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Proposal for a directive on platform workers: enforcement mechanisms and the potential of the (Italian) certification procedure for self-employment

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Abstract

In the frame of the draft directive enforcement measures, the essay investigates the advisability of adopting the certification procedure for employment contracts in order to ensure the correct use of genuine self-employment in the digital platform economy. This is a hypothesis evaluated (and discarded) by the European Commission during the consultations for the adoption of the proposal for a directive on platform work.
Starting from the implementation criticalities related to the legal presumption and the indices of subordination (Chapter II, proposal for a directive) in national legal systems, the centrality of enforcement mechanisms for verifying the correct contractual qualification is highlighted. However, in addition to the "ex post" enforcement tools, it may be necessary to build "ex ante" verification systems, with a deflationary nature, to be activated at the time of signing the employment contract, especially in the area of self-employment. These considerations are advanced by taking as an example the Italian model of the "Certification Commissions", in which the European Commission had shown interest.

Keyword: EU platform workers; balance between economic freedom and workers' rights; self-employed workers; remedies; enforcement mechanisms; certification of labour contracts.

1. Introduction.

The directive proposal for improving working conditions for platform workers[1] does not deviate from the subordination-autonomy dichotomy. Within this framework, the combination of the relative presumption of subordination, the reversal of the burden of

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[1] For a general overview on platform work emerging issues Perulli A., Bellomo S., (eds.), *Platform work 4.0: new challenges for labour law*, Wolters Kluwer, 2021.

proof and the definition of subordination indices are intended to facilitate the contractual reclassification of bogus self-employed workers.[2]

Despite the stated aims, the proposal for a directive does not seem to fully address the enforcement issues. Indeed, long before anyone else, Valerio De Stefano and Antonio Aloisi stated that "(p)latform worker(s) do not necessarily need new regulations, but a more effective enforcement and an unambiguous framework".[3]

In that regard, even if introducing the relative presumption of subordination does try to remedy the ambiguity of qualifying platform workers without distorting the subordination/autonomy dichotomy, the question of "effective enforcement" remains on the table.

However, the legal presumption and subordination indexes do not lead to a particular classification outcome. On the contrary, the complex regulatory and interpretative adaptation of indicators in national legal systems could lead to contractual reclassification procedures with unpredictable outcomes, prompting sudden reorganisations by platforms.[4]

The breakdown of the notion of subordination employment into predictive indexes, widely used in case law, increased the risk of a high degree of "manipulation" by the judge.[5] Moreover, the "codification" of these indicators, even in the light of EU case law, may not have a uniform effect, given that the demonstration of the absence of an employment relationship must, in any case, take place under national legal and case law definitions (Art. 5). On the contrary, as rightly noted, the risk is that, under European Union law, the relative presumption of subordination may be overcome in twenty-seven different ways.[6] This may be done through the legislative transposition of the directive, but also through the interpretative efforts of national courts to adapt the domestic indices of subordination to the "tailor-made" elements listed in the directive.

In this scenario, the presumption indices would widen the exposure of the platforms to a somewhat unpredictable reclassification of the employment relationship (not only in the short term, in a period of "adjustment" in application), contradicting the aim of the proposal to ensure a level playing field and legal certainty for both contractual parties.[7]

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[2] See Hießl C., *The legal status of platform workers: regulatory approaches and prospects of a European solution*.in this Issue. Among the first Italian commentators, 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, C1-C20; Bronzini G., *La proposta di Direttiva sul lavoro nelle piattaforme digitali tra esigenze di tutela immediata e le sfide dell'"umanesimo digitale"*, in *LavoroDirittiEuropa*, 1, 2022, 2 ff.; Giubboni S., *La proposta di direttiva della Commissione europea sul lavoro tramite piattaforma digitale*, in *Menabò di Etica ed economia*, gennaio 2022; Treu T., *La digitalizzazione del lavoro: proposte europee e piste di ricerca*, in *Federalismi.it*, n. 9, 2022, pp. 190-211; Valente L., *Tra subordinazione e autonomia: la direttiva sui rider*, lavoce.info, 15 dicembre 2021; Ratti L., *A Long Road Towards the Regulation of Platform Work in the EU* (forthcoming).

[3] De Stefano V., Aloisi A., *European Legal framework for digital labour platforms*, European Commission, Luxembourg, 2018, 53.

[4] As predicted by Bertolini A., Alyanak O., Cant C., López T., Agüera P., Howson K., Graham M., *Fraiwork Response to the European Commission's Proposal for a Directive on Platform Work*, Fairwork, online, 2021; De Minicis M., Marocco M., *Consistenza, caratteristiche e bisogni dei lavoratori delle piattaforme. Quali strategie regolative alla luce della proposta di Direttiva?*, in *LavoroDirittiEuropa*, 1, 2022, 1-13.

[5] Deakin S., *Decoding Employment Status*, in *King's Law Journal*, 31, 2, 2020, 180-193.

[6] Barbieri M., nt. (2).

[7] On the contrary, according to part of the doctrine, the relative presumption of subordination and predictive indexes strengthen the legal certainty between the various actors involved in the labour market because of the

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On the other hand, the use of genuine self-employment in the digital platform sector becomes increasingly less feasible in the face of a legal presumption which, in order to widen the margins of contractual requalification in favour of subordination, risks drawing an even more confused *discrimen* between subordinate and self-employed work. Indeed, the new indices open up an extensive interpretation of the notion of "employee" in the interpretative practice of many Member States (e.g., Italy[8]). Above all, beyond the narrower perimeter of hetero-direction, these indices consider all the intrinsic and extrinsic characteristics of the employment relationship that refer to the concept of hetero-organisation.[9] Therefore, it cannot be denied that self-employment spaces, even if qualified under the hybrid categories introduced by national laws,[10] could be at least reduced. It will be difficult for a platform to overcome (negatively) the presumption of subordination, since two indices are enough to activate it.[11]

However, the legal presumption and the indices of subordination must leave room for the use of genuine self-employment. This concession is first and foremost essential to protect the freedom to provide services.[12] Moreover, under the new protections on algorithmic management introduced by the same proposal (Chapter III)[13], from which self-employed workers also (partially) benefit the margins, the use of self-employment seem to be "justified".

In this frame, the legal presumption seems to be a partial solution without implementing mechanisms to ensure its effectiveness. In this respect, it has rightly been pointed out that one of the main shortcomings of European law is that while it confines itself to establishing material rights, it ignores the consequences of their non-implementation.[14]

On the other hand, European legislation has always been particularly respectful of the principle of national procedural autonomy, which leaves states free to set up their own system for monitoring and implementing European rules. However, the absence of European

reduced uncertainty linked to the contractual qualification. Cfr. Kullmann M., *Platformisation' of Work: An EU Perspective on Introducing a Legal Presumption*, in *European Labour Law Journal*, 13, 1, 2021, 66-80.

[8] *Ex multis*, Bandelloni G., *Corsi e ricorsi dell'eterodirezione*, in *Labour & Law Issues*, 7, 1, 2022, 2 ff.; Santoro Passarelli G., *La subordinazione in trasformazione*, in *Diritto delle Relazioni Industriali*, 4, 2021, 1125 ff.

[9] Giubboni S., nt. (2); Bronzini G., nt. (2), 2 ff.

[10] For example, in Germany, the so-called employee-like persons (*arbeitnehmerähnliche personen*); in Italy, parasubordinate and hetero-organised labour; in Spain, the TRADE (*trabajador autónomo económicamente dependiente*); in the UK, the "worker". As summarised by Williams C. C., Horodnic I. A., *Dependent Self-Employment. Theory, Practice and Policy*, Elgar, 2019, in particolare al Capitolo 7 "Approaches towards addressing the misclassification of employment", 142-160.

[11] Ponterio C., *La direzione della Direttiva*, in *LavoroDirittiEuropa*, 1, 2022, 11.

[12] On this point, however, it should be noted that the European Commission, for once, seems to sacrifice economic freedoms in the complex balance with social protections. The directive proposal runs counter to ECJ case law, which in the past has deemed the legal presumption of subordination as an obstacle to the effective exercise of the freedom to provide services in the EU market and a disincentive for the genuinely self-employed (CJEU – Case C-255/04, *Commission of the European Communities v French Republic*, [2006] ECLI:EU:C:2006:401). It is true that, in the presence of a relative Euro-Union presumption, the obstacle to the freedom to provide services in the Single Market is removed. This, of course, is true in principle because uniformity in the application of the legal presumption in the Member States is far from certain.

[13] Aloisi A., Potocka-Sionek N., *De-gigging the labour market? An analysis of the 'algorithmic management' provisions in the EU Platform Work Directive* in this Issue.

[14] Kullman M., nt. (7).

harmonisation measures makes this principle a kind of "congenital defect" that hinders homogeneous implementation between the Member States.

On this basis, it may be pointed out that the legal presumption's standardising effect will largely depend on the enforcement arrangements put in place at the national level. Reference is, *in primis*, made to judicial redress, the control of the competent public authorities (including inspection bodies and social security bodies), and industrial relations instruments.

In the face of these critical issues, an overview of the of transparency and enforcement mechanisms is drawn (§§ 2; 2.1.). Emphasis will be placed on the role played by the certification procedures for self-employment contracts (§2.2.), especially in the light of the Italian experience (§3). Following the analysis, it's argued that it would be beneficial – to both platforms and workers – to define an effective enforcement system both at the *stage of establishing the employment relationship* and the *ex-post* stages (§4). Paragraph 5 concludes.

2. The importance of enforcement mechanisms.

2.1. Transparency and enforcement.

Among its specific objectives, the directive proposal lists improving the enforcement of the relevant rules by supporting labour and social protection authorities to obtain more information on digital work platforms[15]. Indeed, in this respect, the proposal establishes precise transparency obligations on platforms for the benefit of public authorities. In particular, Member States shall require digital platforms to declare work performed to the competent labour and social protection authorities of the Member State in which the work is performed and to share relevant data with those authorities (Art. 11). In this regard, however, the proposal specifies that the obligation rests on the "digital labour platforms which are employers". The effect is paradoxical: this measure is functional to control the use of false self-employment by the competent authorities, but the obligation of transparency is limited only to platforms which, being employers, use subordinate work and do not require such controls.

Secondly, the competent authorities and workers' representatives can access information on platform work. This information must be updated every six months (Art. 12). These measures will help the authorities to ensure that workers' rights are respected, and social security contributions collected.[16] The provisions undoubtedly respond to a pressing need since platform workers are often "ghosts" for national monitoring and control systems.[17]

[15] European Commission, COM(2021) 762 final, 3 ff. On the need to create synergies between public labour institutions, López López J., de le Court A., *When the Corporate Veil is Lifted: Synergies of Public Labour Institutions and Platform Workers*, in *The King's College law journal*, 31, 2, 2020, 324-335.

[16] European Commission, COM(2021) 762 final, 4. The Commission estimates that Member States could benefit from an increase in tax and social security contributions of up to EUR 4 billion per year (13).

[17] In this connection, in Italy, Pasquale Tridico, President of the Inps (the national social security body), recently complained that, following notorious legal cases, there are no longer any workers declared in the Inps archives, either as employees, collaborators or hetero-organised workers. In fact, companies are declaring these workers as occasional workers who provide services for earnings of less than €5,000 in order to avoid social security

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Among the remedies and enforcement measures (Chapter V), there are those "ordinary" such as the right to redress (Art. 13), the protection against adverse treatment or consequences and dismissal (Artt. 17-18) and the procedural framework on controls and penalties (Art. 19). With regard to the latter provision, the fact that the Privacy Authority is entrusted with the task of coordinating supervisory activity and ensuring the application of the workers' rights enshrined in the Directive is perplexing. It seems quite clear that it would be more pertinent to attribute this coordinating role to labour authorities, such as the Ministry of Labour or the inspection bodies.[18]

A series of "tailor-made" provisions for platform work also stand out. Firstly, the possibility for representatives to initiate judicial and administrative proceedings to enforce the individual rights of workers (Art. 14). This provision enhances recent trade union practices of bringing the "qualifying issue" before the courts.[19] Taking the Italian case as an example, very often the need to protect platform workers has led national unions to use litigation as a tool of conflict against platforms. However, some courts have decided to reject the legitimacy to take legal action of trade unions representing the self-employed.[20] Article 14 attempts to remedy this critical issue by enshrining the right of representatives to take legal action on behalf of or in support of both employed and self-employed workers.

Secondly, platforms are required to create communication channels for workers, both employed and self-employed (Art. 15). On this point, the directive enhances the widespread trend that sees the trade union exploit the ability of the web to amplify the echo of the claims. In this area, more than in others, we are witnessing a "technological" evolution of the industrial relations model that involves the expansion of the practical instruments of collective action.[21] This trend represents the response to the process of dematerialization of the workplace – and to the difficulties of organizing collectively – strongly evident in platform work.[22]

charges. See the presentation of the President of the Inps at the Senate hearing on 30 March 2022. (https://www.inps.it/docallegatiNP/Mig/Allegati/Audizione_Presidente_Tridico_29-03-2022.pdf). In order to monitor the phenomenon, Ministerial Decree no. 31 of 23 February 2022 was issued, which defines the standards and rules for the telematic transmission of the communications due by principals (committenti) in case of work mediated by digital platforms. In detail, the principal of the self-employed work, including occasional work, must provide the communication by the 20th day of the month following the establishment of the employment relationship. This electronic communication obligation was introduced by Law Decree no. 152 of 6 November 2021, converted with amendments into Law no. 233 of 29 December 2021 (Article 27, paragraph 2 *decies*).

[18] On the same position, CNEL, *Audizione informale del CNEL nell'ambito dell'esame della "Proposta di direttiva del Parlamento Europeo e del Consiglio, relativa al miglioramento delle condizioni di lavoro nel lavoro mediante piattaforme digitali (COM (2021) 762/inaT)"*, XI Commissione (Lavoro pubblico e privato) della Camera dei deputati, 20 April 2022.

[19] Healy J., Pekarek A., *Work and wages in the gig economy: can there be a high road?*, in Wilkinson A., Barry M. (eds), *The Future of Work and Employment*, Elgar, 2020, 161; Unterschütz J., *Digital work – real bargaining: how can the sustainability of social dialogue be ensured in the digital era?*, in Kenner J., Florczak I., Otto M. (eds), *Precarious Work. The Challenge for Labour Law in Europe*, Elgar, 2019, 222-241.

[20] Gaudio G., *Algorithmic management, sindacato e tutela giurisdizionale*, in *Diritto delle Relazioni Industriali*, 1, 2022, 30-74.

[21] La Tegola O., *Il conflitto collettivo nell'era digitale*, in *Diritto delle Relazioni Industriali*, 3, 2020, 638 ff.

[22] Unterschütz J., *Come together now! New technologies and collective representation of platform workers*, in *Acta Universitatis Lodziensis*, *Folia Iuridica*, 95, 2021, 61-69.

Thirdly, the possibility for courts and competent authorities to order platforms to disclose relevant evidence, including confidential information on algorithms, is enshrined (Art. 16). This provision could have a decisive impact in court because digital platforms often refuse to make detailed information on how the algorithm works available to the court. It is true that States must ensure that the courts take effective measures to protect such information (Art. 16(2)). However, inevitably the provision establishes a sort of disclosure obligation for platforms that comes into tension with the protection of intellectual property and commercial secrets. On this point, the proposal is ambiguous. First it clarifies that "(d)igital labour platforms should not be required to disclose the detailed functioning of their automated monitoring and decision-making systems, including algorithms, or other detailed data that contains commercial secrets or is protected by intellectual property rights". However, the next statement admits that "the result of those considerations should not be a refusal to provide all the information required by this Directive".[23]

In addition, the provision limits the disclosure obligation only to proceedings concerning the correct determination of the employment situation (Art. 16(1)). The literal interpretation of the rule could hinder the extension of its effects beyond the judgment on contractual classification. This information is however decisive for assessing in court the existence of discrimination caused precisely by the functioning of the algorithm, without addressing the question of contractual qualification.[24]

Indeed, the anti-discrimination law (of EU derivation) makes possible to protect platform workers regardless of the type of contract.[25] Although there was no room to investigate, in a well-known Italian court case, the judge condemned a digital platform for indirect discrimination arguing that the "blindness" of automatic decision processing feeds the discriminatory potential.[26] This argumentative passage is in line with the case-law of the CJEU, according to which the lack of transparency of the decision-making mechanisms assumes evidential relevance.[27]

Yet, access to information even in court cases on discrimination could facilitate the ascertainment of discriminatory outputs caused by algorithmic functioning. One solution is the possibility for Member States to introduce rules in this regard that are more favourable to platform workers, including self-employed workers (Art. 16(3)).

[23] Recital 33, COM(2021) 762 final.

[24] On the issue of discrimination in platform work, Moore P.V., *The Mirror for (Artificial) Intelligence: In Whose Reflection?*, in *Comparative Labor Law & Policy Journal*, 41, 47, 2019, 47-68; Schubert C., Hütt M. T., *Economy-on-demand and the fairness of algorithms*, in *European Labour Law Journal*, 10, 1, 2019, 3-16; Kullmann M., nt. (7).

[25] Alessi C., *Lavoro tramite piattaforma e divieti di discriminazione nell'UE*, in Alessi C., Barbera M., Guaglianone L. (eds), *Impresa, lavoro e non lavoro nell'economia digitale*, Cacucci, 2019, 683-698.

[26] Order of the Court of Bologna, 31 December 2020. Barbera M., *Discriminazioni algoritmiche e forme di discriminazione*, in *Labor*, 7, 1, 2022, I.7 ff.; Santagata De Castro R., *Anti-discrimination Law in the Italian Courts: the new frontiers of the topic in the age of algorithms*, WP CSDLE "Massimo D'Antona".IT – 440/2021, 16 ff.; Perulli A., *La discriminazione algoritmica: brevi note introduttive a margine dell'Ordinanza del Tribunale di Bologna*, in *LavoroDirittiEuropa*, 1, 2021, 1-7; Pietrogiovanni V., *Deliveroo and Riders' Strikes: Discriminations in the Age of Algorithms,* in *International Labor Rights Case Law*, 7, 2021, 317-321; , Peruzzi M., *Il diritto antidiscriminatorio al test di intelligenza artificiale*, in *Labor*, 7, 1, 2021, I.48 ff.

[27] CJEU – Case, C-109/88, *Danfoss* [1989] ECLI:EU:C:1989:383; CJEU – Case 318/86, *Commission v. French Republic* [1988].

2.2. The certification of self-employment contracts: the discarded option to be "rescued".

From the overview of the measures just analysed, a series of provisions emerge aimed at facilitating controls and guaranteeing judicial and collective means of redress. Instead, concerning the implementation of the legal presumption, Article 4(1) provides that Member States be required to establish "a framework of measures, in accordance with their national legal and judicial systems". The legal presumption also applies in all relevant administrative and judicial proceedings. In addition, States must formulate guidelines for the competent authorities and strengthen controls and inspections on the ground (para. 3).

It seems that the provision focuses mainly on verifying the correct contractual classification through *ex post* implementation mechanisms, i.e., after the moment of establishment of the employment relationship (or the commercial relationship) depending on the type of contract chosen, if any. These refer to checks and inspections on the one hand, and recourse to the courts on the other: instruments of primary importance but which presuppose a certain capillarity and continuity (for the former) and discretionary activation by the employee (for the latter).

Unfortunately, there is no trace of the so-called "*ex ante*" verification instruments to ensure the correct contractual classification of the employment relationship, especially if it is self-employed. These could certainly include the certification of employment contracts, which is an administrative procedure in Article 4(1) logic.

Nevertheless, among the measures considered in the impact assessment, Option A2 envisaged introducing a combination of procedural and litigation prevention measures: reversal of the burden of proof, the procedure for the certification of contracts, and clarification of insurance and social protection for self-employed workers.[28]

In this package of measures, the institution of certification would be introduced to ensure the correct contractual qualification when establishing the employment relationship. In detail, a simplified out-of-court procedure would be set up within an independent body (labour authority; university), following the example of some national experiences. Furthermore, the certification would be applied to all contractual relationships related to the requesting platform and with the same organisational characteristics. Its validity would cease with the substantial modification of contractual conditions. Finally, in the event of an appeal against the certification act, the burden of proof would shift to the employee.

It is clear that this option, for which many digital platforms expressed a preference,[29] was based on the assumption that it would primarily protect the self-employed on the platform by limiting cases of contractual reclassification. Moreover, it should be emphasised that these measures were placed as alternatives to the legal presumption.

The usefulness of introducing certification in addition to the measures introduced in the directive proposal cannot be denied, given that the multifaceted nature of platform work

[28] European Commission, SWD(2021) 396 final/2, 21.
[29] *Ibid*, 23.

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does not recommend seeking a single regulatory solution.[30] If it were true that many digital platforms would quickly change their organisational model in order to escape contractual reclassification, the passage (especially mandatory) to certification bodies could represent a guarantee of the correct qualification of self-employed work relationships. This mechanism would offer at least a twofold advantage: on the one hand, it would prevent the legal presumption from inevitably leading to a "case-by-case" judicial review; on the other hand, it would guarantee the use of genuine self-employment.

3. The Italian model in a complex regulatory framework.

To minimise litigation especially in non-standard labour, the proposed suggestions are based on the Italian experience of the "Certification Commissions", which have long been a voluntary tool to assess and validate the correct contractual qualification of employment relationships.[31] Third parties and impartial parties are authorized to create and manage Commissions, including Universities and bilateral bodies set up by the social partners.[32]

Introduced in 2003,[33] the certification procedure aims to provide certainty on the correct action of the contractual parties in a context in which contractual types proliferate in order to satisfy the need for flexibility of companies.[34] The procedure has a "deflationary effect" of judicial disputes on the contractual classification, because it guarantees a preventive control on the contractual regularity through the evaluation activity of the Commissions. Certification Commissions are impartial and technically competent bodies.[35]

Originally designed to prevent litigation on certain atypical types of contracts,[36] the certification procedure was then extended to all contracts in which a work performance can be deducted, directly or indirectly.[37] Therefore, contracts of a commercial nature, such as procurement contracts, may also be subject to certification. This aspect is particularly relevant for the present analysis, because the certification of the "terms of use" of digital platforms that impact on work relationships could also be evaluated as possible.

[30] Del Frate M., *Lavoro digitale e certificazione dei contratti: l'iniziativa regolativa della Commissione europea*, in *Diritto delle Relazioni Industriali*, 4, 2021, 1221.
[31] On this, Sciotti R., *Considerazioni sulla rilevanza qualificatoria della certificazione dei contratti di lavoro*, WP C.S.D.L.E. "Massimo D'Antona".IT, - 2004/24; Avondola A., *Legge, Contratto e Certificazione nella qualificazione dei rapporti di lavoro*, Jovene Editore, 2013; Novella M., *Certificazione in materia di lavoro e tutela giurisdizionale*, in *Lavoro e diritto*, 2-3, 2014, 347-372; Ciucciovino S., *La certificazione dei contratti di lavoro: problemi e questioni aperte*, Giappichelli, 2014.
[32] Art. 76 d.lgs. n. 276/2003.
[33] D. lgs. n. 276/2003 (artt. 75 ff.). For further details, Ciucciovino S., *Voce Certificazione dei contratti di lavoro*, 2016, https://www.treccani.it/enciclopedia/certificazione-dei-contratti-di-lavoro_(Diritto-on-line)/.
[34] Asnaghi A., *La certificazione dei contratti di lavoro: un lungimirante regalo della visione modernista di Marco Biagi*, in *LavoroDirittiEuropa*, 1, 2019, 1-7.
[35] Art. 76, co. 1, d.lgs. n. 276/2003. The bodies authorized to set up and manage the Certification Commissions are: bilateral bodies; Territorial Directorates of Labour and Provinces; public and private Universities; General Direction for the Protection of Working Conditions of the Labour Ministry; Provincial Councils of the Order of Labour Consultants.
[36] Part-time contracts, intermittent and shared employment contracts, project contracts and joint venture contracts.
[37] Art. 30, Legge n. 183/2010.

The Commissions' activity is first substantiated in the recognition of the negotiating will of the parties, which assumes evidential value also in the judgment. Relying on the "collaborative participation" of the parties, the Commissions acquire information aimed at adopting the act of certification (declarations and meetings with the parties, documentation, etc.). Secondly, the Commissions verify the concrete correspondence of the chosen contract with the type required by law, ascertaining the conscious consent of the contractual parties. At the same time, the Commissions provide legal advice and assistance to the parties at the time of signing the contract and of any subsequent modification of the contract.[38] In this way, the Commissions support the parties to comply with the requirements and limits that the legal system imposes for the chosen type of contract.

The outcome of the procedure is constituted by the reasoned certification document that has the value of an administrative act to ascertain the qualification of relations between private individuals towards public authorities (Ministry of Labour, Revenue Agency, social security institutions). Therefore, the act of certification has binding effect on the contractual parties and third parties concerned, and can only be contested in court. However, the appeal to the court must necessarily be preceded by an attempt at conciliation facing the Commission which certified the contract. In addition, the appeal can only take place on three grounds: incorrect classification of the contract; non-compliance between the certified contract and its execution; defects in consent.[39]

The certification may have a retroactive effect and start from the beginning of the execution of the contract, if the Commission is able to verify the compliant execution starting from the beginning of the relationship.[40] However, it should be noted that the certification concerns the contract and not the verification of the execution of the work relationship. Ex-post controls remain among the tasks of public supervisory authorities and judicial bodies. Therefore, there is no risk of overlapping tasks. Nevertheless, legal certainty and contractual stability are guaranteed by the fact that public bodies are prohibited from exercising their typical powers over a certified contract.[41]

The Italian model was taken into consideration by the European Commission during the consultation phases for the adoption of the proposal, precisely because of its potential to prevent judicial litigation and to ensure compliance with the legal requirements.

In Italy, the certification procedure has taken on an increasingly important role in the face of the reforms that, in the last decade, have innovated the regulatory framework on employment relationships. The legislator has never explicitly refuted the subordination-autonomy dichotomy, but has in fact created a "quadripartition" of notions:[42]

[38] Art. 81, d.lgs. n. 276/2003.
[39] Art. 80, d.lgs. n. 276/2003.
[40] Art. 79, d.lgs. n. 276/2003.
[41] The object of the interdiction are the powers of ascertaining warning, notifications, social security and insurance recovery and the sanctioning powers.
[42] Vidiri G., *Art. 2 del d.lgs. n. 81/2015 e lavoro autonomo: verso un diritto del lavoro a formazione giurisprudenziale?*, in *Argomenti di diritto del lavoro*, 1, 2015, 1231.

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subordination,[43] self-employment[44] and, in the second area, continuous coordination[45] and hetero-organization.[46]

This theoretical structure has direct applicative repercussions on the certification of employment contracts, which becomes central above all in the search for the contractual classification of "non-pure" self-employed workers. The reference is primarily to the last two notions.

Firstly, the "coordinated and continuous collaboration" relationship is characterized by three elements: the continuity of the relationship, the coordination between the client and the worker and the predominantly personal character of the work activity.[47] In essence, it is a sub-type of self-employment, but it differs from it because the pure self-employed worker has the exclusive obligation to respect the contractual conditions and to proceed "by the book" (art. 2224 c.c.), without any coordination constraint.[48] Recently, the legislator has dissolved some doubts about the distinctive elements of coordinated and continuous collaboration, enhancing the organizational autonomy of the worker.[49] However, interpretation differences on "coordination" between the worker and the client still remain.[50]

3.1. Hetero-organized work at the test of certification.

Even more heated is the debate on hetero-organized work, introduced above all to protect riders. It is important to point out that this is self-employment, but the protective institutions of subordination status (selectively) apply to it. In summary, hetero-organized work takes the form of mainly personal and continuous work performances and whose modalities of execution are organized by the client (as a platform). The rules provide that the parties can

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[43] Art. 2094 c.c.
[44] Art. 2222 c.c.
[45] Art. 409, n. 3, c.p.c.
[46] Art. 2, d.lgs. n. 81/2015, as amended by Legge n. 128/2019.
[47] Santoro Passarelli G., *I rapporti di collaborazione coordinata e continuativa. Una fattispecie in via di trasformazione?*, Jovene, 2015, 2.
[48] D'Ascola S., *La collaborazione organizzata cinque anni dopo*, in *Lavoro e diritto*, 1, 2020, 4; Pessi M., *Ancora sul concetto di coordinamento*, in *Rivista Italiana di Diritto del Lavoro*, 3, 2020, 337 ff.
[49] Art 15, Legge n. 81/2017. On the topic, Santoro Passarelli G., *Civiltà giuridica e trasformazioni sociali nel diritto del lavoro*, in *Diritto delle Relazioni Industriali*, 2, 2019, 425-427; Perulli A., *Il Jobs Act del lavoro autonomo e agile: come cambiano i concetti di subordinazione e autonomia nel diritto del lavoro,* WP CSDLE "Massimo D'Antona".IT, n. 341/2017, 16 ff.; Ferraro F., *Riflessioni sul coordinamento* ex *art. 409 n. 3 c.p.c.*, in *Rivista Italiana di Diritto del Lavoro*, 4, 2020, 543 ff; Razzolini O., *I confini tra subordinazione, collaborazioni etero-organizzate e lavoro autonomo coordinato: una rilettura*, in *Diritto delle Relazioni Industriali*, 2, 2020, 345-380., Marazza M., *In difesa del lavoro autonomo (dopo la legge n. 128 del 2019)*, in *Rivista Italiana di Diritto del Lavoro*, 1, 2020, 61 ff.; Pisani C., *La nozione legale di coordinamento introdotta dall'articolo 15 della legge n. 81/2017*, in *Diritto delle Relazioni Industriali*, 3, 2018, 823 ff. Before the reform intervention, part of the doctrine already believed that these collaborations were characterized by a rigorous organizational autonomy. Cfr. Perulli A., *Il lavoro autonomo, le collaborazioni coordinate e le prestazioni organizzate dal committente*, WP CSDLE "Massimo D'Antona".IT, n. 272/2015, 43. The "coordination" is therefore expressed through the agreement between the parties. On this point, Nogler L., *Ancora su "tipo" e rapporto di lavoro subordinato nell'impresa*, in *Argomenti di diritto del lavoro*, 1, 2002, 128-129.
[50] *Ex multis*, Ferraro F., *ibid*, 543 ff., considers that it is difficult to distinguish clearly between the employer's instructions and the coordination between the client and the "collaborator". *Contra*, Zoppoli A., *Le collaborazioni eterorganizzate tra antiche questioni, vincoli di sistema e potenzialità*, in *Diritto delle Relazioni Industriali*, 3, 2020, 727 ff.

activate the certification procedure to attest the absence of the hetero-organized work's requirements.[51]

To be honest, Italian literature is still strongly divided on two interpretative fronts: on the one hand, there are those who place hetero-organized work in the area of self-employment and those who, on the contrary, consider it in the ground of subordination relationship.[52] Rarely, hetero-organized work was even considered a *tertium genus*.[53]

Proponents of subordination claim that a broadening of the "subordination" notion, beyond the concept of hetero-direction, has been accomplished. The hetero-organization would indeed demonstrate the employment relationship, given that the managerial power of the employer represents the overall organization of the work performance.[54] Art. 2, d.lgs. no. 81/2015, as reformed in 2019, would therefore specify the most modern definition of subordination, introducing a presumption of subordination[55] or an "apparent rule" that contains a specification of the subordination indices:[56] it would be a "soft" subordination (i.e. subordinazione attenuata) on the basis of the jurisprudential evolution.[57]

On the contrary, those who support the thesis of self-employment point out that the legislative provision does not contain any defining and systematic element that implements a typological modification of the subordination relationship (art. 2094 c.c.). Hetero-organized worker does not undergo the managerial power of the employer ("intrinsic" power related to the work performance), but a less pervasive faculty of the client to organize the work performance to make it compatible with the productive factors of the enterprise ("extrinsic" factor related to this work performance).[58] In other words, this "functional adaptation" cannot configure the hierarchical power of the employer (art. 2086 c.c.).[59]

Ultimately, the *ratio* followed by the legislator was to discern a particular type of so-called "parasubordinate work" that expresses a greater need for protection, extending the

[51] Art. 2, co. 3, d.lgs. n. 15/2015.
[52] For a reconstruction of the debate, D'Ascola S., *La collaborazione organizzata cinque anni dopo*, in *Lavoro e diritto*, 1, 2020, 11 ff.
[53] Carabelli U., Spinelli C., *La Corte d'appello di Torino ribalta il verdetto di primo grado: i riders sono collaboratori etero-organizzati*, in *Rivista giuridica del lavoro e della previdenza sociale*, 1, 2019, 91 ff.
[54] Razzolini O., *La nuova disciplina delle collaborazioni organizzate dal committente. Prime considerazioni*, WP CSDLE "Massimo D'Antona".IT, n. 266, 2015, 2 ff.; Treu T., *In tema di Jobs Act. Il riordino dei tipi contrattuali*, in *Giornale di diritto del lavoro e di relazioni industriali*, 146, 2015, 155 ff.
[55] Tiraboschi M., *Il lavoro etero-organizzato*, in *Diritto delle Relazioni Industriali*, 4, 2015, 978-987; Nuzzo V., *I confini delle tutele lavoristiche, oggi*, in *Costituzionalismo.it*, 1, 2020, 73-118; Nogler L., *La subordinazione nel d.lgs. n. 81 del 2015: alla ricerca dell'autorità del punto di vista giuridico*, in WP CSDLE "Massimo D'Antona".IT, 267, 2015, 16; Persiani M., *Note sulla disciplina di alcune collaborazioni coordinate*, in *Argomenti di diritto del lavoro*, 6, 2015, 1260. Cfr. Ferraro G., *Collaborazioni organizzate dal committente*, in *Rivista italiana di diritto del lavoro*, 1, 2016, 53 ff.
[56] Tosi P., *L'art. 2, comma 1, d.lgs. n. 81/2015: una norma apparente?*, in *Argomenti di diritto del lavoro*, 6, 2015, 1130.
[57] Santoro Passarelli G., *I rapporti di collaborazione organizzati dal committente e le collaborazioni continuative e coordinate ex art. 409 n. 3 c.p.c.*, WP CSDLE "Massimo D'Antona".IT, n. 278/2015, 16.
[58] Perulli A., nt. (49), 26 ff.
[59] Maresca A., *Brevi cenni sulle collaborazioni eterorganizzate*, in *Rivista italiana di diritto del lavoro*, 1, 2020, 73 ff. Similmente, Zoppoli A., nt. (50), 709.

protective apparatus of employment status:[60] it is rather "soft" autonomy (autonomia attenuata).[61]

At the jurisprudential level, the interpretative intervention of the Court of Cassation in support of the self-employment thesis was decisive.[62] Anyway, despite adopting different interpretations on the nature of hetero-organized work, many rulings have recognized platform workers as hetero-organized workers.[63]

At the national level, strong contrasts on the correct contractual qualification of platform workers persist.[64] These ambiguities are based first of all on the controversial interpretation of hetero-organized work, but also on the need to reinterpret the subordination indices to adapt the concepts of dependence to social reality and new organizational business models.[65] On the basis of this assumption, other courts have recognised the existence of an employment relationship between the riders and the digital platforms.[66]

Now, it is not easy to predict how the relative presumption and the indices of subordination, introduced by the EU proposal, will fit into this tangle of interpretation. As anticipated, it is possible that these instruments will push for a broad interpretation of the Italian notion of subordination or will have little effect because, *de facto*, these indices are assimilated within hetero-organized work, a "gateway" to the protection system of the subordination status.[67]

But in light of the complex Italian framework, it is clear that the certification procedure can play a central role in the search for the correct contractual classification of platform workers. As anticipated, it is precisely for this reason that the legislator has established the possibility for platforms to resort to certification commissions, in order to ascertain the lack of the requirements of hetero-organized work in favour of other forms of self-employment.

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[60] Magnani M., *Autonomia, subordinazione, coordinazione nel d.lgs. n. 81/2015*, WP CSDLE "Massimo D'Antona".IT, n. 294, 2016, 10 ff.

[61] Ciucciovino S., *Le "collaborazioni organizzate dal committente" nel confine tra autonomia e subordinazione*, in *Rivista Italiana di Diritto del Lavoro*, 3, 2016, 321-343.

[62] Cass. 24 gennaio 2020, n. 1663 in *Diritto delle Relazioni Industriali*, 1, 2020 con nota di Maresca A.

[63] *Ex multis*, Trib. Torino 7 maggio 2018, n. 778, in *Diritto delle Relazioni Industriali*, 4, 2018, with note by Ferrante V.; Trib. Milano 10 settembre 2018, n. 1853, in *Labor*, 2019, with note by Forlivesi M., App. Torino 4 febbraio 2019, n. 26, in *LavoroDirittiEuropa*, 1, 2019, with note by De Luca Tamajo R., and in *Diritto delle Relazioni Industriali*, 3, 2019, with note by Del Frate M.; Trib. Bologna 24 febbraio 2022, n. 111. In addition to riders, about call center outbound, Trib. Roma, 6 maggio 2019, n. 4243 in *Rivista giuridica del lavoro e della previdenza sociale*, 2, 2020 with note by Giovannone M.

[64] Tra tutti, Cordella C., *Il lavoro dei rider: fenomenologia, inquadramento giuridico e diritti sindacali*, WP C.S.D.L.E. "Massimo D'Antona".IT, n. 441, 2021, 1-37; De Marco C., Garilli A., *L'enigma qualificatorio dei riders. Un incontro ravvicinato tra dottrina e giurisprudenza*, WP C.S.D.L.E. "Massimo D'Antona".IT, n. 435, 2021, 1-30; Pilati A., *Le collaborazioni organizzate dal committente e le incertezze della giurisprudenza sul lavoro tramite piattaforma*, in *Labour & Law Issues*, 7, 2, 2021, 55-80; Santoro Passarelli G., *Sui lavoratori che operano mediante piattaforme anche digitali, sui riders e il ragionevole equilibrio della Cassazione 1663/2020*, WP C.S.D.L.E. "Massimo D'Antona".IT, n. 411, 2020, pp. 1-10; Perulli A., *Il diritto del lavoro "oltre la subordinazione": le collaborazioni etero-organizzate e le tutele minime per i riders autonomi*, WP C.S.D.L.E. "Massimo D'Antona".IT, n. 410, 2020, 1-73. *See* also the entire Extraordinary Issue of *Massimario di giurisprudenza del lavoro*, 2020.

[65] Re-proposing the reasoning of Trib. Palermo, 24 novembre 2020, n. 3570, in *Diritto delle Relazioni Industriali*, 1, 2021, with note by Ferrante V.

[66] *Ibid.*; recently, Trib. Milano 20 aprile 2022, n. 1018.

[67] Tosi P., *Riflessioni brevi sulla Proposta di Direttiva del Parlamento Europeo e del Consiglio relativa al miglioramento delle condizioni di lavoro nel lavoro mediante piattaforme digitali*, in *LavoroDirittiEuropa*, 1, 2022, 5; Ponterio C., nt. (11), 8-9.

Furthermore, the Commission verifies also compliance with art. 2222 c.c. (pure self-employment) and art. 409 c.p.c. n. 3 (coordinated and continuous collaboration relationship).

4. The (multifaceted) potential of certification procedures in platform work.

However, the use of certification procedures remains a faculty. It is probably for this reason that the activity of the Certification Commissions has not yet managed to attract digital platforms. Effectively, these workers are usually hired with occasional assignments or they are even irregular and without a contract.[68] On the other hand, the certification activity is particularly intense on multiple contractual areas (e.g. self-employment, coordinated and continuous collaborations, agency contracts, organic and corporate relationships, etc.). It is therefore clear that the imposition of an EU obligation to use the certification procedure could force companies – which choose to use contractual relationships other than subordination – to submit to the technical and impartial assessment of a certifying body. Where they exist, these bodies enjoy a high level of expertise and a long experience in discerning the correct contractual qualification of atypical workers. Certification is also a rapid administrative tool, with a manifest deflationary purpose, which reduces the legal uncertainties and the time (and costs) of judicial litigation. But that's not all. In fact, the Commissions could play a fundamental role in several respects, and not only on that of the contractual qualification which has been evaluated by the European Commission.

First, as usual, these bodies could verify that the contents of the contract comply with the *nomen juris* chosen by the platform. As anticipated, in the Italian legal system, the criteria for subordination listed in the EU proposal are compatible with hetero-organized work, in the area of self-employment. Those criteria do not refer only to the employer's managerial power, which is the essential characteristic of employment relationships. Rather, many criteria are compatible with the client's possibility to organize the worker's performance to make it fungible with the factors of production and the results of the enterprise, as provided for hetero-organized work.[69] Clear examples are the rules on external appearance (Article 4(2)(b)), the verification of the quality of results (Article 4(2)(c)) or the restriction of the freedom to organise working time (Article 4(2)(d)). To tell the truth, the criteria go even beyond the concept of hetero-organization, referring to the condition of "economic dependence" of the worker on the platform.

In particular, the limitation placed on the possibility of building a client base or performing other work (Article 4(2)(e)) weighs heavily. It is for this reason that the first commentators already consider hetero-organized work as a "preventive conformation" to the proposal for a directive.[70] In fact, hetero-organization allows access to (most of) the protections of subordination, ensuring a high level of protection of workers. It will be up to the national legislature to take a position when transposing the directive.

[68] *See* nt. (17).
[69] Perulli A., nt. (49), 28. The same A., *Il diritto del lavoro "oltre la subordinazione": le collaborazioni etero-organizzate e le tutele minime per i riders autonomi*, WP CSDLE "Massimo D'Antona".IT – 410/2020, pp. 1-73.
[70] Tosi P., nt. (67).

However, it should not be underestimated that these indices refer to subordinate work, pushing the Italian legal system to a broad interpretation of the concept of subordination. Given that these are elastic indices, referring to all aspects of the work relationship, and that "two out of five" are enough to recognize subordination, proof to the contrary for platforms would become almost impossible.

For this reason, acting preventively by resorting to the certification procedure can limit the risks of reclassification of those work relationships, of an autonomous nature, truly hetero-organized. As mentioned, it is possible to activate the certification procedure to ascertain the absence of the requirements of hetero-organized work.[71] In practical terms, the Certification Commissions must ascertain the absence of hetero-direction, i.e. the managerial, control and disciplinary powers of the client that demonstrate the bond of subordination. Once the autonomous nature of the employment relationship has been ascertained (art. 2222 of the Italian Civil Code), the Commissions exclude, or not, the absence of the client's hetero-organization powers, with reference first of all (but not only) to the times and places of the service. Therefore, if the absence of hetero-organization is found, the work relationship is qualified as subordinate. Otherwise, the relationship is classified as hetero-organized. This is an apparently *negative* certification, but which nevertheless results in the qualification of the work contract on the basis of the elements characterizing the contractual type.[72]

It should not be forgotten that the Certification Commissions also verify the existence of the coordinated and continuous collaboration relationship.[73] In this case, the verification focuses on the methods of coordination between the parties, which must be mutually agreed.[74] In fact, in the Italian context, in some cases the platforms have decided to adopt this type of contract, always in the area of self-employment.[75]

Second, certification could be extended to the clauses of commercial contracts or to the "terms of use" unilaterally imposed by platforms, especially where it is company practice not to conclude employment contracts with "providers" (e.g., crowd workers).[76] Moreover, in this hypothesis, the certification of "terms of use" would make it possible to obviate the material difficulties of certifying discontinuous and very short-term contracts, indirectly protecting the large number of workers who, over time, will be bound by those terms. In fact, the certification activity can concern any contract, including commercial ones, in which a work performance is deduced, even indirectly (for example, procurement and subcontracting contracts).[77]

[71] Art. 2, co. 3, d.lgs. n. 15/2015.
[72] Ciucciovino S., nt. (33).
[73] Cfr. *supra* § 3.
[74] Art. 2, co. 1, d. lgs. n. 81/2015; art. 409 n. 3) cod. proc. civ.
[75] According to a survey by Inapp (the national institute for the analysis of public policies), 20% of platform workers declare that the work relationship is qualified as a coordinated and continuous collaboration. Cfr. De Minicis M., Marocco M., nt. (4).
[76] Mangan D., *Delivering on the Binary Divide*, in *European Labour Law Journal*, 12, 2, 2021, 232 ff., stressed the need to strengthen contractual protection mechanisms for self-employed workers in a clearly weak position vis-à-vis counterparts who unilaterally impose contractual terms.
[77] Art. 75, d.lgs. n. 276/2003.

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Third, during the preparatory phase, the Commission should assess the functioning of algorithmic management and its compatibility with the chosen type of contract, providing itself with highly qualified professionals.[78] Finally, the broad scope of the certification procedure would also make it possible to enhance the assistance and consultancy phase that precedes the conclusion of contracts, to support platforms and workers in identifying the authentic contractual will.

Recourse to certification could thus fulfil its deflective function by ascertaining the compatibility of the algorithmic management model with the contractual models. On this point, it should be noted that certification does not prevent the judge from reviewing the certification measure. However, it should be mentioned that the parties must make a preliminary attempt at conciliation before the Commission and, at the trial, the judge must abide by the parties' statements during the certification, which could make up valuable evidential material on the contractual qualification.[79]

On this reading, alongside the instruments introduced to protect platform-based employees, certification procedures appear to be a useful enforcement mechanism to protect genuine self-employed workers who, among other things, make up the majority of platform-based workers according to the European Commission.[80] In this context, another purpose of contract certification is even more corroborated, namely to provide certainty in the relationships between companies and public administrations regarding tax and contribution controls.[81]

5. Conclusion.

By reintroducing the opposition between employed and self-employed work, the directive proposal introduced several instruments to combat bogus self-employment.

However, it will be necessary to understand to what extent the legal presumption and the less rigid interpretation of "dependence", suggested by the new subordination indices, will make it possible to absorb into employment those working activities that currently fall under the classification of self-employment and the intermediate categories introduced in national legislation.[82]

The fact remains that the Commission's aim of ensuring legal certainty within the established subordination/autonomy dichotomy requires a pragmatic approach to ensure the correct contractual qualification pursued by Chapter II of the proposal. Strengthening and coordination of enforcement instruments are therefore essential to ensure that the legal presumption has the effect of reclassifying falsely autonomous employment relationships.

[78] Also of this opinion Aniballi V., *Il lavoro organizzato mediante piattaforma digitale: nuove sfide per le Commissioni di certificazione*, in *Diritto delle Relazioni Industriali*, 4, 2019, 1075 ff.; Benincasa G., *Ai confini tra autonomia e subordinazione: la qualificazione del rapporto di lavoro*, note to Trib. Bologna 20 ottobre 2020, in *Diritto delle Relazioni Industriali*, 4, 2020, 1141-1147.

[79] Aniballi V., *ibid.*; Rausei P., *La certificazione dei contratti di lavoro*, in *Diritto e pratica del lavoro*, 2020, 34-35.

[80] European Commission, COM(2021) 761 final, 5.

[81] Nogler L., *La certificazione dei contratti di lavoro*, in *Quaderni di diritto del lavoro e delle relazioni industriali*, 2004, 15 ff.

[82] Bronzini G., nt. (2).

Nonetheless, the affirmation of the Commission according to which "genuine self-employed people working through platforms will indirectly benefit from more autonomy and independence, as a result of digital labour platforms adapting their practices to avoid any risk of reclassification"[83] appears unfoundedly optimistic. On the contrary, in these moments of organisational model transitions, there is a risk that digital platforms devise more sophisticated mechanisms to conceal the use of bogus self-employment.[84]

However, we cannot blindly oppose the *tout court* use of self-employment within the new organizational models that inevitably push in this direction. It is one thing to think that self-employment needs greater protection, and it is now clear that we should move in this direction regardless of the dichotomous approach;[85] it is another thing to hinder recourse to self-employment through the continuous forcing of contractual schemes aimed at *a priori* "pigeonholing" the platform workers, notoriously a "moving target" difficult to place in the narrow dichotomous dialectic.[86]

For this reason, within the "framework of measures"[87] to be adopted by Member States to assess the existence of the rebuttable presumption, enforcement instruments with a preventive and deflationary purpose, such as certification procedures could therefore be included to ensure the proper use of genuine self-employment. The certification procedure has in fact become for the parties a moment of information and awareness on reciprocal rights and obligations, in order to combine the legal logic with the productive-organizational ones.[88] In this sense, it is a suitable tool to address the real and current dynamics of the labour market,[89] which rigid regulatory logics can hardly manage.

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[83] European Commission, COM(2021) 762 final, 3.

[84] ETUC has highlighted how digital platforms are already changing their contractual models in an "attractive" way, but always in the context of self-employment, to avoid contractual requalification. Cfr. ETUC, *Platforms trying to trick workers out of rights*, Press release, 11 May 2022.

[85] Perulli A., Treu T., *"In tutte le sue forme e applicazioni": per un nuovo Statuto del lavoro* (forthcoming).

[86] Garben S., *Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU*, European Risk Observatory Discussion paper, 2017, 14.

[87] Art. 4., par. 1, *Ibid.*

[88] Tiraboschi M., *La c.d. certificazione dei lavori "atipici" e la sua tenuta giudiziaria*, in *Lavoro e Diritto*, 1, 2003, 101-126.

[89] Zampini G., *La certificazione volontaria dei contratti di lavoro: la parabola di una riforma*, in *Massimario di giurisprudenza del lavoro*, 1, 2020, 238.

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