.

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[57] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206 .
[58] *See* the extensive account by Gould W.B. IV, *For Labor to Build Upon: Wars, Depression and Pandemic*, Cambridge University Press, Cambridge, 2022.
[59] *Compare* Cherry M.A, *Employment Status for "Essential Workers": The Case for Gig Worker Parity*, in *Loyola Los Angeles Law Review*, 2022, forthcoming (available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4006595), arguing that the steps the US federal Government took to protect the gig workers during the pandemic provide a basis for showing that an extension of the basic rights and protections to this vulnerable group on a more permanent basis is possible in the US as well.

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