Fifteenth International Conference
In Commemoration of Professor Marco Biagi
DIGITAL AND SMART WORK
Modena, Marco Biagi Foundation, 20-21 March 2017

(Track 3: Digitalization, employment rights and collective representation)

The (Unbearable?) Lightness of Self-employed Work Intermediation

Gionata Cavallini*

1. Introduction: the "nosedive" of labour law?

Nosedive, the first episode of the third season of the British series *Black Mirror*, released worldwide on Netflix in October 2016, depicts a dystopian reality where everyone can give a score to anybody else through a five-star system implemented on their smartphones, displaying everyone's name and current rating. As personal rating determines social status and access to jobs and housing, Lacie spends her day handling frenetically her smartphone trying to improve her rating, until she goes through a sudden and unexpected rating decrease. Such "nosedive" will drive her to madness while the spectator falls as well into an increasing anxiety towards a sinister and yet believable reality.

Lightening the risks of reputational systems, *Nosedive* makes a fine and yet clear reference to Uber's five-star rating system, one of the core points of the organisational schemes of the famous American Platform. Reputational systems constitute a *leitmotiv* of most of the platforms that provide services able to fall within the notion of "digital work", as including "crowdwork" and "work on demand via apps", the two main categories that have been identified in literature as part of a unitary phenomenon, calling for a unitary approach[1].

* Ph.D. Candidate in Labour Law, State University of Milan. References to Italian courts' decisions and scientific reviews follow the editing criteria adopted by the *Rivista italiana di diritto del lavoro*.

[1] V. DE STEFANO, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig Economy*, in *Comparative Labour Law & Policy Journal*, 2016, vol. 37, n. 3, p. 474; E. DAGNINO, *Il lavoro nella* on-demand economy*: esigenze di tutela e prospettive regolatorie*, in *Labour Law Issues*, 2015, 2, 90, who observes that the main difference is that the former involves an "on-demand *virtual* workforce" while the latter involves an "on-demand *mobile* workforce". In the perspective of a unitary approach also J. PRASSL & M. RISAK, *Uber, Taskrabbit, and Co.: Platforms as Employers?*

Exactly one week later after the release of *Nosedive*, a London Employment Judge issued the first European decision on the *status* of Uber drivers[2], ruling that the relationships between the platform and the drivers are subject to statutory employment law provisions on minimum wage and paid leave. There is of course no direct linking between the episode and the judgement, even if the latter emphasised *inter alia* Uber's rating system[3]. The episode, however, witnesses quite precisely that "digitalisation" is not just the breakout of new organisational and productive schemes. It interferes with the very essence of human life, reshaping the invisible borders between work time and free time, work place and home, and whoever gets work mails on his smartphone may confirm.

The challenge[4], in this perspective, is to avoid technological (r)evolution from bringing also labour standards to a "nosedive", allowing the rise of unregulated legal schemes able to bypass statutory employment law by introducing elements of rupture with the traditional notion of *employee*. "Digitalisation", in its tending towards a dangerous commodification of labour[5], is a challenge that requires action on different frontlines. There are several differences among the platforms offering "digital work" services[6] and even Employment Judge Snelson admitted that Uber "*could have devised a business model not involving [it] employing drivers*"[7]. The global phaenomenon we are facing has also to pass through the lenses of different legal systems, characterised by relevant differences with concern to the criteria employment judges use to qualify the relationship.

Thus, if one part of the challenge is to return – where possible – to the domain of statutory employment law those relationships that are actually misclassified under applicable legislation, it seems necessary to follow also a complementary path, especially in those jurisdictions where judicial reclassification would be difficult to reach. This happens to be the case of Italy, where first instance judges tend to give extreme importance to the circumstance that the worker is not technically bound to perform his tasks, supported by the Supreme's Court enduring statement that "*any human activity can be performed under the scheme of an employment relationship or under the scheme of self-employed work*"[8] . It seems necessary, therefore, to make further reflections on the development – both at an interpretative and at a policy making level – of protective

Rethinking the Legal Analysis of Crowdwork, in *Comparative Labour Law & Policy Journal*, vol. 37, n. 3, p. 619, who however use the term "crowdwork" for both the aforementioned types of work.

[2] *Aslam, Farrar et al. v. Uber B.V. et al.* (London Employment Tribunal 28 October 2016).

[3] *Ivi*, p. 29, n. 8.

[4] M. WEISS, *Digitalizzazione: sfide e prospettive per il diritto del lavoro*, in *DRI*, 2016, n. 3, p. 662.

[5] B. BERGVALL-KÅREBORN & D. HOWCROFT, *Amazon Mechanical Turk and the Commodification of Labour*, in *New Technology, Work and Employment*, 2014, vol. 29, n. 3, p. 213; A. ALOISI, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of "On-Demand/Gig Economy" Platforms*, in *Comparative Labour Law & Policy Journal*, 2016, vol. 37, n. 3, p. 653.

[6] ALOISI, *Commoditized Workers, cit.*, p. 688, where the A. indicates four key variables that may differ from platform to platform (means of exchange, system of payment, population of the users and workers' status).

[7] *Aslam, Farrar et al. v. Uber B.V. et al.*, n. 97.

[8] Among the most recent, Cass. 8 November 2016, n. 22658; 3 October 2016, n. 19701; 19 September 2016, n. 18320, all in *De Jure.*

schemes applicable to all human beings that work, regardless of the legal scheme (employment, self-employment or other) under which they carry out their activities[9].

In this perspective, the paper aims to verify whether it is useful and possible to search for some protective provisions applicable to digital workers outside the field of statutory employment law.

To this end, the first part of the paper will deal with the problem of the qualification under Italian law of the relationships involving the worker, the user and the platform, and will conclude that many platforms may successfully claim the self-employed status of their workers. Even the existence of intermediation relationships seems convincing, although the platform does not carry only intermediary's obligations.

The second part will analyse the consequences of such reconstruction under Italian law, with particular reference to some critical points (such as the possibility to to "dismiss" an Uber driver because of his low reputational rates or to refuse Turkers' work without payment). The paper will try to give an answer to those open questions through the application of general contract law, self-employed work rules and B2b regulations, with an eye to two recent Italian legislative proposals, in order to verify whether some protection can be found outside the domain of statutory employment law, and, in the affirmative, to what extent.

2. Qualification Issues: employees, quasi-subordinate workers or self-employed workers?

The qualification of the relationship as an employment or self-employment one represents a crucial standpoint in almost every jurisdiction[10]. Employees generally enjoy several statutory provisions (on wages, working time, and social security benefits) that independent contractors do not, on the ground of their supposed higher bargaining power and economic independence.

It is quite difficult to qualify digital workers univocally either as employees or as independent contractors, as they find themselves in some sort of grey area[11]. The platform operates at the same time as a broker matching labour supply and demand, as a provider of services and goods and as an employer establishing the most important rules governing the transaction[12], including its termination, which may consist in the deactivation of the worker's account[13].

---

[9] P. TULLINI, *C'è lavoro sul web?*, in *Labour Law Issues*, 2015, vol. 1, n. 1, p. 9.

[10] A. PERULLI, *Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects*, European Commission 2003, p. 6.

[11] With reference to crowdwork, A. FELSTINER, *Working the Crowd. Employment and Labor Law in the Crowdsourcing Industry*, in *Berkeley Journal of Employment and Labour Law*, 2011, 32:1, p. 168, who points out as platforms deliberately decided to take advantage of the fact that "*there were virtually no cases, and few indications in the legal literature as to how courts might approach regulation of the 'cyberspace workplace'*".

[12] TULLINI, *C'è lavoro sul web?, cit.*, p. 8.

[13] In a dubitative way, ALOISI *Commoditized workers, cit.*, p. 674.

As one of the first decisions from the U.S. litigation on platform drivers[14] pointed out very clearly, "*Lyft drivers don't's seem much like employees* […] *but Lyft drivers don't seem much like independent contractors either*". "*A reasonable jury could conclude that the plaintiff Lyft drivers were employees. But* […] *a reasonable jury could also conclude that they were independent contractors*"[15].

In the US, the difficulties in reaching a clear consensus on the legal status of digital workers brought to significant litigation[16], which appeared to undermine the entrepreneurial model adopted by the "work on demand via app" platforms[17]. Notwithstanding the worldwide debate it gave raise to, as many platforms accepted to negotiate a settlement[18] (or even unilaterally acknowledged the employee status of their workers[19]), the question is still open.

The recent judgement issued by London's Employment Tribunal on 28 October 2016[20] took a clear position stating the applicability of the statutory rights related to minimum wage and paid leave to Uber drivers working in the London area, individuating a series of circumstances pointing to the existence of an employment relationship[21]. The anti-formalistic approach of the British judge in the case reflects the efforts of that literature who suggested to determine the scope of statutory employment law adopting a functional approach to the concept of Employer, instead of recurring to the "received" notions of employee,[22], even with particular reference to the case of platform work[23].

2.1. Are digital workers *employees* under Italian law?

In Italy, gig-economy-related litigation raised first on competition law issues[24], with licensed taxi drivers successfully preventing Uber from relasing the Uber-pop

---

[14] *Cotter et al. vs. Lyft Inc.*, Case No. 13-cv-04065-VC, Order denying cross-motions for summary judgement (California Northern District Court 11 March 2015).

[15] *Ivi,* p. 13. The judge consequently denied issuing a summary judgement, referring the case to a jury.

[16] M. CHERRY, *Beyond Misclassification: The Digital Transformation of Work*, in *Comparative Labour Law & Policy Journal*, 2016, vol. 37, n. 3, p. 577, providing an in-depth analysis of U.S. litigation.

[17] S. KESSLER, *The Gig Economy Won't Last Because It's Being Sued To Death*, in *fastcompany.com*, 17 February 2015; C. DEAMICIS, *Homejoy Shuts Down After Battling Worker Classification Lawsuits*, in *recode.net*, 17 July 2015.

[18] As in the aforementioned *Cotter v. Lyft* case, settled on 27 January 2016 for 12 million dollars, and in *O'Connor et al. v. Uber Technologies Inc. et al.*, settled on 21 April 2016 for almost 100 million dollars. CHERRY, *Beyond misclassification, cit.*, notes that "*the result is ultimately disappointing for those who saw this as a case that would most likely set a precedent*".

[19] It is the case of the shopping on-demand platform Instacart. D. ALBA, *Instacart Shoppers Can Now Choose to be Real Employes*, in *wired.com*, 22 June 2015, reports the CEO's words, explaining that the company wanted "*to provide supervision and training, which can only be done with employees*".

[20] *Supra*, n. 2.

[21] The judgement reports (p. 29) thirteen circumstances, from "*the fact that Uber interviews and recruits drivers*" to "*the fact that Uber subjects drivers through the rating system*" and "*reserves the power to amend the drivers' terms unilaterally*".

[22] PRASSL, *The Concept of Employer, cit.*, p. 34, who focuses on the five main functions of the employer.

[23] PRASSL & RISAK, *Uber, Taskrabbit, and Co., cit.*, p. 636, where the functional method is applied to two platforms: Uber, who emerges as a "sole employer" and Taskrabbit, where the main functions are shared between the platform and the users.

[24] N. RAMPAZZO, *Rifkin e Uber. Dall'età dell'accesso all'economia dell'eccesso*, in *Diritto dell'informazione e dell'Informatica*, 2015, II, 6, p. 957.

service, which would have allowed (unlicensed) private citizens to provide transportation services[25]. The Italian gig-economy faced its first defy from the labour side just in October 2016, when Foodora drivers took collective action in reply to the decision of the Company to change their payment scheme from a 5,60 Euros per hour to a 3 Euros per delivery[26]. The mobilisation of Foodora drivers brought the problem of digital labour at the centre of the debate, gaining also the cover of the prestigious weekly *Internazionale*[27], and required the intervention of the Labour Department, after which the company increased to four Euros the delivery fee[28].

Even though in Italy the ascertainment of the employment status follows a path which is similar to the several tests developed in Common Law systems, as it focuses on the degree of control that the employer exercises on the execution of the performance[29], to seek the re-classification of many digital workers as employees under Italian law could be somewhat "gasping"[30].

While common law jurisdictions developed a series of different "tests" to determine the application of the different statutory regulations applicable to the employment relationship, Italian law, as many other continental laws, provides for a unitary notion of employee, *i.e.* "*who engaged himself to cooperate for remuneration in an enterprise by working manually or intellectually under the direction of the entrepreneur*"[31]. The identification of the characters of the employee's *subordination* – as opposite to the self-employed worker's *autonomy* – has always been an evergreen topic, accompanying the development of Italian labour law from its very beginning to the challenges brought by technological innovation[32].

The reflections developed by case law and administrative authorities on the qualification of the *status* of pony expresses and of call center workers represented an important step in the elaboration of the criteria able to identify employment relationships. Today, the reasoning developed in those cases looks like the most persuasive argument for whoever would have to defend before a court the self-employment *status* of digital workers.

---

[25] Trib. Milano 25 May 2015 and Trib. Milano 2 July 2015, both in *Diritto dell'informazione e dell'informatica*, 2015, 6, at p. 1053 and 1068 respectively.

[26] G. MOSCA, *Lo sciopero contro Foodora è il sogno infranto della sharing economy*, in *Wired.it*, 11 October 2016.

[27] N. 1174, 7/13 October 2016, p. 44, translating S. O'CONNOR, *When your boss is an algorithm*, in *ft.com*, 8 September 2016.

[28] F. SAVELLI, *«Quattro euro a consegna, contributi e assicurazione infortuni: vi spieghiamo perché paghiamo così»*, in *Corriere.it*, 4 November 2016.

[29] As provided also by ILO *Recommendation concerning the employment relationship* n. 198/2006, part. II, clause 13, which gives relevance to "*the fact that the work is carried out according to the instructions and under the control of another party*".

[30] TULLINI, *C'è lavoro sul web?, cit.*, p. 11.

[31] As translated by T. TREU, *Labour Law and Industrial Relations in Italy*, 2nd edition, Kluwer Law International, 2007, p. 35.

[32] O. RAZZOLINI, *La nozione di subordinazione alla prova delle nuove tecnologie*, in *DRI*, 2014, n. 4, p. 974.

2.1.1. From ponies to kangaroos

If you just change his walky-talky with a smartphone, a pony express from the roaring 80s presents many similarities with those forms of "work on demand via apps" that provide delivering services (such as Deliveroo, Foodora and JustEat, whose drivers you can easily spot in many Italian city streets)[33].

A significant litigation accompanied the development of the pony express business model, together with an animated doctrinal debate[34]. Several first instance judges acknowledged the existence of employment relationships, in labour proceedings promoted by the worker[35] or by the Social Security Authority (INPS) [36] as well as in criminal trials[37]. Such decisions represented the attempt to interpret the legal notion of employee as an open reference "*to the economic and social reality in its variety and historical dynamicity*"[38]. Emphasising the economic dependency of the worker, his insertion into an entrepreneurial organisation, the degree of control exercised by the company and the continuity of the performance, those decisions deemed irrelevant the allegation that workers were free to accept or refuse the single tasks assigned, rejecting the companies' main defence. The reasoning made more than thirty years ago that "*it is not realistic to sustain that messengers are free to accept or decline the single task.* […] *once he chooses to work to gain money, the messenger is actually forced to answer the call to perform the delivery*"[39], resembles some of the considerations made by Common Law judges in the Uber proceedings[40].

Higher courts, however, did not embrace this interpretative option and overruled the first instance decisions, individuating precisely in the freedom to refuse tasks the main element excluding the existence of a tie of subordination[41]. The fact that in many cases the pony express carried out the activity continuously was deemed irrelevant, supported

---

[33] D. DI VICO, *Foodora, Deliveroo e Just Eat: la vita da pony express hi-tech*, *corriere.it* 15 October 2016.
[34] L. DE ANGELIS, *I* pony express *tra subordinazione e autonomia*, in G.G. DEODATO, E. SINISCALCHI, *Autonomia e subordinazione nelle nuove figure professionali del terziario*, Milano 1988, p. 57; A.M. CHIESI, *Il tempo del lavoro nel settore della consegna immediata*, in *IRES/Papers,* Collana ricerche n. 10, Milano 1986.
[35] Pret. Milano 20 June 1986, in *RIDL*, 1987, II, p. 70, critically commented by ICHINO, and in *OGL*, 1986, II, p. 983, critically commented by SPAGNUOLO VIGORITA.
[36] Pret. Milano 7 October 1988, in *FI*, 1989, II, c. 2908; Pret. Torino 12 February 1996, in *RIDL*, 1997, II, p. 290, commented by ZANOTELLI.
[37] Pret. Pen. Milano 27 April 1987, in *L80*, 1987, P. 258, commented by CHIUSOLO.
[38] Pret. Milano 20 June 1986, cit., p. 71.
[39] *Ivi*, p. 73 f. Therefore the judgement concludes that "*to sustain that they are self-employed workers … would mean to misrepresent the legal relevance of their work through a formal-only use of the traditional criteria, but also a socially and historically wrong evaluation*" (p. 75).
[40] *Aslam, Farrar et al. v. Uber B.V. et al.*, considered irrelevant the fact that Uber drivers "*are never under any obligation to switch on the App or, even if logged on, to accept any driving assignment*" (n. 85). Also according to *O'Connor et. al. v. Uber Technologies Inc. et al.*, Order denying defendant's motion for summary judgement (California Northern District 11 March 2015), p. 7, "*the fact that a certain amount of freedom is allowed or is inherent in the nature of the work involved does not preclude a finding of employment status*".
[41] At first by second instance judges (Trib. Milano 10 October 1987, in *FI*, 1989, I, c. 2632), and then by the Supreme Court (Cass. 10 July 1991, n. 7608, in *RIDL*, 1992, II, p. 370, commented by VIGANÒ, and in *RGL* 1992, II, p. 505, commented by CHIACCHIERONI.

by those Authors pointing out that the employment *status* finds its reason in a legal-only notion of continuity, *i.e*. in the "*legitimate expectation of the creditor on the continuity of the performance according to a program agreed in advance*"[42].

Since higher courts continue to uphold this orientation[43], it seems very difficult for the many digital workers occupied in the sector of transportation and delivering services to achieve the judicial ascertainment of the employee status under Italian law.

2.1.2. When your cubicle is at home

Call centers were at the centre of literature's reflections in the first decade of this century[44]. As they gave rise to the most massive concentration of allegedly self-employed workers in a particular economic sector[45], call centers became emblematic of the condition of precariousness of many Italian workers, deserving also a role in popular culture and cinema[46].

Some of the outcomes reached by legal literature, case law and public authorities should be taken into consideration when it comes to the qualification of crowdworkers, *i.e.* those digital workers who do not only meet their tasks but also perform them online, constituting a global *virtual* workforce[47].

In fact, there is not that much difference between the human intelligence tasks crowdsourced through Amazon Mechanical Turk and other crowdsourcing platforms and some of the tasks performed in call centers. In both cases, we are mostly before labour intensive activities involving the execution of monotone and repetitive "microtasks" that do not require particular skills.

Also due to the political relevance of the problem of repressing misguided employment relationships, during the center-left Prodi Government (2006-2008) and the center-right Berlusconi government (2008-2011) the Italian Ministry of Labour repeatedly issued interpretative criteria to determine the conditions under which it is possible to work in a call center under a self-employment relationship.

A 2006 circular addressed to labour inspectors[48] clarified that only call center workers who perform *in bound* activities – *i.e.* who undertake to answer to incoming calls – shall be always deemed as employees. With reference to *out bound* workers – *i.e.* those who undertake a campaigning project consisting in making a certain amount of calls – the circular stated that it is possible to qualify the relationship as a self-employed one insofar as the worker is free "*a) to decide whether to perform the activity and when; b) to schedule*

---

[42] P. ICHINO, *Libertà formale e libertà materiale del lavoratore nella qualificazione della prestazione come autonoma o subordinata*, in *RIDL*, 1987, II, p. 80.
[43] Cass. 20 January 2011, n. 1238, in *GCM*, 2011, n. 1, p. 85.
[44] M. MARAZZA, *Il mercato del lavoro dopo il caso Atesia. Percorsi alternativi di rientro dalla precarietà*, in *ADL*, 2007, 2, 327; V. DI BELLA, *Call center e co.co.pro*, in *DPL*, 2007, p. 1459; A. MARESCA & L. CAROLLO, *Il contratto di collaborazione a progetto nel settore call center*, in *DRI*, 2007, 3, p. 675.
[45] MARAZZA, *Il mercato del lavoro, cit.*, p. 329.
[46] Some movies marked that turn point, such as *Tutta la vita davanti* (2008) and *Generazione 1000 Euro* (2009).
[47] DAGNINO, *Il lavoro nella* on-demand economy*, cit.*, p. 90.
[48] Ministry of Labour Circular 14 June 2006, n. 17.

the daily working time; c) to suspend the execution of the performance"[49]. In this case, safe for forms of coordination with the client, the *out bound* worker can determine autonomously his working schedule and therefore falls beyond the scope of the employee notion. Although the Ministry is not a Legislator and was just addressing labour inspectors, the document had a significant impact also on case law, with some decisions deeming as self-employed out bound workers[50] and other decisions emphasising the non-binding nature of the ministerial document[51].

Conscious of the difficulties in applying the criterion based on the distinction between *in bound* and *out bound* activities, the Ministry issued in 2008[52] a second circular which narrowed the scope of self-employed work in call centers, individuating a series of factors which would entail reclassification of *out bound* self-employed workers[53]. The successive center-right government, however, clarified that such sort of presumption of the existence of an employment relationship contrasted with the discipline of self-employed project-related work provided for by legislative decree 276/2003, and with the Supreme Court jurisprudence[54].

Also adopting the narrowest approach promoted by the first document, however, the subjection to the direction of the employer also with regard to the definition of the working period still represents an element that is necessary to claim successfully the employment status.

In light of these principles, it would be even more difficult in most cases to classify as employees, under Italian law, those workers who perform their activity on crowdsourcing platforms. Not only they are free – like the *out bound* call centers workers – to determine their working schedule in terms of time, but they also retain "*the freedom to choose when and where to work, how long to spend, and what work to perform*"[55]. In addition, the fact that they perform their activity from their own homes, or from any place where a wi-fi connection is available – thus without any physical relationship in the workplace – would constitute a further element that an Italian judge may valorise in order to deny reclassification.

2.2. Quasi-subordinate self-employed workers?

Pony express and call center case law witnesses that – despite the attempts to valorise the economic and social weakness of the worker – Italian labour law developed

[49] *Ivi*, p. 4. Critical M. ROCCELLA, *Manuale di diritto del lavoro*, Giappichelli, Torino 2010, p. 60, who considered artificial and unable to contrast misclassification the distinction between *in bound* and *out bound* workers.
[50] Trib. Roma 3 December 2008, in *DPL*, 2009, p. 1887.
[51] Trib. Milano 18 January 2007, in *DPL*, 2007, p. 1264.
[52] Ministry of Labour Circular 31 March 2008, n. 8.
[53] Such as: a) the lack of the determination of the specific promotional campaign assigned to the worker; b) the assignment of also in bound activities, even though partially; c) the determination by the call center of the working time; d) the impossibility, due to the informatics devices used by the worker, to freely schedule working time; e) the impossibility for the worker to interrupt the performance through a "break" command; f) the exercise of directive and disciplinary power by the call center company.
[54] Ministerial Note 3 December 2008, n. 17286.
[55] FELSTINER, *Working the crowd, cit.*, p. 154.

a legal-only notion of subordination, meant as the provision of a personal effort, in terms of time and energies, to the employer and subject to his direction[56]. Even though judges would evaluate the circumstance of the effective and stable introduction of the worker in the firm's organisation and a series of secondary criteria, the autonomy of the worker with respect to time scheduling, choice of tasks and working place appears to be *de iure condito* an unsurmountable obstacle to reclassification in terms of an employment relationship.

It is also hard to assimilate properly digital workers to the category of quasi-subordinate workers developed in Italy, German and Spain, as some common law area scholars suggested[57]. In general, the notion of "economic dependency" postulates that the worker devotes the main part of his activity to a single client[58], while in the case of digital work, as it has been noted, there is often no stable counterparty to burden with duties and responsibilities[59].

The scope of the Italian definition of quasi-subordinate workers includes those workers who, without any tie of subordination, provide continuously a mostly personal activity under the coordination of the counterpart of the contract (art. 409 civil procedure code., as emended in 1973 for the purpose of the extension of a few employment warranties to quasi-subordinate workers). Even though coordinated and continuous collaborations are treated as self-employed relationships, some particular rules are set with regard to social security contributions, which are set for 2/3 on the client. The recent reform of Italian labour law known as *Jobs Act* abrogated the discipline on project-related work (art. 61-69.bis), that was applicable to quasi-subordinate workers. Such abrogation, together with the parallel re-conduction to the field of employment of so called *heter-organised* relationships[60], has been waved by the government as the elimination a precarious and unpopular working form[61] .

However, it is to say that, on one hand, the last measure may not in fact contain any real innovation[62]. On the other hand, what has been eliminated is not the possibility to recur to quasi-subordinate work but just the few warranties that had been introduced to

[56] The father of Italian labour law, Ludovico Barassi, sustained such a legal-only notion of subordination in the first decades of the XX century (L. BARASSI, *Il contratto di lavoro nel diritto positive italiano*, Società Editrice Libraria, Milano 1915, p. 6 f.).
[57] S.D. HARRIS & A.B. KRUEGER, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker",* The Hamilton Project Discussion Paper 2015-10, December 2015.
[58] A. PERULLI, *Un Jobs Act per il lavoro autonomo: verso una nuova disciplina della dipendenza economica?*, in *CSDLE, It*, 235/2015, p. 16.
[59] M. FORLIVESI, *La sfida della rappresentanza sindacale dei lavoratori 2.0*, in *DRI*, 2016, n. 3, p. 666.
[60] Those relationships involving the execution of a performance that is organised by the counterpart also with respect to the time and the place of the execution (art. 2, d.lgs. 81/2015).
[61] In an interview Prime Minister Renzi proudly claimed the intention to eliminate coordinated and continuous collaborations, project-related work "*and all that kind of stuff*" (*La Repubblica*, 30 November 2014).
[62] O. MAZZOTTA, *Lo strano caso delle collaborazioni organizzate dal committente*, in *Labor*, 2016, 1/2, p. 7, who notes that the criterion of temporal and spatial heter-organisation was already used by courts to distinguish employment relationships from self-employed ones, even when "quasi-subordinate".

avoid its abusive recourse (such as the duty to indicate the specific "project" for which the contract is stipulated, under penalty of reclassification).

Anyways, if we consider the counterpart of the self-employed digital worker to be the several clients that he may happen to serve, it would be quite difficult to conclude that such activity, which is certainly personal, is characterised by the elements of continuity and coordination. The terms and conditions of some platforms appear to foresee the risks for a single client to repeatedly receive services from a same worker[63], and decline any responsibility for the case that such continuous recourse entails the constitution of an employment relationship under applicable legislation[64].

If we evaluate the existence of the elements of continuity and coordination with reference to the relationship between the worker and the platform, however, we could easily conclude that in many cases there is a quasi-subordinate relationship falling within the scope of art. 409 n. 3 c.p.c.

In Italy, some platforms have qualified their relationship with workers as a coordinated and continuous collaborations (it is the case of the Foodora delivering platform), and yet the platform was still able to pay fees which were far under minimum wage, allowing workers to earn something like three euros per hour. Therefore, even when it is possible to deem as quasi-subordinate the workers that continuously work on the same platforms, the qualification in terms of quasi-subordinate workers is not *per se* sufficient to guarantee further protection to those digital workers who would not be able to reach reclassification. Quasi-subordinate work, conclusively, should not indeed be considered a sort of panacea[65].

2.3. Self-employed workers, unfortunately

The considerations just developed on the qualification of digital workers' legal *status* under Italian law suggest that even though the language used in the terms and conditions set by platforms may be seen as "*twisted language ... [that] merits, we think, a degree of scepticism*"[66], the claim that platforms are not parties of any employment relationships is not that easy to undermine. Even outside Italian law and its narrow notion of employee, the qualification in terms of self-employment laid down in the platforms' terms and conditions appears convincing *de iure condito*[67], although the often-unsustainable consequences of such qualification (with reference to working conditions and occupational stability) may suggest the opportunity to deem the platforms as employers or at least joint employers.

---

[63] AMT Participation Agreement, § 3: "*You acknowledge that, while Providers are agreeing to perform Services for you as independent contractors and not employees, repeated and frequent performance of Services by the same Provider on your behalf could result in reclassification of that employment status*".
[64] Taskrabbit Terms of Service, § 12.
[65] De Stefano, *The Rise of the "Just-in-Time-Workforce", cit.*, p. 497.
[66] *Aslam, Farrar et al. v. Uber B.V. et al.*, n. 87.
[67] BERGVALL-KÅREBORN & HOWCROFT, *Amazon Mechanical Turk, cit.*, p. 218; DE STEFANO, *The Rise of the "Just-in-Time-Workforce", cit.*, p. 478; DAGNINO, *Il lavoro nella* on-demand economy*, cit.*, p. 91.

The conclusion that the examined digital workers are in most cases self-employed contractors does not derive from an overvaluation of the contractual label (*nomen iuris*), which is substantially irrelevant. Such a qualification, instead, is strongly suggested by the circumstance that – safe for pathological cases – they are not actually bound to the directive power of any employer as long as they truly retain the freedom to choose when and where to work, how long to spend, and what work to perform.

It is a conclusion that is coherent also with European law, which does not impose any wider qualification criterion (although there is no EU competence on the qualification of employment relationships). In fact, the European Court of Justice individuated the essence of subordination in the circumstance that the worker "*acts under the direction of his employer as regards, in particular, his freedom to choose the time, the place and the object of his work*"[68].

The "freedom" of the worker and the presence of a plurality of users suggest that the legal framework of digital work could be the triangular scheme of "self-employed work intermediation", constituted by three contracts: one self-employment contract between the worker and the user, and two intermediation contracts stipulated by the platform with the worker and the user.

The following paragraphs will try to analyse the relationships involved in the triangular scheme proposed by the platforms themselves, in order to verify whether – when reclassification would not be accepted by a judge – the rules governing the specific relationships, as well as those applicable by virtue of the contractual integration between them, may prevent digital workers to fall within an "empty space of law".

2.4. Mere intermediary or party to the self-employment contract?

If there is a self-employment relationship, we should first ask ourselves who the counterpart of the worker in such relationship is. If we accept the reconstruction operated by the platform, we should say that it is only the time-per-time user, and that therefore not even who works eight hours per day via the same platform can be considered someone "continuously serving a same main client".

While we have seen that the qualification in terms of self-employment laid down by the platforms appeared convincing (safe for pathological cases), the claim that they just intermediate the provision of transportation services by the users seems more artificial, almost absurd[69]. About Ubers' activity, labour judges have noted that "*Uber does not simply sell software; it sells rides. Uber is no more a "technological company" than Yellow Cab is a 'technology company' because it uses CB radios to dispatch taxi cabs*"[70] and that it is "*unreal to deny that Uber is in business as a supplier of transportation services. Simple common sense argues to the contrary*"[71] . Also

[68] ECJ 2 December 2014, C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, in *European Competition Law Review*, 2015, p. 181, commented by BABIRAD, and in *RIDL*, 2015, II, p. 566, commented by ICHINO.
[69] WEISS, *Digitalizzazione, cit.*, p. 656.
[70] *O'Connor et al. v. Uber Technologies Inc. et al.*, p. 10.
[71] *Aslam, Farrar et al. v. Uber B.V. et al*., n. 89.

competition law judges held the platform responsible for carrying a transportation service[72], and a Barcelona judge requested for an ECJ's preliminary ruling on the question of the nature of the activity carried out by Uber[73].

The same functional approach proposed to individuate in the platforms *the* employer or *one of the* employers of the digital worker[74] could be useful also in the different perspective of the individuation of the counterpart of the self-employement relationship.

The platform acts indeed as a "cumbersome middleman"[75] and the intermediation contracts are both deeply connected with the self-employment contract. The intermediation contract sets in fact the frame within which several self-employment contracts are stipulated by the worker and a plurality of clients. Platforms do not only intermediate service, they provide services to users by connecting them to the workers who would actually perform the required activity following the indications set by the platforms themselves.

As they do intermediate, they will respond for the obligations deriving from the intermediation contracts they subscribe with the users and the workers. The mediation contract is also a contractual type regulated by dispositive provisions of the Italian civil code (art. 1754 and ff.). The user-platform relationship shall meet the requirements set forth by consumer law when the user is a physical person, acting for non-entrepreneurial purposes, and even with regard to the worker-platform intermediation contract it would not be out of place to think about the application of consumers protection against vexatious clauses, emphasising the circumstance that the worker acts as a "prosumer"[76].

However, as platforms set also the rules governing the self-employment relationship, they do also become a party to that relationship or, at the very least, they should still be held responsible for those breaches of the self-employment contract to which they participated, even when the input comes from the user.

In this perspective, we may find in the worker-platform relationship the character of continuity that misses with regard to the relationship between the worker and the user (entailing the application of quasi-subordinate discipline). In addition, even the most occasional worker may enforce against the platform the rights deriving from the self-employment relationship.

But what rights are we talking about?

---

[72] Trib. Milano 2 July 2015, cit., p. 1076, where the judge underlines as "*it seems in fact possible to assimilate completely the intermediation activity to the taxi services [as] the conduct of the Company results certainly inextricably connected to the activity performed by the single drivers who violate the discipline governing the provision of taxi services*".

[73] Request for a preliminary ruling 7 August 2015, C-434/15, *Asociación Profesional Élite Taxi v Uber Systems Spain, S.L.* The decision of the Luxembourg Court, which may have relevant consequences also for labour lawyer, as it could state that they run – for any effect – a transportation business, should arrive in the spring of 2017.

[74] PRASSL & RISAK, *Uber, Taskrabbit, and Co., cit.*, p. 635 f.

[75] A. DONINI, *Il lavoro digitale su piattaforma*, in *Labour Law Issues*, 2015, vol. 1, n. 1, p. 59; S.C. MOATTI, *The Sharing Economy's New Middlemen*, in *hbr.org*, 5 March 2015.

[76] ALOISI, *Commoditized workers, cit.*, p. 664 f.

3. Self-employed work rights and their sources

In Italy, as in most civil law countries, the discipline of self-employed work contracts is quite gaunt (only seven articles in the civil code, art. 2222 to 2228) and construes the notion of the self-employed worker in negative, by stressing the lack of subordination. Labour lawyers, with some exceptions[77], have not often focused on such discipline, as they have limited the analysis to the problem of qualification[78].

The challenge of digital work, however, could be an opportunity to develop a new perspective on the protection of self-employed personal work. It does not seem a coincidence that the recent Italian Bill 2233 (*infra*, § 3.2) contains in the same text provisions on "autonomous non-entrepreneurial work" (first part) and employment provisions "promoting flexibility with reference to the working time and place" (second part). The structure of the bill itself thus confirms that the digitalisation of labour – of standards types and of new forms of labour – requires action on different frontlines.

Moreover, European contract law has indeed developed in the last decades a human dimension in regulating contracts characterised by the imbalance of the parties[79], on the ground of the interpretative evaluation of the general clause of good faith[80] as well as because of the legislative intervention in the field of consumer law and B2b contracts[81]. In this perspective, it has been underlined that contract law represents nowadays – perhaps even more than labour law itself – "*a fruitful field for the ethical evaluation of entrepreneurial behaviours*"[82].

With respect to that apparent "empty space of law" represented by the condition of self-employed digital workers, it is important to stress out that some rules would still apply. Contract law general principles (such as the principle of good faith and correctness), would find full application, prohibiting those behaviours that result in the abusive exercise of the rights descending from the contract[83].

---

[77] A. PERULLI, *Il lavoro autonomo. Contratto d'opera e professioni intellettuali*, Giuffrè, Milano 1996.
[78] M.T. CARINCI, *Il contratto d'opera*, in G. GITTI, M. MAUGERI, M. NOTARI (Eds.), *I contratti per l'impresa*, Il Mulino, Bologna 2012, p. 176.
[79] L. NOGLER & U. REIFNER, *Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law*, Eleven International Publishing 2014.
[80] F. DENOZZA, *Il lavoro nell'impresa neo-liberale*, in M.T. CARINCI (Ed.), *Dall'impresa a rete alle reti d'impresa. Scelte organizzative e diritto del lavoro*, Giuffrè, Milano 2015, p. 75, insisting on the utility of general clauses as applicable to every field of private law.
[81] *I.e.* those contractual relationships between a strong main firm and a series of small or micro-businesses who depending on the former. G. GITTI & G. VILLA, *Il terzo contratto. L'abuso di potere contrattuale nei rapporti tra imprese*, Il Mulino, Bologna 2008; E. LABELLA, *Tutela della microimpresa e "terzo contratto"*, in *EDP*, 2015, n. 4, p. 857.
[82] A. PERULLI, *Il controllo giudiziale dei poteri dell'imprenditore tra evoluzione legislativa e diritto vivente*, in *RIDL*, 2015, I, n. 1, p. 83.
[83] U. MORELLO, *Abuso del diritto: la difficile via della concretizzazione*, in A. GAMBARO & U. MORELLO (Eds.), *Lezioni di diritto civile*, Giuffrè, Milano 2013, p. 685, the reference is in particular to the principles stated in the famous Renault Case, where the Italian Supreme Court (Cass. 18 September 2009, n. 20106, in *I contratti* 2010, p. 5) deemed abusive the sudden and unjustified termination of a franchise relationship between Renault and a small agent condemning the French Company to reparation for damage and loss.

On another hand, it will be appropriate to consider the application of the discipline of B2b contracts, and in particular of art. 9, law 192/1998, which prohibits the "abuse of economic dependency" [84] of a small firm towards a main client. Although such provision is contained in a Law regulating the "sub-supply" commercial relationships, the Italian Supreme Court clarified that article 9 has a wider scope than the other provisions of that Law, as it constitutes a "general clause", applicable to any contractual relationship in which an abuse of economic dependence may occur[85]. On this ground, it seems reasonable to extend the application of the prohibition of the abuse of economic dependency to self-employment relationships, in order to protect, at the very least, autonomous workers from suffering unilaterally and arbitrary decisions made by their counterpart[86].

The combination of the few civil code provisions regarding self-employment, together with the general principles of contract law and the extensive interpretation of the B2b contracts rules, may result in a discipline able to provide some protection against some of the critical issues raised by platform-mediated work, as the following paragraphs will try to show.

3.1. Some consequences under private law

Most platforms retain the power to exclude the worker from the use of the platform, deactivating his account. If we consider digital workers as employees such deactivation may be deemed as a dismissal, and would therefore need to comply with national and European provisions requiring the dismissal to be justified[87]. Self-employed workers, instead, do not enjoy the same warranties. The relevance of the problem of "deactivation power" emerges if only we take into account the circumstance that one of the conditions contained in the *Cotter v. Lyft* settlement proposal provided for the enforcement of a grievance process heard by an arbitrator to be undertaken before account deactivation[88].

Deactivation, actually, does look more like the termination of the intermediation contract than like the termination of the self-employment relationship that is framed within it. In this perspective, the specific provision about the termination of the self-employment contract provided for by art. 2227 of the Civil Code, providing for the right to terminate at will the relationship by paying the worker a compensation, does not seem any useful. If we consider deactivation as the termination of the intermediation frame, on the contrary, we could usefully recur to contract law general principles and B2b contracts regulations to syndicate its legitimacy.

---

[84] Economic dependency is defined as "*the situation allowing a firm to determine, in its commercial relationship with another firm, an excessive imbalance of rights and duties*".

[85] Cass. S.U. 25 November 2011, n. 24906, in *Foro italiano* 2012, 3, I, 805.

[86] D. DEL BIONDO, *L'abuso di dipendenza economica nei confronti dei lavoratori autonomi*, in M.T. CARINCI (Ed.), *Dall'impresa a rete alle reti d'impresa, cit.*, p. 423.

[87] As art. 30 of the Charter of Fundamental Rights of the European Union clearly states, "*every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices*".

[88] CHERRY, *Beyond Misclassification, cit.*, p. 583. The provision of a due process before deactivation resembles closely the protective schemes adopted against dismissal.

Two decisions from Southern Italy regarding the famous online auction and shopping website *Ebay* may represent a good example. Both decisions, rendered in the contest of the special "urgency" proceeding provided for by art. 700 c.p.c., ordered the Company to re-activate the accounts of two sellers who had been de-activated due to low feedbacks.

The first decision[89] deemed unlawful the deactivation under the general rules on contract termination set forth by the civil code (art. 1454 and ff.), considering the mere presence of low feedbacks not sufficient to demonstrate the existence of a serious breach of the contract. The judge considered that a clause allowing resolution only due to low feedbacks would be a vexatious clause requiring double subscription (missing in the case) for its enforceability[90]. However, it has been noted that even in presence of a second subscription, the clause would still be void under art. 9 L. 192/1998, as it realises "an abusive imposition of unjustifiably vexatious conditions"[91].

The second decision[92] seems more aware of the social and economic dimension of the problem and gave relevance to the oligopolistic structure of Ebay's on-line marketplace. The judge recognised the existence of the so called *periculum in mora* (necessary to access to the urgency proceeding) because "*the exclusion from Ebay does not only produce some lost clients, but excludes a micro-business from the market itself*"[93]. However, the judgement explicitly excluded the application of consumer protection law and of Law 1992/1998, on the ground that there was no "*introduction of the micro-business in the productive process of a main client*"[94].

What is interesting about the two aforementioned decisions is that, even if they move within the field of general contract law, they are still able to grant the weak party of the relationship with a *real* protection, a sort of reinstatement, reaching an effect that reminds the traditional sanction against unjustified dismissal.

Many of the considerations developed by the aforementioned decisions can deal with the reputational systems adopted by some platforms. With regard to digital workers, it would be easier to invoke the invalidity under art. 9 Law 192/1998 of vexatious clauses granting termination at will powers to the counterpart, as there is nothing ancillary to the platforms business in their activity[95]. In this perspective, it is possible to give a partial

---

[89] Trib. Messina 7 July 2010, in *Diritto dell'informazione e dell'informatica*, 2011, p. 118, commented by CIMINO.

[90] Art. 1341 (2) of the civil code provides a list of clauses that require double subscription if they are contained in general terms and conditions set by one party without negotiation, as the clause allowing that party to freely terminate the contract.

[91] I.P. CIMINO, *Sospensione dell'account di vendita nel marketplace di ebay, tutela del contratto e della libertà di impresa nel commercio elettronico*, in *Diritto dell'informazione e dell'informatica*, 2011, p. 132 f., who notes that "unjustifiably vexatious conditions" in B2b relationships are mainly those allowing the strong party to unilaterally modify the rules governing the contract and to terminate it without notice.

[92] Trib. Catanzaro 30 April 2012, in *Diritto dell'informazione e dell'informatica*, 2012, p. 1174, commented by ARANGUENA.

[93] *Ivi*, p. 1180.

[94] *Ivi*, p. 1176.

[95] As the Employment Judge noticed in *Aslam, Farrar et al. v. Uber B.V. et al.*, n. 95.

answer to the question *is account deactivation a new form of dismissal?*[96] The answer is still open, but in any case even without applying dismissal discipline it is possible to prevent the unjustified exclusions of workers from the platforms. Low ratings can bring to deactivation only if they derive from a seriously neglect conduct of the worker and in any case a minimal procedure to allow the worker to defend himself shall be accorded.

The issue is strictly connected with the problem of the control that the platform is capable to exercise on the execution of the performance, even by delegating it to users[97]. Such control, in fact, is compatible with the self-employed nature of the relationship as long as it remains a control on the *result* of the work – in order to guarantee minimum standards of quality and safety – and not on the *execution* of the worker's performance. Coherent with the alleged self-employment status, personal ratings should not depend on the amount of time the worker devotes to the tasks delivered via app.

Should the reputational system "punish" dormant workers, they would be able to react invoking an employee status, as they would end up to be at the disposal of an employer (as Judge Snelson noticed, quoting Milton, "*they also serve who only stand and wait*"[98]). Nevertheless, at the same time, they would also have the possibility to invoke their self-employment status in order to *prevent* the platform from affecting their rate or to "dismiss" them without a concrete reasonable cause. Although it is clear that the acknowledgement of an employment status would bring much more benefits, it may also be useful to provide the worker with a "second bullet", in a context characterised by uncertainty and by the malleability of employment tests[99].

Although the case of the termination of the contract through account deactivation seems paradigmatic, a similar approach could be adopted to ascertain the legitimacy of the clauses allowing the user to refuse the acceptance of a performed task, without providing payment to the worker[100], as well as to question the legitimacy of the exclusivity clause that some platforms insert in their general conditions[101].

In the first case special provisions on self-employed work regarding the right to receive due compensation may apply. Art. 2227 of the civil code provides the client with the right to terminate the self-employment relationship when the task has been partially executed, "*compensating the worker for the expenses, for the performed work and for his loss*". Case law stated that the "loss" under art. 2227 c.c. is constituted by the full price of the agreed performance[102]. The special provision on self-employed "intellectual performances" (art. 2237 c.c.) provides the worker with the right to be compensated for the expenses and to be paid for the performed work, which will be quantified "with regard

---

[96] ALOISI*, Commoditized workers, cit*., p. 674.
[97] A. ROSENBLAT & L. STARK, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, in *International Journal of Communication*, 2016, 10, 3758; PRASSL & RISAK, *Uber, Taskrabbit & Co., cit*., p. 626.
[98] *Aslam, Farrar et al. v. Uber B.V. et al*., n. 100.
[99] CHERRY, *Beyond Misclassification, cit.*, p. 582.
[100] AMT Participation Agreement, § 3.
[101] DE STEFANO, *The Rise of the "Just-in-Time-Workforce", cit.*, p. 488, referring to AMT's and Topcoder's terms and conditions.
[102] Among the most recent decisions, Trib. Monza, 12 January 2016, in *De Jure*.

to the utility deriving to the client". Under both these regulations, which prohibit termination without compensation when the performance is not yet completed, it seems that the clause allowing the client to refuse a *completed* task should be *a fortiori* not enforceable under Italian law.

Even the exclusivity clauses may be deemed unlawful under Italian law. In the first place, as they result in "restrictions to the freedom to contract with third parties" they certainly require double subscription under art. 1341 c.c.[103]. In the second place, it could be appropriate to consider such clause as vexatious under B2b statutes, and thus void under art. 9 L. 128/1998, adopting the same reasoning proposed with regard to the remedies against account deactivation.

It seems therefore possible to address some crucial issues regarding the protection of digital workers also through the application of non-employment regulations: the general rules of contract law, the specific rules on self-employment and the regulations regarding B2b contractual relationships. However, the recourse to civil law principles and regulations is still far from being a satisfactory solution, as it presents all the weaknesses of an interpretative-only solution and leaves unsolved many critical points.

3.2. Towards the development of a Statute for self-employed (digital) workers

An answer to the absence of an exhaustive discipline on pure self-employed work comes from the recent Italian Bill 2233 (pending in the Chamber of Deputies[104]) containing "protective provisions on self-employed non-entrepreneurial work".

As it has been underlined, the legislator tried for the first time to construe a discipline of self-employed work based on the acknowledgement of its social and ethical value, rather than on the prejudice that it hides actual employment relationships[105].

The Bill introduces several warranties for self-employed workers, ranging from the protection against payment delays (art. 2), to tax benefits (art. 7 and 8), to the access to formation and collocation services (art. 9) and public procurement (art. 11), to social security benefits such as (unpaid) maternity leave, sick leave and injury leave (art. 12 and 13).

In the perspective of digital self-employed work, one of the most important provisions is set up by art. 3, which explicitly provides for the application to self-employment relationships of the aforementioned art. 9 L. 192/1998, thus removing the uncertainties of interpretative extension. In addition, art. 3 specifies that the clauses "*granting the client the power to unilaterally modify terms and conditions and, where the self-employment relationship is characterised by continuity, to terminate the relationship without notice*" are vexatious and thus void.

---

[103] *Supra*, n. 90.

[104] The bill was approved by the Senate and transmitted to the Chamber of Deputies on 3 November 2016.

[105] O. RAZZOLINI, *Il ddl sul lavoro autonomo: dalla tutela della dipendenza alla tutela della persona*, in *nelmerito.com*, 6 may 2016; S. GIUBBONI, *Prime osservazioni sul disegno di legge del Governo in materia di lavoro autonomo non imprenditoriale*, in *Massimario di giurisprudenza del lavoro*, 2016, n. 4, p. 244. Even the relation to the Bill by Senator Sacconi remarks this change of perspective.

It is not clear whether the invalidity of the vexatious clause would lead to *real* remedies (such as the re-constitution of the relationship or the disapplication of the clause), as the Bill provides that the worker would be entitled to receive reparation for damage and loss (art. 3 (3)). However, it seems possible to interpret such provision as granting reparation for the damage and loss related to the enforcement of the vexatious clause, without excluding the possibility of the restoration of the *status quo ante* at the request of the worker.

A more specific attempt to regulate the provision of personal services in the gig-economy is represented by the Bill 3564 containing "provisions on digital platforms for the sharing of goods and services and provisions promoting sharing economy" (so called Sharing Economy Act)[106]. Although the Bill reflects somehow the misunderstanding that the gig-economy represents an aspect of sharing-economy[107], and its purpose is mainly to promote sharing economy[108] – with an eye to the tax increase that may derive from its development[109] – the Bill contains some provisions which may be extremely relevant for the purpose of granting a fair treatment to platform-mediated workers.

Art. 4 of the Bill provides that the platform owners shall adopt a written policy, subject to the Competition Authority's approval, including the contractual terms and conditions between the platform and its users. The Bill provides for a list of clauses penalising the "user-operator" (broad label that seems to include also those that we have called "digital workers"), which are expressly sanctioned with invalidity. In particular, platforms terms and conditions can not "a*) burden the user-operator with any kind of exclusive obligation;* b*) allow the control on the execution of his performance, not even through hardware or software systems;* c*) determine compulsory fees for all users;* d*) allow the exclusion of the user-operator from the platform or penalise him in the presentation of his offer without serious reasons;* […] h*) forbid the user operator from criticising the owner of the platform*" (art. 4 (2)).

Although the Bill is meant to regulate all kinds of sharing economy activities, without a specific labour law focus, the provisions that we have just examined – promoting transparency and fairness in the platform's management – should be welcomed as they represent a consistent step forward in filling up that "empty space of law" where digital workers seemed to fall.

---

[106] Proposed on 27 January 2016 and currently pending in the Chamber of Deputies.

[107] Critics to this reconstruction have been made by many commentators: G.M. ECKHARDT & F. BARDHI, *The Sharing Economy Isn't about Sharing at All*, in *hbr.org* 28 Janary 2015; V. MANSHARAMANI, *What happens when the sharing economy stops sharing and starts owning?*, in *pbs.org* 4 February 2016; A. CALLAWAY, *Apploitation in a City of Instaserfs: How The "Sharing Economy" Has Turned San Francisco into a Dystopia for the*
Working Class, in *Monitor*, 2016, vo. 22, n. 5, p. 18.

[108] The Relation to the Bill makes reference to D. WOSSKOW, *Unlocking the Sharing Economy. An Independent Review*, report commissioned by the UK Business Ministry and released in November 2014 and recommending as to how the UK could become a global centre for this fast-growing sector.

[109] The Relation to the Bill foresees the emersion of 450 million Euros of GDP as of today (producing a 150 million Euros tax revenue, which could raise to 3 billion by 2025.

4. Conclusions

The frustrations raising from the difficulty in applying statutory employment law to digital workers[110] should not lead to the misunderstanding that no protection can be found outside that domain. The lightness of intermediated self-employed work remains unbearable, but some attempts to make it heavier may be crowned with success.

Through the valorisation of contract law principles and regulations we may already be able, at an interpretative level, to address some of the issues raised by platform-mediated self-employed work. The legislative perspective of implementing new sets of rules for "pure" self-employed workers and digital "users-operators" may also bring further answers to the exigencies of digital workers.

Some crucial points, however, remain unresolved. Certainly the problem of low wages, which cannot be faced by the application of the constitutional principle of minimum wage[111] or by the provision on quasi-subordinate workers fair wage, abrogated by the *Jobs Act* reform[112]. But also the risks of self-exploitation and exploitation of child labour[113] and the difficulties in pursuing effective collective representation for an atomised working force[114] cannot find a satisfactory solution outside the field of statutory employment law. The challenge to avoid digitalisation from bringing to a nosedive labour law standards, therefore, calls for a political reflection to be conducted both at national and at supranational level.

[110] WEISS, *Digitalizzazione, cit*., p. 662.

[111] Case law repeatedly stated the exclusion of self-employed worker from the scope of art. 36 of the Constitution, providing the right to "proportionate and adequate salary", since the Constitutional Court decision 7 July 1964, n. 75, in *GCost*, 1964, p. 751. P. PALAZZO, *La prestazione d'opera professionale e l'art. 36 della Costituzione*, in *RTDPC*, 1973, p. 1643, underlines the reasoning of the Court that self-employed workers do not need such a warranty as they do not share the same condition of weakness suffered by employees. More recently, Cass. 8 June 2007, n. 13440, in *De Jure*.

[112] Art. 52 d.lgs. 81/2015 abrogated the whole discipline of project-related work, thus eliminating also the provision (art. 63 d.lgs. 276/2003) under which project workers could not be paid less than comparable employees.

[113] DE STEFANO, *The Rise of a "Just-in –Time-Workforce", cit.*, p. 500 f.

[114] FORLIVESI, *La sfida della rappresentanza sindacale, cit.*