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„ Addressing platform worker misclassification: state of the art and developments in the EU and in the US “

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Abstract

Recent significant developments in the ICT sector have accelerated the spread of the so-called digital labour platforms. On the one hand these tools represent an important source of opportunities both for businesses and workers, but on the other hand, they can give rise to several challenges for workers, due to the specificities of platform work. Amongst these challenges, the one concerning the employment status of people working through such platforms is probably the most problematic. Indeed, it is not uncommon for businesses to classify those people as self-employed, whilst, in fact, they are employees, thus depriving platform workers of a series of rights to which they should be entitled. This issue, which has been addressed by several international institutions ranging from the International Labour Organisation to the Organisation for Economic Co-operation and Development, is at the core of public debate both in the European Union and in the United States where national courts are facing an increasing number of lawsuits asking for a more accurate classification of platform workers. In the light of the above, the purpose of this work is therefore threefold, aiming at: a) understanding and framing the problem of platform workers misclassification globally and with a specific focus on the EU and the US, b) systematizing the solutions introduced or proposed by the EU, its Member States and the US to eliminate or limit the effects of misclassification, c) observing how platforms workers can enforce their rights and claim their actual employment status in the context of US and EU courts.

Deutscher Abstract

Jüngste bedeutende Entwicklungen der IKT-Branche haben die Verbreitung digitaler Arbeitsplattformen beschleunigt. Diese Instrumente bieten Unternehmen und Arbeitnehmern einerseits vielfältige Chancen, können andererseits aber aufgrund der spezifischen Merkmale der Plattformarbeit zu verschiedenen Herausforderungen für Arbeitnehmer führen. Die vermutlich kritischste dieser Herausforderungen ist die Bestimmung des Beschäftigungsstatus solcher Plattformarbeiter. Nicht selten stufen Unternehmen diese Personen als Selbstständige ein, obwohl sie in Wirklichkeit Arbeitnehmer sind, wodurch ihnen Rechte vorenthalten werden, auf die sie eigentlich Anspruch haben sollten. Mehrere internationale Institutionen, darunter die Internationale Arbeitsorganisation und die Organisation für wirtschaftliche Zusammenarbeit und Entwicklung, haben sich bereits mit dieser Problematik befasst, die auch im Mittelpunkt einer öffentlichen Debatte in der Europäischen Union und in den Vereinigten Staaten steht, wo nationale Gerichte mit einer zunehmenden Zahl von Klagen konfrontiert sind, die eine genauere Einstufung von Plattformarbeitern fordern. Vor diesem Hintergrund verfolgt diese Arbeit drei Ziele: Erstens das Problem der falschen Klassifizierung von Plattformarbeitern weltweit und mit besonderem Augenmerk auf die EU und die USA zu verstehen und zu umreißen, zweitens die von der EU, ihren Mitgliedstaaten und den USA eingeführten oder vorgeschlagenen Lösungen zur Beseitigung oder Begrenzung der Auswirkungen einer falschen Klassifizierung zu systematisieren und drittens zu beobachten, wie Plattformarbeiter ihre Rechte durchsetzen und ihren tatsächlichen Beschäftigungsstatus vor Gerichten der USA und der EU einfordern können.

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Abbreviations

AB5	California Assembly Bill 5
ADEA	Age Discrimination in Employment Act
CAL. LAB. CODE	California Labor Code
CAL. UNEMP. INS. CODE	California Unemployment Insurance Code
Cass. Civ.	Cassazione Civile
CEEP	Centre Européen des Entreprises Publiques
CEO	Chief Executive Officer
CJEU	Court of Justice of the European Union
COM	Communication
COVID-19	Coronavirus Disease 2019
DLPs	Digital Labour Platforms
EC	European Commission
EEC	European Economic Community
ETUC	European Trade Union Confederation
ETUI	European Trade Union Institute
EU	European Union
FLSA	Fair Labor Standards Act
FMLA	Family and Medical Leave Act
FUTA	Federal Unemployment Tax Act
GDP	Gross domestic product
GPS	Global Positioning System
ICT	Information and Communications Technology
ILO	International Labour Organization
INC.	Incorporated
IRES	Institut de Recherches Economiques et Sociales
IRS	Internal Revenue Service
MN	Minnesota
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
OECD	Organization for Economic Co-operation and Development
PRO	Protecting the Right to Organize
Prop 22	Proposition 22
SEZ.	Sezione
STS	Sentencia del Tribunal Supremo
SWD	Staff working document
TFEU	Treaty on the Functioning of the European Union
U.S.C.	United States Code
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
UNICE	Union des confédérations de l'industrie et des employeurs d'Europe
US	United States
US$	United States dollar

Introduction

In the past few years, the world has been witnessing a rapid and significant growth of the so called digital (or online) platforms. These tools, which permit the interaction between users via the Internet, are having an incredible impact on the global economy and are reshaping the rules of the labour market. Particularly relevant in the latter regard are the so called "digital labour platforms", platforms which intermediate on-demand services requested by customers and provided by individuals.[1]

Whilst those platforms are certainly contributing to the growth of many economies and to the improvement of services provided to customers, on the other hand they are triggering a series of issues related to the rights and conditions of individuals providing services via these platforms. Amongst these, one in particular is drawing the attention of scholars, courts and international organisations: the misclassification of platform workers. Indeed, all platform workers have to be classified according to the categories of workers existing in the applicable legal system. Typically, two categories of workers exist: that of employees and that of self-employed workers.

When it comes to individuals providing services via platforms, companies usually classify them as individual contractors (a subcategory of self-employed workers). This classification however may not always be correct, due to the blurred line between the two categories and the unclear legal frameworks applicable to platform workers. As a result, in recent years more and more platform workers have been challenging their employment status in courts requesting to be re-classified as employees, so that they can have access to all the rights and protections related to such status. Indeed, as it will be addressed throughout the dissertation, in most of the legal systems, self-employed workers are granted less rights and protections (for instance in terms of minimum wages, paid leaves, unemployment compensation, etc.) than employees.

In the light of the increasing amount of litigation on the classification of platform workers registered all over the word, this work has the intent to outline the state of the art, across the EU and the US, of the attempts to address platform worker misclassification both in legislations and in courts.

For this purpose, the work has been divided into three chapters.

[1] European Commission, *Commission Staff Working Document* SWD(2021) 143 final of 15.6.2021

The first chapter will provide the readers with introductory information on the digital economy and on digital labour platforms with a particular focus on global data. A specific section will be dedicated to the notion of the employment relationship, particularly relevant for understating the concept of misclassification which will also be addressed in Chapter I, in addition to highlighting other challenges related to platform work.

Chapter II will be devoted to the European Union and its Member States, to data related to platforms and platform workers operating therein, to the consequences that misclassification may have in those areas and in particular to the legally or non-legally binding frameworks developed in order to guarantee platform workers a set of adequate social and labour rights even in the event they are misclassified or in order to clarify the status of those workers. Furthermore, a specific section will be dedicated to case law concerning the reclassification of platform workers as employees across the European Union.

In Chapter III, the focus will be on the United States (US), starting with an overview of platforms and platform workers operating therein, before moving to an overview of the state of misclassification in the US. Afterwards, a considerable part of the chapter will address the notion of 'employee' in the US legal system taking into consideration three major tests used by judges to assess the status of workers in courts: the common law agency test, the economic reality test and the ABC test. Particular attention will be paid to the latter, due to its simplicity and its recent success in California, home of a substantial number of digital labour platforms. In this regard we will consider the case which launched the application of such test, its codification by California's legislator, the oppositions that such a decision encountered on the part of platforms and their proposed alternative of establishing a third category of workers. Finally, we will conclude the chapter with a comparison between US practices and the proposal for a directive on platform work recently developed by the European Commission.

Chapter I: Digital labour platforms and the challenge of worker misclassification

1.1 Developments in digital economy

Since early 1990s, when the information and communications technology (ICT) revolution started, the world has been continuously facing a rapid diffusion of the Internet which had an impact on multiple, almost all, economic sectors and which affected, although at different paces, all countries all over the world.[2]

From the early 2000s, then, a rapid development of digital infrastructure enabled the use of the internet and ICT tools to become widespread amongst both businesses and individuals.[3] These developments, accompanied by a more recent expansion of big data analytics, the emergence of artificial intelligences and the increasing availability of cloud infrastructure and computing services, eventually paved the way for the rise of the so called "digital economy".[4]

This term is commonly used to describe the changes that digital technology is bringing about in the fields of production and consumption. However, a widely accepted definition of the term is missing, due to the fact that the process of digitalisation is relatively at an early stage and still ongoing.[5] Nonetheless, the Organisation for Economic Co-operation and Development (OECD), in the context of the G20 Digital Economy Task Force meeting held in Saudi Arabia in 2020, proposed the following definition: «The Digital Economy incorporates all economic activity reliant on, or significantly enhanced by the use of digital inputs, including digital technologies, digital infrastructure, digital services and data. It refers to all producers and consumers, including government, that are utilising these digital inputs in their economic activities.»[6]

One of the key drivers of the digital economy is represented by the development and growth of new business models, notably digital platforms.

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[2] International Labour Organization, *World Employment and Social Outlook 2021: The role of digital labour platforms in transforming the world of work*, International Labour Office, Geneva, 2021 | UNCTAD, *Digital Economy Report 2019: Value Creation and Capture: Implications for Developing Countries*, New York: United nations Publications, 2019

[3] International Labour Organisation (2021), op. cit.

[4] International Labour Organisation (2021), op. cit. | UNCTAD, op. cit.

[5] UNCTAD, op. cit.

[6] OECD, *A roadmap toward a common framework for measuring the digital economy. Report for the G20 Digital Economy Task Force*, Saudi Arabia, 2020, p.5

The latter (also called "online platforms") have been defined by the OECD as «digital services that facilitate interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the Internet. »[7] The United Nations Conference on Trade and Development explains that the term platform as such refers to mechanisms which enable a set of parties to interact and that digital platforms provide these mechanisms but online.[8] Furthermore, it adds that digital platforms play the role of intermediaries and/or infrastructures: in the first case they connect different groups of people whilst in the second they function as infrastructures that different users can build upon.[9]

1.2 Digital labour platforms

According to the International Labour Organisation (ILO)[10], digital platforms can be classified into three categories: a) platforms offering digital services or products to individuals, b) platforms that facilitate and mediate between different users and c) digital labour platforms.[11]

The term "digital labour platform" (DLP) «refers to a private internet-based company which intermediates with a greater or lesser extent of supervision on-demand services, requested by individual or corporate customers and provided directly or indirectly by individuals, regardless of whether such services are performed on-location or online.»[12]

As this definition suggests, the services offered through digital labour platforms may be performed either online or on location.

We can therefore make a distinction between online web-based platforms (commonly referred to as crowdwork) and locally based labour platforms.[13]

As the ILO pointed out, «crowdwork is work that is executed through online platforms that connect organizations, businesses and individuals through the internet, potentially on a global

[7] OECD, *An Introduction to Online Platforms and Their Role in the Digital Transformation*, OECD Publishing, Paris, 2019 https://doi.org/10.1787/53e5f593-en
[8] UNCTAD, op. cit.
[9] Ibid
[10] International Labour Organization (2021), op. cit.
[11] Furthermore, some platforms can be seen as "hybrid", providing services across more than one category
[12] European Commission, SWD(2021) 143 final, *Commission Staff Working Document. Analytical Document. Accompanying the Document "Consultation document: Second phase consultation of social partners under Article 154 TFEU on a possible action addressing the challenges related to working conditions in platform work"*, Brussels, 15.6.2021.
[13] J. Berg et al., *Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World*, Geneva: International Labour Office, 2018

basis»[14] and crowdwork platforms are the digital services that facilitate crowdsourcing, that is to say the act of outsourcing work from the public at large ("the crowd").[15]

Tasks performed on crowdwork (or web-based) platforms are diverse and can range from "microtasks" (small, mainly clerical tasks, that can be completed remotely, including for instance, translation, transcription and annotation; image identification content moderation; audio and video transcription; data collection and processing) to bigger tasks such as the creation of a logo, the development of a website, the creation of a logo or of a marketing campaign.[16]

In location-based platforms, instead, traditional working activities such as transport, cleaning, care provision and delivery, as well as forms of clerical work and services performed by plumbers or electricians are offered and assigned via mobile apps, but, contrary to what happens in crowdwork platforms, those activities are executed locally.[17]

Both these types of platforms are of incredible importance for the growth of digital economy and are certainly reshaping the workplace thanks to the opportunities they provide to both workers and businesses.[18]

Businesses, for instance, benefit from the possibility of accessing workers and sourcing talent globally thus allowing them to reduce costs and improve productivity. In this regard, for instance, the OECD showed that 90% of crowdwork is commissioned by developed countries, but 80% of the work is performed in emerging economies.[19] Furthermore, through platforms, businesses can access to a wider market and a broader customer base.[20]

Workers, on the other hand, are provided with new income-generating opportunities and flexible work arrangements. These advantages can be particularly beneficial to specific categories of workers such as women, person with disabilities, young people and migrants which are usually more exposed to difficulties in entering the labour market or have specific

[14] International Labour Organization, *Non-standard employment around the world: Understanding challenges, shaping prospects*, Geneva: International Labour Office, 2016, p. 40
[15] J. Berg et al., *op. cit.*
[16] Ibid | International Labour Organisation (2016), op. cit.
[17] International Labour Organisation (2016), op. cit.
[18] International Labour Organization (2021), op. cit.
[19] European Trade Union Institute, *The world(s) of work in transition. Conference report* — ETUI-ETUC Conference Brussels, 27-29 June 2018
[20] International Labour Organization (2021), op. cit.

needs.[21] Furthermore, platforms can help workers complement their revenue from low paying jobs, expand their activity and acquire new clients.[22]

However, as we will see, digital labour platforms can give rise not only to opportunities but also to serious challenges which can lead to threats for their rights and social protection.

Before approaching the subject of challenges, it seems important to highlight the magnitude of the digital labour platform phenomenon by providing the reader with some data.

1.2.1 Global figures and characteristics of DLPs

It is important to draw attention to the exponential growth that digital labour platforms have undergone worldwide in only ten years: considering just online web-based platforms and location-based platforms providing taxi and delivery services, the numbers rose from 142 active platforms in 2010 to 777[23] in 2020.[24] Interestingly, despite this fivefold increase, the majority of these platforms remain concentrated in just a handful of places: the United States (29%), India (8%) and the United Kingdom (5%).[25] Furthermore, the United States and India dominate respectively the demand for online work globally (47%) and the supply of online work globally (33%).[26]

As far as the amount of money involved in this sector is concerned, data is available only for the 47% of the abovementioned platforms, amounting to 367 platforms which, as of 30 January 2021, attracted a total global funding of US$119 billion. The distribution of the funding is definitely not symmetrical, with 96% of investments going to Asia, North America and Europe and with only 4% allocated to Latin America, Africa and the Arab States. Also the distribution of the funds amongst categories of digital labour platforms is uneven: taxi services platforms receive a larger share of funds compared to delivery and online web based platforms and just

[21] Ibid
[22] European Commission, C(2021) 4230 final, *Consultation document. Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work*, Brussels 15.6.2021
[23] Of which 383 are delivery platforms, 283 are online web-based platforms, 106 are platforms providing taxi services and 5 are hybrid platforms providing varied types of services such as taxi, delivery and e-commerce services (International Labour Organisation, op. cit.)
[24] International Labour Organization (2021), op. cit.
[25] Ibid
[26] Rani, U., Dhir, R.K., *Platform Work and the COVID-19 Pandemic*, Ind. J. Labour Econ. 63**,** 163–171 (2020) https://doi.org/10.1007/s41027-020-00273-y

two platforms providing taxi services receive the 75% of the total amount of investments devolved to this kind of platforms.[27]

As regards revenues, the 31% of digital labour platforms generate US$52 billion in 2019. As with investments, the geographical concentration of revenues is also skewed, with United States and China generating 72% of the total amount and Europe generating 11%.[28]

1.2.2 The impact of Covid-19 on DLPs

An important boost to the emergence of certain types of DLPs has been given by the Covid-19 pandemic. Indeed, since the outbreak of the pandemic, there has been an increase in online web-based work and consequently an increase in the number of workers registered on online web based platforms.[29] The Online Labour Index, which «measures the supply and demand of online freelance labour across countries and occupations by tracking the number of projects and tasks across platforms in real time»[30], shows that despite an initial steep global decline in March 2020, the demand for such work picked up considerably from mid-April to June 2020[31], probably as a result of the massive switch by businesses to remote work and teleworking. Furthermore, due to Covid-19, many on location DLPs providing services such as tutoring or teaching started offering those services online.[32]

Nonetheless the labour supply in online work has increased more consistently than the demand. On one hand workers have been incentivized to register on online web-based platforms by the belief that such platforms could provide them with opportunities for replacing lost incomes and by the fact that registration is quite easy; on the other hand, however, being able to receive work and make enough money through platforms can be quite difficult, especially due to the high global competition and workers probably expecting a higher demand for online tasks.[33]

As far as location-based platforms are concerned, some of them played a key role in providing essential services during the lockdown, notably delivery services.[34]

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[27] International Labour Organization (2021), op. cit.
[28] Ibid
[29] Rani, U., Dhir, R.K., op. cit.
[30] Oxford Internet Institute & International Labour Organization, *Online labour Observatory*, http://onlinelabourobservatory.org/
[31] Rani, U., Dhir, R.K., op. cit.
[32] W. P. de Groen et al., *Digital labour platforms in the EU: Mapping and business models. Final Report*, Luxembourg: Publications Office of the European Union, 2021
[33] Ibid | International Labour Organisation, op. cit.
[34] Rani, U., Dhir, R.K., op. cit.

Indeed, a report of the European Commission[35] showed that during 2020, food delivery platforms more than doubled in size in the EU, with an increase of + 125% mostly due to the fact that people were restricted to their homes and could not physically go to stores or restaurants.[36] On the other hand, however, taxi services, which dominated the DLPs economy between 2016 and 2019, have been negatively impacted by Covid-19, losing about a third of their activities (- 35%). Similar effects have been accused by platforms engaged in the leisure and retail sectors, even though their size in the digital economy is significantly smaller.[37]

1.3 The classification of platform workers

When it comes to individuals involved in the digital labour platforms market, we should keep in mind that such platforms can rely on two types of workers in order to operate and offer their services: workers directly employed by the platform and workers mediated by the platform. Workers in the first category, which represent only a small fraction of the digital labour platforms workforce, have an employment relationship, whilst workers in the second category don't and therefore are classified as self-employed or independent contractors[38] by the platforms.[39]

1.3.1 The notion of "employment relationship"

But what does it mean to be in an employment relationship? Generally speaking, the answer is to be found in the definitions set by legal systems which usually, as we will see, offer a fixed - and probably anachronistic - distinction between employees and contractors. The ongoing changes in work organization we are witnessing today, however, require a different and more modern approach on the part of national legislations which, in contrast, are still struggling to

[35] W. P. de Groen et al., op. cit.
[36] Ibid
[37] Ibid
[38] The meaning of these two terms varies across countries, as we will see in the next chapters, but in general we may say that self-employment refers to «a broad set of labour practices wherein a natural person earns income without an employment relationship with an employer» (Z. Kilhoffer et al., *Study to gather evidence on the working conditions of platform workers. Final report*, Luxembourg: Publications Office of the European Union, 2020, p. 9) and an independent contractor is «a person contracted to provide services to another entity as a non-employee» (ibid, p. 8).
[39] International Labour Organization (2021), op. cit.

adapt to those changes.[40] As a consequence, the issue of establishing whether or not an employment relationship exists has become more and more problematic in recent years.[41]

Following such difficulties, major labour market players recognized the need to address the matter at an international level. [42] In this regard the ILO pointed out that «national policy should at least include measures to: a) provide guidance for the parties concerned, in particular employers and workers, […] on the distinction between employed and self-employed workers»[43].

Indeed, as we have mentioned, although labour law systems vary from country to country, it must be noted that a common denominator of all systems exists, and it is represented by the traditional binary model of the employment relationship which distinguishes dependent employees from autonomous self-employed workers.[44]

Typically, this distinction is grounded in statutes and civil or labour codes which may contain a definition of the employment contract including the conditions for determining the existence of such a contract.[45] Despite the obvious national differences grounded in legal traditions, all notions of contract of employment are characterised by the existence of a precondition: «an inherently vertical power relationship between employer and employee»[46]. This vertical power relationship can be qualified by different terms, which, most commonly, are: "subordination", (economic) "dependency", "direction", "supervision", "control", "employer's authority", "orders" or "instructions". [47] Focusing on the term "subordination" which is probably the most used and the concept of which will be largely discussed in the next chapters, it is generally understood to mean that «the employer or his or her representatives direct or are likely to direct the performance of the work»[48].

Most of the time, however, legislation alone is not sufficient to provide a precise description of the notion of employment (and of self-employment), thus de facto leaving the role of deciding

[40] G. Casale, *Employment Relationship. The Employment Relationship: a Comparative Overview*. Geneva: International Labour Office, 2011.
[41] Ibid
[42] Ibid
[43] ILO, International Labour Conference (95th session), 'Recommendation concerning the employment relationship' (Geneva, 2006), para 4 (a), available at www.ilo.org/ilolex/cgi-lex/convde.pl?R198
[44] G. Casale, op. cit. | Although the binary distinction between employed workers and self-employed workers represents the dominant approach, a growing number of national jurisdictions are moving towards more articulated systems of classification including "hybrid" notions of work relationship (see G. Casale, op. cit.)
[45] G. Casale, op. cit.
[46] ibid, p. 51
[47] G. Casale, op. cit.
[48] ibid, p. 26

who falls within these definitions and who does not to national judicial authorities. Again, the approach adopted by courts in carrying out such a role can vary from one country to another and judges can be more or less "generous" in their interpretations. Nonetheless, in all systems the distinction between employment and non-employment is a question of both law and, more importantly, fact. Indeed, the concept of employment relationship is above of all a factual one which presupposes the performance of a series of acts.[49] In order to establish its existence, courts all over the world are called to apply some "indicators" or "indicia" to the work relationship at stake. In this regard, the Employment Relationship Recommendation (n. 198)[50] of the ILO provides a list of indicators which «are all, by and large, used by national judiciaries in what is clearly emerging as a consistent and universal 'multi-factor' test.»[51]

Those indicators are:

> a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;
>
> (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.[52]

1.4 Workers mediated by digital labour platforms: data and characteristics

Whilst data on employed workers are easily accessible, estimating the numbers of workers mediated by digital labour platforms ("platform workers") is quite difficult due to the lack of transparency on the part of platforms. Attempts have been made by researchers and statistical

[49] G. Casale, op. cit.
[50] ILO, International Labour Conference (95th session), 'Recommendation concerning the employment relationship' (Geneva, 2006)
[51] ibid, p. 66
[52] ILO, International Labour Conference (95th session), 'Recommendation concerning the employment relationship' (Geneva, 2006), para 13

offices to estimate the number of those workers, however the estimates obtained vary widely amongst themselves due to definitional and methodological differences.[53]

Therefore, it is not possible to provide the reader with an accurate number.

Nonetheless, quantifying the number of platform workers is not as important, for the purposes of this research, as getting an overview of their socio-demographic characteristics. Diverse international organisations and institutes have attempted to depict the features of digital labour platform workers.

The first result that deserves to be mentioned is the fact that platform workers are diverse: they come from different backgrounds and decided to engage in platform work for different reasons.[54]

Regarding the latter aspect, for instance, the reasons for choosing platform work can vary significantly depending on whether the platform in which they are engaged is web-based or location-based as well as on whether the tasks performed require a high or low level of skills. Indeed, if we look at location-based platforms which provide highly standardized services such as delivery and transportation, we may notice that they attract a specific demographic type of workers, different, for instance, than those attracted by platforms engaged in more specialized work. They are usually workers belonging to vulnerable population groups such as young workers, immigrants[55] and racialized workers.[56] For those workers, platform work may, therefore, represent the only source of income and indeed research have shown that the «lack of alternative employment opportunities»[57] is the main reason leading platform-based workers to engage in such activities.

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[53] International Labour Organization (2021), op. cit. | "Definitional differences" means that searchers have used different definitions of platforms and of the reference period in question. "Methodological differences" means that searchers have followed either an income-based or a job-based approach (International Labour Organization (2021), op. cit.). For instance, a research conducted in 2015 estimated that the number of US platform workers was 0.4% of total employment «by using data for the number of Uber drivers, and scaling this by the total number of Google searches for a list of 26 labour platforms» (OECD, *Measuring platform mediated workers*, OECD Digital Economy Papers, No. 282, OECD Publishing, Paris, 2019 https://doi.org/10.1787/170a14d9-en). The same method was used to estimate the number of active platform employees in EU at the end of 2015 (0.05% of EU employees). Another research, instead, calculated a rise in the number of US platform workers between 2015 and 2018 by using information taken from the bank accounts of customers. (OECD (2019), op. cit.). For other attempts of measuring the number of platform workers see also O. Kässi, V. Lehdonvirta, F. Stephany, *How many online workers are there in the world? A data-driven assessment*. Open Research Europe 2021, 1:53. https://doi.org/10.12688/openreseurope.13639.3

[54] Working on digital labour platforms A trade union guide for trainers on crowd-, app- and platform-based work

[55] In this regard, the ILO estimated that migrant workers engaged in the app-based delivery sector represent 15% of the workforce (ILO)

[56] T. Berger et al., *Uber happy? Work and well-being in the 'Gig Economy'*, Economic Policy, Vol. 34, Issue 99, July 2019, pp. 429–477, July 2019

[57] International Labour Organization (2021), op. cit., p. 145

On the other hand, when it comes to web-based platforms workers, their motivations regarding the decision to engage in that kind of job tend to be different, the first reported answer being «complementing pay from other income sources»[58]. Other reasons are linked to the greater autonomy or access to an expanded client base that web-based platform can provide.[59]

Furthermore, the appeal of platform work can also depend significantly on local labour market conditions and on other employment prospects. Notably, in regions with poor labour market conditions, fewer job opportunities can have a twofold effect: on one hand, highly skilled individuals may decide to engage in web based platform work in order to ensure higher rates of pay; on the other hand, however, some works performed through location based platforms, such as driving a taxi, cleaning homes or delivering food, may seem a good opportunity even for skilled or educated workers.[60] Indeed, surveys have shown that, contrary to what could be expected, a considerable proportion of workers engaged in platforms providing taxi and delivery services have high educational levels, with 24% of app-based taxi drivers and 21% delivery workers having a university degree.[61]

A last important data point relating to the demographic characteristics of platform workers, which deserves a mention, concerns the age and sex of the latter. Research indicates that the workforce of both web-based and location-based platforms is predominantly represented by young men, the majority of workers being below the age of 35 and women being about four in ten workers in online web-based platforms, and less than one in ten workers in the taxi and delivery sector.[62]

1.5 Challenges related to platform work

Notwithstanding the already mentioned numerous opportunities that digital labour platforms offer to people providing services via these platforms, research has shown that the downsides of this growing and promising sector are equally numerous.

Without addressing all the antitrust issues which platform work may give rise to, we could start, as a first challenge that platform workers must face, by mentioning the lack of sufficient amount

[58] Ibid, p. 143
[59] H. Johnston et al., op. cit.
[60] H. Johnston, op. cit.
[61] International Labour Organization (2021), op. cit. | Less surprisingly, online web-based platform workers are generally highly educated with over 60% of respondents having attained a university degree. (International Labour Organization (2021) op. cit.)
[62] International Labour Organization (2021), op. cit.

of work reported by the respondents (45%). That would be due to the increasing labour supply and consequently the strong competition on platforms and to the fact that a crucial role in obtaining new work is played by reviews and feedback.[63]

Another common problem is represented by commission fees charged by the platforms to the workers (especially taxi drivers), which can change unilaterally and without any notice, considerably affecting workers' revenues.[64]

Access to social protection for platform workers is also challenging: only a small proportion of workers have social security coverage. Focusing on the taxi and delivery sectors, only 30% of the workers are covered for employment injury, despite being exposed to important risks for their safety and health partly related to the high work intensity[65] to which they are subject.[66]

The European Commission[67] stressed the relevance of four categories of challenges related to the specific features of platform work.

The first category that I would like to address comprises the issues stemming from the use of algorithms in the platforms' management. As we know, platform work is driven by algorithms which are based on workers' data related to various aspects of their work performance. Most of the time, workers don't have any control over or access to this data, not to mention the fact that the source code of algorithms is completely inaccessible to workers thus making them unable to know the reasons of some actions undertaken by the platforms, like for instance a rejection of a task or the deactivation of the account or a low rating.[68] Therefore, one of the main problems related to algorithm-based model for platforms workers is the lack of information which may entail a lack of possibilities of redress against decisions taken under that model and an unbalanced power relationship. Furthermore, under the algorithm-based business model, it is not always clear who is responsible for decisions, thus creating a significant responsibility gap.[69]

[63] Ibid
[64] Ibid
[65] Due to, amongst other factors, gamification (offering incentives or bonuses to stimulate workers' engagement) through which platforms incentivize workers to work long hours and algorithm-controlled break times (International Labour Organization (2021), op. cit.).
[66] International Labour Organization (2021), op. cit.
[67] European Commission, *Consultation document* C(2021) 4230 final of 15.6.2021
[68] International Labour Organization (2021), op. cit.
[69] European Commission, *Consultation document* C(2021) 4230 final of 15.6.2021

A second category includes issues stemming from the cross-border nature of digital labour platforms. Such a nature can cause problems in determining the applicable law and the competent jurisdiction in case of disputes which can be detrimental to the workers.[70]

The third category, which will be addressed further in the second chapter, regards regulatory gaps at EU level in the field of platform work.[71]

The fourth category is probably the most significant and represents the core subject of the present work. It regards challenges related to the employment status[72] of platform workers and the consequent obligations on the part platforms.[73]

1.5.1 The problem of misclassification

As already mentioned in § 1.3, platforms can offer two types of work relationships: workers are either directly hired by the platforms or they have their work mediated through the platforms. In the latter case, which is the most frequent, workers are classified as "self-employed" or "independent contractors" by the platforms. These classifications, however, often don't reflect the reality of the facts.

Indeed, many platform workers, although classified as self-employed or independent contractors, do not benefit from the freedom and autonomy to organise their work which should be the premise for the self-employed status.[74] In theory, as self-employed or independent contractors, they should be able to choose working hours, to plan breaks and be free of declining orders if they wish to do so. However, in practice, this is often not the case, especially for low-skilled location-based platform workers whose schedules and destinations are shaped by algorithms and by rating systems.[75] Indeed, as reported in the ILO surveys, «a sizeable proportion of workers in the app-based taxi (37 per cent) and delivery (48 per cent) sectors are unable to refuse or cancel work, as such refusal or cancellation is likely to have negative

[70] Ibid
[71] Ibid
[72] «The employment status or labour market status indicates the status of a person as either working in the framework of an employment relationship (employee) or working on their own behalf and for their own account (self-employed). It refers non-exhaustively to the contractual aspect of employment in terms of the autonomy and the authority that workers have in their jobs, the duration and number of working hours, incorporating economic risk» (Z. Kilhoffer et al., op. cit., p. 67)
[73] European Commission, *Consultation document* C(2021) 4230 final of 15.6.2021
[74] International Labour Organization (2021), op. cit.
[75] Ibid | Z. Kilhoffer et al., op. cit.

implications for their ratings»[76]. Furthermore, surveys showed that respondents have very little time to decide whether or not to accept an order[77], thus affecting their freedom of choice. Platform workers, therefore, do not experience genuine freedom and control over their work.

Technology and AI play a crucial role in organising the work of people engaged in digital labour platforms, and another way in which they are employed in this respect is represented by tracking systems such as GPS which enable platforms to monitor workers and the routes they take as well as the time spent in completing orders.[78]

Another indicator of workers' autonomy is represented by control over compensation and the freedom to set rates. This is usually not the case when it comes to platforms which, through their terms of service agreements, unilaterally regulate conditions related to working time, pay, dispute resolution and other issues.[79] Platform workers most of the time don't have any bargaining power in the precontractual stage, and even beyond, and are only able to accept or refuse the conditions imposed by the platforms. Moreover, a genuine contractual negotiation, which is missing in case of platforms work, is itself supposed to be an indicator of self-employed activity.[80]

In light of the above mentioned, an increasing number of platform workers are bringing actions against platforms, claiming to have been misclassified by the latter and calling for the attribution of the employee status rather than that of self-employed.[81]

Although some platforms deliberately misclassify their workers in order to avoid some obligations which would result from the employee status, such as fiscal obligations or those related to employment and social security regulation and workers' representation, and to shift risks onto workers, employment misclassification concerns not only platform work and is not always intentional. In fact, the increased flexibility of work together with digitalisation and technological changes have made the distinction between different employment statuses

[76] International Labour Organization (2021), op. cit., p. 177
[77] «On Uber, drivers receive a request and are given between 15 and 40 seconds to decide, based on limited information» (International Labour Organization (2021), op. cit. p. 178)
[78] International Labour Organization (2021), op. cit.
[79] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021
[80] International Labour Organization (2021), op. cit. | European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021 | European Commission, *Consultation document* C(2021) 4230 final of 15.6.2021
[81] Ibid | M. Carboni, *A New Class of Worker for the Sharing Economy*, 22 Rich. J.L. & Tech 11 (2016). Available at: http://scholarship.richmond.edu/jolt/vol22/iss4/2

blurred, thus making the determination of the workers' employment status a difficult and non-straightforward matter. [82]

The issue is of primary importance, mainly because many legislations ensure labour and social protection only to workers classified as employees and not to self-employed[83]. Only workers who are in an employment relationship can have access to the entire spectrum of labour rights, like those related to working time, leaves and occupational health and safety. Furthermore, employees can access social protection programmes more easily than self-employed and are entailed with a better protection in case of cross-border disputes at EU level.[84]

For these reasons, the necessity for prompt regulatory responses that could tackle the already mentioned changes in the labour market is becoming more and more imperative.

In particular, scholars have stressed the need for a so called "third way", a new hybrid worker category between those of employees and self-employed workers which could, on the one hand, ensure platform workers protection and rights under certain social and labour laws, as for instance wage and hour laws, and, on the other hand, enable platforms to keep their successful business models.[85] As we will see, however, that proposal is still far from becoming a reality in most of the legal systems, due to the large criticisms that it has encountered. The major fear is, indeed, that such a category of worker could led to an expansion of the grey area between the two traditional categories of workers thus eventually eroding them and leading to further exploitation.[86]

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[82] International Labour Organization & Organisation for Economic Co-operation and Development, *Ensuring better social protection for self-employed workers. Paper prepared for the 2nd Meeting of the G20 Employment Working Group under Saudi Arabia's presidency*, 8 April 2020 | Z. Kilhoffer et al., op. cit.

[83] International Labour Organization, op. cit.

[84] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021 | In case of cross-border disputes between the employer and the worker the Rome I and Brussels Ia regulations entitle employees, considered the weaker party to a contract, with favourable provisions guaranteeing a high level of protection. Brussels Ia states that an employee can only be sued in the Member State where he has is domicile and that he can chose to sue the employer in different Member States, while Rome I states that the parties can decide the law applicable to the employment contract, but they cannot disapply the mandatory legal provisions of the jurisdiction applicable in the absence of that choice. These provisions are not applicable to self-employed which are protected only by general rules, thus being exposed to a greater legal uncertainty (European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021).

[85] W.B. Gould IV, M. Biasi, "The Rebuttable Presumption of Employment Subordination in the US ABC-Test and in the EU Platform Work Directive Proposal: A Comparative Overview", *ILLeJ*, vol. 15, no. 1, pp. 85–98, Jan. 2022 | M. Carboni, op. cit.

[86] M. Carboni, op. cit. | U. Brancati et al., *New evidence on platform workers in Europe*, Luxembourg: Publications Office of the European Union, 2020

To date, in the absence of a third category of workers, most of the courts in the United States and in the European Union are forced to apply the traditional dual worker classification to the new business models introduced by platform work.[87]

In the next two chapters we will try to understand how the misclassification of platform workers is addressed and solved within the EU and the US, at a legislative and jurisdictional level, in the light of a still missing adequate solution to the matter.

[87] M. Carboni, op. cit.

Chapter II: Addressing misclassification in the EU

2.1 Characteristics of platform work and workers in the EU

At the outset, it might be helpful to provide the reader with a brief overview of the characteristics of the digital labour platforms active in the EU and of the workers providing services through them.

First of all, in terms of numbers, platforms in the EU are generally consistent with the general global trends previously observed: studies report a significant increase in the number of EU digital labour platforms over the past five years, going from about 463 DLPs active in 2016 to 520 in 2020.[88]

An impressive increase has been registered also in terms of revenues. Indeed, the total size of DLPs economy in the European Union has increased almost fivefold in just 5 years (from EUR 3 billion in 2016 to EUR 14 billion in 2020), a large part of this amount being generated by taxi and delivery platforms.[89]

As far as the origin of digital labour platforms active in the European Union are concerned, 77% of them originated in the EU. France is the country with the majority of active DLPs within the European Union, followed by Belgium, Spain and Germany.[90]

The majority of the platforms not originating from the EU have their origin in the US and in the UK.[91]

When it comes to data regarding workers engaged in platform work in the European Union, establishing the total number is just as difficult as establishing the number of workers involved in DLPs globally.[92] Nonetheless, the European Commission's Joint Research Centre provides an interesting overview of the socio-demographic characteristics of such workers.[93]

In 2018 the average age of platform workers was 33.9 compared to an average age of 42.6 years for offline workers.[94]

[88] W. P. de Groen et al., op. cit.
[89] Ibid
[90] Ibid
[91] Ibid
[92] However, it has been estimated that approximately 1.79% of the workforce in the EU provide services via online platforms. (U. Brancati et al., op. cit.)
[93] U. Brancati et al., op. cit.
[94] Ibid

The EU digital labour platforms workforce is still predominantly male dominated, but the report provided by the Research Centre shows how the percentage of female working through platforms increased between 2017 and 2018.[95]

An increase has been registered also in the total earnings of platforms workers, with earnings amounting for EUR 2.6 billion in 2016 and for EUR 6.8 billion in 2019.[96]

Another interesting and surprising data reported by researchers regards a socio-demographic characteristic of EU platform workers which have been found to be generally more educated than offline workers.[97]

A brief and last remark on the geographic origin of people working through platforms in the EU: estimates reveal that 13.3% of main platform workers were born in a different country from the one where they performed platform work.[98] The top three countries of origin of platform workers born abroad are Algeria, Romania and Angola.[99]

2.2 Employment status of platform workers in the EU

As we have previously mentioned, the employment status of workers is a matter of primary importance in the context of digital labour platform since misclassification of workers can have a serious impact on their rights. For this reason, the issue of misclassification is at the forefront of public debates on platform work in the European Union, both at the Member States as well as at the Community level.

The European Commission defines the employment status (or labour market status) as «the status of a person as either working in the framework of an employment relationship (employee) or working on their own behalf and for their own account (self-employed)»[100] and it adds that «it refers non-exhaustively to the contractual aspect of employment in terms of the autonomy

[95] Ibid
[96] Ibid | In 2020, due to restrictions related to the Covid-19 pandemic, revenues dropped to an estimated EUR 6.3 billion (Ibid)
[97] 58% of platform workers had attained a high education level, opposed to 36% of offline workers (U. Brancati et al., op. cit.)
[98] «Main platform workers are those who claim to work more than 20 hours a week providing services via digital labour platforms or earn at least 50% of their income doing so» (U. Brancati et al., op. cit., p. 3)
[99] U. Brancati et al., op. cit.
[100] Z. Kilhoffer et al., op. cit., p. 67

and the authority that workers have in their jobs, the duration and number of working hours, incorporating economic risk.»[101]

The distinction is not always easy to make, especially when it comes to platform workers.

Indeed, notwithstanding the fact that the new increased flexibility of work together with workers' autonomy and developments in digitalisation and technology have made it difficult to discern amongst different employment statuses more generally, classifying platforms workers remains particularly difficult, notably in the EU, mainly due to the uncertain legal framework lying behind the issue. In fact, first of all, in most of the Member States platform workers are not entitled to a separate and specific status but have to be classified under one of the existing employment statuses.[102]

Only a few EU countries have introduced a third category, besides those of employed and self-employed workers, affording workers falling under it a protection level, in terms of working conditions and social protection, higher than that granted to independent contractors and lower than that granted to employees. In those countries, which are Bulgaria, Spain and Germany, platform workers can be deemed part of those third categories.[103] Other attempts of introducing a third category of workers have been made across the EU, but they have fallen short because of the resistances of either social partners or policymakers. For instance, in Sweden the idea of introducing a third category has been rejected since the already existing system has been deemed to be flexible enough to deal with individual cases and labour market developments whilst, in the opinion of the social partners, a new category would have been too static giving rise to «new boundary issues between statuses».[104] In France it was argued that the introduction of a third category might have had the negative effect of «encouraging workers to transfer from employee status to this third status»[105] with the result that they would be granted fewer protections. This fear indeed is in line with what happened in Italy with the introduction of a third category of workers ('quasi-subordinate worker') in 1973. In fact, following that introduction, many employers preferred classifying their workers under that third status as it guaranteed them lower social security contributions.[106]

[101] Ibid
[102] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021
[103] Z. Kilhoffer et al. op. cit.
[104] Eurofound, *Employment and working conditions of selected types of platform work*, Luxembourg: Publications Office of the European Union, 2018, p. 45
[105] Ibid
[106] Eurofound, op. cit.

At EU level as well, the idea of introducing a new intermediate category of workers has been set aside, also in the light of trade unions' opposition, and the European Commission clearly stated in the Consultation Document on "possible actions addressing the challenges related to working conditions in platform work" that «there is no intention to create a 'third' employment status at EU level.»[107]

However, platform workers can hardly fit into traditional categories of workers due to the complex employment relationship they are involved in. Very interesting in this regard is the fact that platforms typically claim to be intermediaries, connecting workers to clients, often explicitly refusing the role of employer in their terms and conditions.[108] In addition to that it must be said that it is difficult for judges to apply the principles set in labour law or case law in order to distinguish employees from the self-employed in the context of platform work because of the blurring nature of this type of work.[109]

Consistently with the global trend, when expressed in the terms and conditions, the status of the platform workers chosen by platform operating in the EU is usually that of self-employed or independent contractors. Indeed, as the European Commission reported, 92% of digital labour platforms active in the EU classify platform workers as self-employed.[110]

Despite that data, however, a survey conducted by the Commission's Joint Research Centre, showed that platform workers, most of the time, don't perceive themselves as self-employed. In fact, more than 70% of the respondents claimed to be employees, whilst only the 10% perceived themselves as self-employed.[111]

Indeed, as we already said, whilst sometimes the self-employed status of platform workers may reflect the reality of the facts, many times that is not the case, notably when it comes to platform workers performing low-skilled on-location tasks (like for instance transportation or household services) who are subject to a greater control of the platform in terms of both work allocation and organisation.[112]

[107] European Commission, *Consultation document* C(2021) 4230 final of 15.6.2021, p. 21
[108] U. Brancati et al., op. cit.
[109] Z. Kilhoffer et al., op. cit.,
[110] W. P. de Groen et al., op. cit.
[111] U. Brancati et al., op. cit.
[112] Ibid

2.3 Consequences of misclassification in the EU

EU workers who find themselves misclassified have to face roughly the same challenges that we reported in the first chapter.

The first challenge is related to social protection[113] which in the vast majority of EU countries is partially linked to the employment status of the workers and in particular to the status of "employee", with some benefits, such as coverage in case of unemployment, awarded only to this category of workers.[114]

In some EU countries, such as Austria, Hungary and Italy, social security benefits are universal and cover also self-employed workers. Other countries have a separate protection scheme for self-employed workers, thus allowing platform workers to have some form of protection. Unfortunately, however, this is not a common praxis, and many platform workers remain deprived of basic social rights. Moreover, as pointed out by the European Commission[115], those workers, most of the times, do not register as self-employed, thus *de facto* remaining unprotected.[116]

Misclassification, furthermore, can imply that workers wrongly classified as self-employed cannot have access to national minimum wages, in those Member States where that applies, or to collective bargaining.[117]

Indeed, Member States may award minimum wages only to employees and collective agreements are typically a prerogative of only employees as well.[118]

In general, limited bargaining power and non-representation[119] of platform workers constitute another challenge triggered by misclassification. Representation, in general, plays a pivotal role for the improvement of workers' labour situation and for the safeguard of fair working and employment conditions. However, for most of platform workers that is not possible precisely because they are classified as self-employed: under the law of many Members States self-employed are not allowed to organise. Furthermore, EU competition law prevents self-

[113] «Social protection is understood as the coverage of risks and needs associated with unemployment, sickness and healthcare, old age, invalidity, parental responsibilities, loss of a spouse or parent, housing, and social exclusion» (Z. Kilhoffer et al., op. cit., p. 71)
[114] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021 | Z. Kilhoffer et al., op. cit.
[115] In Z. Kilhoffer et al., op. cit.
[116] Z. Kilhoffer et al., op. cit.
[117] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021
[118] Z. Kilhoffer et al., op. cit.
[119] «Representation by a trade union, works council, health and safety delegate or similar institutes, at the level of the platform or as platform workers» (Z. Kilhoffer et al., op. cit. p. 84).

employed (who, for this purpose, are treated like entities conducting economic activities, and therefore undertakings) from doing so, if such organizations lead to agreements which are considered detrimental for consumers (as for instance those that fix prices). It must be borne in mind, however, that EU law doesn't prevent self-employed workers from forming associations, but the boundaries between agreements reached by this associations which are compatible with competition law and agreements which are not, are relatively blurred.[120]

Another important issue stemming from misclassification is the fact that, as self-employed workers, platform workers generally don't have any protection against the termination of the employment contract. Platforms that want to end the relationship with workers can do so by simply deactivating their account, without being obliged to give explanations or prior notice. Some platforms can even automatically link the dismissal to the worker performance, not allowing workers with low ratings to continue to work. Furthermore, platform workers are not even protected in case of collective dismissal (for example in case of insolvency of the platform).[121]

Finally, the issue of working time also deserves a brief mention. Indeed, as we already said, platform workers should be free to set and change their working schedule, by simply logging into the platform or choosing their hours of availability, but in practice their flexibility over working time is limited by platforms' monitoring systems and by algorithms. Furthermore, many platform workers, particularly those engaged in location-based platforms, may have to work non-standard hours, like for example at night, on weekends or on public holidays. That's because they are usually not covered by national legislations on working time which generally is only applicable to employees.[122]

2.4 National responses to the challenges of platform work

In the context of the European Union, national responses to challenges stemming from platform work and in particular from misclassification of platform workers are diverse. Various Member States have attempted to make up for the lack of sufficient legal instruments protecting platform workers (especially self-employed workers) by adopting different approaches. These approaches can range from extending the personal scope of national labour and social law

[120] Z. Kilhoffer et al., op. cit.
[121] Ibid
[122] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021

targeting employees to introducing a third category of workers (between self-employed and employee) entitled with specific rights. Most of these initiatives have been taken in respect of specific sectors (usually food delivery services), as, for instance, in the case of Italy which in 2019 adopted a law granting food delivery riders better working conditions and protection, ensuring them some of the rights usually afforded only to employees, such as a guaranteed minimum wage, paid holidays and sick leave.[123]

Similar provisions have been adopted by Portugal and Spain.

Portugal adopted in 2018 a law dedicated to the transport sector obliging platforms to have their relationship with drivers intermediate by 'operators" (i.e. legal persons or companies).[124] Indeed, under this provision only operators can be contracted by ride-hailing platforms and drivers can only have a contractual relationship with the operators. This relationship, furthermore, is always supposed to be an employment relationship, regardless of what the contract calls it. Moreover, the legislation introduces drivers' protection in respect of working time, ensuring limitations on working hours and forbidding drivers from working for more than 10 hours per day.[125]

In Spain a newly adopted decree, the so called "Riders' law"[126] introduces the presumption that delivery riders working for digital platforms are employees[127] and platforms hold the burden of proof in case they want to claim the contrary. This legislation follows a decision of the Spanish Supreme Court that will be discussed further in § 2.6 and is considered pioneering this issue within the European Union. Indeed, under this new law, delivery platforms have to hire riders, granting them with rights related to the employee status and with social security contributions. Furthermore, the law requires platforms to disclose and to provide workers' representatives with relevant information related to how algorithms and artificial intelligence impact working

[123] L. 2 novembre 2019, n. 128, Conversione in legge, con modificazioni, del decreto-legge 3 settembre 2019, n. 101, recante disposizioni urgenti per la tutela del lavoro e per la risoluzione di crisi aziendali | See Z. Kilhoffer et al., op. cit. | European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021

[124] Lei n.º 45/2018 Regime jurídico da atividade de transporte individual e remunerado de passageiros em veículos descaracterizados a partir de plataforma eletrónica

[125] Ibid

[126] Real Decreto-ley 9/2021, de 11 de mayo, por el que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales.

[127] The presumption applies «for the activities of distribution of any type of product or merchandise, when the employer exercises its faculty of organisation, direction and control, directly, indirectly, or implicitly, through the algorithm management of the service or working conditions, via a digital platform» (Eurofound, *Riders' law*, 20 August 2021, https://www.eurofound.europa.eu/data/platform-economy/initiatives/riders-law , accessed on 23 July 2022)

conditions and assignations, hiring and dismissal decisions and the evaluation of workers' performance.[128]

Despite the many attempts and the promising progress achieved by national legislation in tackling the issue of platform workers' misclassification and poor working conditions, to date, only one Member State (France) has adopted a specific legislation providing platform workers with labour and social rights irrespective of the activity sector. Indeed, the French parliament enacted in 2016 the *Loi El Khomri*[129] targeting «independent workers[130] in an economically and technically dependent relationship with an online platform»[131]. This law is particularly important because it directly and explicitly tackles the «hybrid employment status of certain platform workers» [132] by granting them continued education and training and, most importantly, adequate protection in case of professional diseases and work accidents[133] as well as the right to start or join trade unions and to take collective action.[134]

Although this law certainly constitutes a first important step, on the part of national legislators, towards the recognition of the need for a special set of laws protecting platform workers, it is still limited. [135] Indeed, as far as labour law rights are concerned, for instance, apart from the right to strike and the right to organise, self-employed platform workers do not benefit from the other rights usually granted to employees (such as those in terms of working time, remuneration, or the termination of the employment relationship). [136] Furthermore, the French law leaves open the question on the legal status of platform workers. Indeed, as it has been pointed out, the El Khomri law «does not qualify all workers using such platforms as self-employed, but simply indicates the personal scope of its provisions.»[137]

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[128] Eurofound, *Riders' law*, 20 August 2021, https://www.eurofound.europa.eu/data/platform-economy/initiatives/riders-law, accessed on 23 July 2022) ׀ European Commission, *Commission Staff Working Document* SWD(2021) 143 final of 15.6.2021

[129] Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels

[130] Literal translation of the French term *travailleur indépendant* (the general meaning is that of self-employed person or independent contractor).

[131] Z. Kilhoffer et al., op. cit., p. 106

[132] Ibid

[133] The law guarantees access to a voluntary insurance against work accidents the premium of which must be paid by platforms. Alternatively, platforms can provide a collective insurance (European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021)

[134] Z. Kilhoffer et al., op. cit. ׀ European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021

[135] K. Chatzilaou, *Can digital platforms challenge French Labour Law?, in* S. Bellomo, F. Ferraro (eds.), *Modern Forms of Work: A European Comparative Study*. Vol. 48. Sapienza Università Editrice, 2020.

[136] Ibid

[137] Ibid, p. 97

However, «the most comprehensive legislation on platform work»[138] in the EU has been adopted by the Italian region of Lazio. The regional legislation enacted in 2019[139] aims at improving working conditions and the social protection of all platform workers regardless of their employment status and of the market sector. Indeed, under this legislation platforms are required, amongst others, to: grant platform workers insurance for work accidents and professional diseases; apply the standard minimum daily pay according to relevant national collective bargaining agreements; providing the workers with adequate information related to, amongst others, the functioning of the rating system and the effect that it can have on the employment relationship; ensure health and safety at work by providing training and health and safety equipment; ensure the portability of ratings.[140]

This law, which represents a big move forward in the protection of platform working whilst allowing platforms to keep their business models (including the classification of platform workers as independent contractors) has, nonetheless, attracted many criticisms because of the lack of regional-level competence to legislate in this field. [141] Indeed, scholars have pointed out that that law will be likely declared unconstitutional by the Italian Constitutional Court because regions in Italy don't have the right to regulate in many of the fields addressed by the law at stake. [142] However, as it has been noted, with this law, the regional legislators, who are aware of their competences, probably wanted to launch a provocation in order to stress the need for such a legislation at national level.[143]

That provocation has in fact triggered a reaction of the Italian national legislators which, just a few months later, enacted the mentioned law n. 128/2019, which in the context of a broader scope, introduced some of the protections already afforded to platform workers by the regional law.[144] However, differently from the Lazio legislation, this new national law, as mentioned

[138] Z. Kilhoffer et al., op. cit., p. 106
[139] Regione Lazio, Legge Regionale 12 aprile 2019, n. 4 "Disposizioni per la tutela e la sicurezza dei lavoratori digitali"
[140] IRES, *Don't GIG Up! State of the Art Report*, Document de travail N° 02.2019, IRES, Noisy-le Grand, April 2019 (http://www.ires.fr/index.php/etudes-recherches-ouvrages/documents-de-travail-de-l-ires/item/5935-n-02-2019-don-t-gig-up-state-of-the-art-report) | European Commission, *Commission Staff Working Document* SWD(2021) 143 final of 15.6.2021 | Z. Kilhoffer et al., op. cit.
[141] S. Borelli, *Italy*, in I. Daugareilh et al. (eds.), *The platform economy and social law: Key issues in comparative perspective*. Brussels: ETUI, 2019 | L. Torsello, *Il lavoro dei riders. L'iniziativa di legge nella Regione Lazio*, Diritti Regionali, n. 3/2018
[142] L. Torsello, op. cit.
[143] Ibid
[144] L. 2 novembre 2019, n. 128, Conversione in legge, con modificazioni, del decreto-legge 3 settembre 2019, n. 101, recante disposizioni urgenti per la tutela del lavoro e per la risoluzione di crisi aziendali

before, does not address all platform workers but only those performing delivery services, thus resulting in the regional law being still the most comprehensive.[145]

2.5 Responses at EU level: a brief overview on the EU labour and social acquis

After having analysed some of the most relevant responses that Member States have formulated in order to address the specific issues resulting from the misclassification of platform workers, the present chapter will be dedicated to responses at the EU level. Although, as we will see in Chapter III, the EU is still working on the development of a specific regulatory framework tackling the challenges related to working conditions and social protection of platform workers, in this chapter we will try to see if the already existing EU instruments are able to adequately address such challenges.

As a preliminary remark, it must be said that the European Union has a shared competence with Member States in the field of labour and social protection and therefore it can legislate in this field only if a clear legal basis exists in the treaties and under the principles of subsidiarity and proportionality. When it comes to employment and social protection, the EU has usually legislated by means of directives.[146] Some of those directives constitute the so called "EU labour and social acquis", a set of minimum standards and labour rights applicable to workers across all Member States. It comprises: the Directive on transparent and predictable working conditions[147] which sets protective measures for people working in new or non-standard working relationships; the Directive on work-life balance for parents and carers[148] which provides workers that are parents and caregivers with rights related to leaves and flexible work arrangements and the Directive on safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding[149], which guarantees a minimum period of

[145] Has it has been pointed out, Italian national debate on platform workers is conditioned by short term political needs (to win the elections) which make it difficult to create a national legal framework on platform work. (S. Borelli, op. cit.)

[146] Z. Kilhoffer et al., op. cit. | Member States are bound by directives only to achieve the goals and to comply with timeframes set therein.

[147] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union

[148] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU

[149] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

maternity leave; the Working Time Directive[150] which defines terms as "rest period" and "working time" and sets minimum requirements for the organisation of the latter; the Directive on temporary agency work [151] which establishes a set of principles applicable to temporary agency workers; the Directives on part-time work[152] and on fixed-term work[153] which provides for part-time and fixed-term workers to be entitled with the same working conditions as comparable standard workers; the Occupational Health and Safety Framework Directive[154] which sets minimum health and safety requirements at work; the three directives on anti-discrimination and equal treatment[155] which aim at combating employment discrimination based on sex, sexual orientation, age, religion or belief, racial or ethnic origin or disability.[156]

The EU labour and social acquis undoubtedly represents a valuable floor of rights and protections, nonetheless it contains at least two loopholes that deserve to be highlighted: the first refers to the fact that those directives usually only contain general provisions the enforcement of which is the prerogative of national authorities; the second, and most important loophole for the purposes of the present work, has to do with the personal scope of such legal instruments which, except for the three directives on anti-discrimination and equal treatment, always exclude self-employed workers - and consequently platform workers classified as such. However, as we will see, national courts remain able to determine whether misclassified workers can access the protection and benefits afforded to employees under those directives, on a case-by-case basis.[157]

Besides those directives, the European institutions, in the context of labour and social protection, have also developed a set of soft law instruments[158], some of them expressly

[150] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time
[151] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.
[152] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC
[153] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP
[154] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work
[155] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
[156] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021
[157] Ibid
[158] «Soft law is the term applied to EU measures, such as guidelines, recommendations, declarations and opinions, which – in contrast to regulations, directives, and decisions – are not binding on those to whom they are addressed.»

addressing platform work. Such documents have a broader personal scope thus also covering self-employed people, but, on the other side, being non-legally binding, they do not confer any rights on those workers directly, leaving Member States free to decide whether and how to implement the recommended actions.[159] One of those instruments is the Council Recommendation on access to social protection for workers and the self-employed[160]. Under this recommendation member states are encouraged to ensure access to adequate social protection to all workers, employees and self-employed, irrespective of the type of contract. Member States should guarantee minimum standards of protection and coverage concerning benefits in respect of: unemployment, health care and sickness, maternity and paternity, invalidity, old age and survivors, occupational diseases and accidents at work. The document expressly takes into consideration atypical and new employment relationships such as on-demand work, voucher-based work and platform work; however, it only has an indirect relevance for platform workers.

Other soft law documents have been issued with the specific scope of tackling challenges stemming from new business models such as digital labour platforms. In this regard, the European agenda for the collaborative economy[161], for instance, addresses five main issues, one of them being labour law and worker classification. Another soft law instrument relevant for platform workers may be the European Pillar of Social Rights[162] which aims at achieving equal opportunities and equal access to the labour market, social protection and inclusion and fair working conditions, as well as at providing atypical workers and self-employed with effective minimum protection and security.[163] However, given its non-binding nature, this document is not expected to make a material difference to the rights of platform workers unless followed up legally binding measures.

(Eurofound, *EurWORK - Soft law*, https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/soft-law)

[159] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021

[160] Council Recommendation of 8 November 2018 on access to social protection for workers and the self-employed (2019/C 387/01 of 15.11.2019)

[161] European Commission, COM/2016/0356 final, *Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, Brussels, 2.6.2016

[162] European Commission, *European Pillar of Social Rights*, https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights_en

[163] Z. Kilhoffer et al., op. cit.

2.5.1 Focus on the notion of worker under EU legislation and case law

As we have seen in the last paragraph, the personal scope of the abovementioned directives usually includes only employees, without addressing the rights of self-employed workers. However, most of the time those directives don't use the term "employees" but instead refer to the term "workers" accompanied by qualifications such as "who have an employment contract" or "who have an employment relationship" or instead "under national employment law".[164]

When the directives do not explicitly refer to national legislations, an EU-wide interpretation must be given to the term worker. In this regard, we should look at the concept of worker developed by the CJEU through its case law. In particular, the first iteration of this concept is found in the context of the interpretation of art 45 TFEU on the free movement of workers. For this purpose, the court stated that the term worker has an autonomous EU meaning: «a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration»[165]. The nature of the legal relationship is irrelevant, but the activities performed must be effective and genuine. The key criteria for establishing the existence of a worker, under the CJEU definition, is that of subordination. This criteria, as we will see later, is of utmost importance when it comes to assessing the actual employment status of a platform worker.[166]

As we have previously mentioned, however, some directives concerning labour and social protection may refer to national labour legislations (or to collective agreements and practices). By doing so the EU legislator leaves some discretionary power to Member States which can fill the personal scopes of the directives with national definitions thus inevitably giving different interpretations to concepts established at an EU level. Indeed, the concepts of workers (or employees) differ widely across the Member States. In some countries a legal definition of the concept of worker does not even exist, whilst a definition of an employment relationship or contract does. It can also be that in one country different definitions of worker apply depending on the context of application. A pivotal contribution to defining the national concept of worker has been made by national courts which usually, as the CJEU, consider the subordination as an essential criteria for assessing the existence of an employment relationship.[167]

[164] Ibid
[165] Z. Kilhoffer et al., op. cit., p. 39 | See Judgement of 3 July 1986, *Lawrie-Blum*, C-66/85, EU:C:1986:284
[166] Z. Kilhoffer et al., op. cit.
[167] Ibid

2.6 Relevant case law

As we have already mentioned in Chapter I, all over the world courts play a crucial role in drawing the distinction between employees and self-employed workers. This role is becoming more and more pivotal especially when it comes to platform workers.

Within the EU, national courts have been recently facing a proliferation of lawsuits concerning the employment status of people providing services via platforms.[168] Indeed, in the absence of a specific legal framework, many platform workers who consider themselves to be employees rather than self-employed workers, have no choice but to take legal action in court in order to challenge the alleged misclassification.[169] We will see that, most of the time, those workers are engaged in location-based platform work, especially food delivery and transport services.

Before discussing the case law, however, it is important to draw attention to the most critical, and already addressed, criteria to determine an employment relationship: the notion of subordination. The latter, which can be understood as direction and control by the employer over the worker's activity, is the key for establishing the existence of an employment relationship both at EU level and in most of the Member States. However, exactly this criteria is being challenged by platform work practices.[170] Indeed, if, on the one hand, platforms argue that workers have the freedom to decide whether to accept a task and, in some cases, also when and where to perform the services - thus denying the existence of any form of control and direction -, on the other hand, national courts, given the peculiarities of platform work, are progressively shifting the understanding of subordination towards a different meaning, closer to the concept of "lack of genuine independence."[171] Indeed, in the majority of judgements in favour of reclassification, two main elements have been taken into consideration in order to assess the existence of subordination: the unilateral imposition of terms and conditions by platforms (concerning assignments and payments and including clauses imposing sanctions in cases of non-acceptance of tasks or promising incentives for working longer hours) and the role of algorithms and technologies in organising and monitoring platform work (comprising for instance practices like platforms' rating systems or the constant localisation of workers through GPS).[172] Therefore, although there is no physical superior exercising control and direction by giving concrete instructions to workers, courts focus on the fact that these

[168] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021
[169] Ibid
[170] Z. Kilhoffer et al., op. cit.
[171] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021
[172] Ibid

instructions are usually given by platforms' algorithms and that even in the absence of such instructions, platforms generally determine all aspects of the service performed.[173]

Another aspect that national courts have taken into consideration when assessing the employment status of platform workers is the "absence of genuine entrepreneurial independence" of the latter, which is conceptually in line with the principle established by the CJEU that a worker can't be classified as self-employed if he or she is not able to independently determine his/her own conduct on the market.[174] Under this concept, courts concentrate on aspects like customers' view on platform workers' appearance as independent entrepreneurs, the bearing of the economic risk of the enterprise or the opportunities for platform workers to develop their business.[175]

In conclusion, it seems that national courts are increasingly moving away from the traditional meaning of subordination when determining the employment status of platform workers by developing new criteria that better respond to the challenges posed by the non-conventional organisation of platform work. However, given the differences in the legal traditions existing across member states and those in the judicial philosophies adopted by courts, different, and sometimes contradictory, conclusions have been reached by judges in different countries.[176]

To date more than 100 court decisions on cases of alleged misclassification of platform workers have been issued within the European Union[177]. In a significant number of those cases, courts have decided in favour of reclassification [178] and a "cautious trend" towards the reclassification can be observed in relation to riders and drivers' cases.[179] Given the impossibility of addressing all of them, in the next paragraphs we will focus on the most relevant and recent rulings which have granted the status of employees (or the same rights to which employees are entitled) to platform workers, in four selected countries (Spain, Italy, France and the Netherlands).

[173] Ibid
[174] See Judgement of 4 December 2014, *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411
[175] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021
[176] Z. Kilhoffer et al., op. cit.
[177] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021
[178] Ibid
[179] C. Hießl, *Case law on the classification of platform workers: Cross-European comparative analysis and tentative conclusions*, Forthcoming, Comparative Labour Law & Policy Journal , October 2021. Available at SSRN: https://ssrn.com/abstract=3839603 or http://dx.doi.org/10.2139/ssrn.3839603

2.6.1 Spain

The Spanish social courts have issued dozens of decisions on the alleged misclassification of platform workers, with all except one concerning food delivery riders.[180]

Amongst these rulings, the most relevant is probably the already mentioned Spanish Supreme Court decision[181] which has been credited with setting the stage for the preparation of the "Riders' law". In that decision, the Court stated that the relationship between a rider and Glovo, a ride-sharing platform, was an employment relationship, on the grounds that Glovo determines all the terms and conditions unilaterally, Glovo applies sanctions on riders for violations and misconduct, Glovo gives instructions to the riders and exercises control over them (through GPS tracking, the monitoring of performance and a rating system), the digital infrastructure represents the key factor of production and Glove owns it, and riders do not exercise any genuine entrepreneurial activity.[182]

Interestingly, the Spanish Supreme Court acknowledged the existence, in the work relationship between Glovo and the riders, of elements traditionally characterising self-employed workers, (such as the lack of an obligation to work, the freedom to choose the working time and the route, the absence of an exclusivity clause, the responsibility of the riders for the delivery of goods).[183] Nonetheless, the Court stated that those elements cannot prevail over the above mentioned indicators of an employment relationship and that «the existence of a new production reality makes it necessary to adapt the notions of dependency and alienation to the social reality of the time in which the law must be applied»[184].

2.6.2 Italy

In Italy all the judgements issued in relation to the employment status of platform workers concern food and grocery delivery platforms.[185]

Before addressing one of the most relevant amongst those cases, it is essential to mention that under the Italian labour law self-employed workers can be entitled to roughly the same rights

[180] C. Hießl, op. cit.
[181] Sentencia del Tribunal Supremo 2924/2020 (Sala de lo Social PLENO), de 25 septiembre de 2020 (recurso 4746/2019)
[182] C. Hießl, op. cit.
[183] Ibid
[184] STS 2924/2020 de 25 septiembre de 2020, RJ 7.1
[185] C. Hießl, op. cit.

entitled to employees if their work is found to be "eteroorganizzato", that is to say: «performed predominantly personally, continuously, and subject to the organisation of work methods, such as time and place, by the principal»[186].

In a decision in January 2020, the Italian Supreme Court assessed that in the case of Foodora (a food delivery platform) riders, the work performed could be considered as "eteroorganizzato" thus upholding the second instance judgement of January 2019 which found the riders to be subject to the organisation of methods, time and place of their work by the principal on the grounds that: riders must complete the deliveries within 30 minutes, they are obliged to start the shift from a specific departure area and activate the geolocation system and they have to check orders when picking them up and notify when the delivery has been successfully completed.[187]

2.6.3 France

France has been continuously dealing with lawsuits concerning the classification of platforms workers over the last seven years, leading to numerous decisions at various levels and concerning different types of platform workers, ranging from riders and taxi drivers to workers performing microtasks and crowdwork.[188] The outcomes provided by the courts have been often contradictory, especially when it comes to Uber drivers.[189]

The French Supreme Court in a decision of March 2020 stated, for the first time, that an Uber driver needed to be classified as an employee on the grounds that he could not build up his own clientele and could not determine the terms and condition of service or set his own prices, there was an imposition as far as concern the route, whose non-observance leaded to a reduction in remuneration, the driver ignored some key facts, such as the destination of the customer to which he was assigned, thus making an independent organisation of the activity impossible,

[186] C. Hießl, op. cit., p. 20

[187] Cass. Civ., sez. lavoro, 24 gennaio 2020, n. 1663 | C. Hießl, op. cit. | The second instance court (the Turin's Appeal Court) hadn't granted Foodora riders the status of employees based on the grounds that: no obligations to offer and accept work exist between the parties; riders can choose their working time freely and cancel shifts; Foodora exercises no disciplinary power over riders; riders work in average less than 20 hours per week; the contract refers to "self-employed performance". However, the Supreme Court could not examine that part of the ruling because the appeal was proposed by Foodora and not by the workers. (C. Hießl, op. cit.)

[188] Ibid

[189] It needs to be stressed that the contradiction of approaches does not only concerns judgements issued before the Supreme Court decision, since also subsequent judgments did not adopt the approach of the Supreme Court. Notably a recent decision of the Lyon Appeals Court (January 2021) found Uber drivers to be self-employed based on the lack of an obligation to work and free determination of working time. (C. Hießl, op. cit.)

and a sanctioning regime was put in place by Uber in order to ensure that assigned tasks were accepted (for instance, the driver would have been temporary disconnected from the platform after three refusals).[190]

2.6.4 The Netherlands

In the Netherlands, so far, the civil courts have reached verdicts on a number of lawsuits concerning the alleged misclassification of platform workers performing taxi, delivery and cleaning services.

In a decision of February 2021, the Amsterdam Appeals Court upheld the Amsterdam Civil Court's ruling of January 2019 according to which riders working for Deliveroo, a ride-sharing platform, are to be qualified as employees. The Supreme Court's reasoning was based on the following considerations: riders cannot be considered entrepreneurs since the contract, determining all the essential aspects of work, is unilaterally drafted by Deliveroo and non-negotiable, tasks offered to riders are based on a non-transparent algorithm thus making the possibility for riders to optimise their activity completely dependent on the app, riders represent the key factor of production, riders are obliged to appear to customers as Deliveroo riders and not as independent undertakings, Deliveroo controls riders through GPS tracking, an insurance for accident at work and liability is provided by Deliveroo for all riders (it is unusual to provide independent contractors with an insurance), riders are in a situation of economic dependency and Deliveroo not giving specific instructions to riders does not impact the subordination of riders to the platform because the general character of the instructions is due to the nature of the task.[191]

[190] Arrêt n°374 du 4 mars 2020 (19-13.316) - Cour de cassation - Chambre sociale | C. Hießl, op. cit.

[191] Gerechtshof Amsterdam, 16 februari 2021, 200.261.051/01 | C. Hießl, op. cit. | Since Deliveroo has requested a review of the Appeal Court's assessment, a verdict of the Supreme Court is expected in late December 2022. Therefore, at the moment, a last instance judgement on the case is still missing. However, the latter is likely to uphold the previous decision, in the light of the already issued opinion of the Advocate General. (See S. Sagel, I. Timp, *Deliveroo riders in the Netherlands are employees, according to Advocate General*, De Brauw Blackstone Westbroek, 20 June 2022. https://www.debrauw.com/articles/deliveroo-riders-in-netherlands-are-employees-according-to-advocate-general#experts)

2.6.5 CJEU

The CJEU has not yet dealt with the employment status of platform workers directly. However, two decisions concerning the nature of the services provided by Uber[192] have proven to be a reference for national judgements on the reclassification of platform workers.[193]

Indeed, the CJEU clearly stated that Uber must be seen not as a mere intermediary linking independent microbusinesses and customers but as a transportation company providing a service through its workers.[194]

Another CJEU decision which could be considered relevant for national courts assessing the status of platform workers, stems from a case concerning the application of the Working Time Directive to a self-employed independent contractor working as a neighbourhood courier and providing such service exclusively for a parcel delivery company.[195] In that instance, the Court pointed out that the worker's independence is based on the existence of various elements, such as: the possibility for the worker to use subcontractors or substitutes, the freedom to offer the same services to any third party, including competitors of the company, the freedom to accept or decline the tasks offered by the company, and the freedom to determine the working schedule.[196]

[192] Judgement of 20 December 2017, *Élite Taxi*, C-434/15, EU:C:2017:981 and Judgement of 18 April 2018, *Uber France*, C-320/16, EU:C:2018:221
[193] C. Hießl, op. cit.
[194] Z. Kilhoffer et al., op. cit.
[195] Order of the Court of 22 April 2020, *Yodel Delivery Network*, case C-692/19, EU:C:2020:288
[196] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021

Chapter III: Addressing misclassification in the US

3.1 Characteristics of platform work and workers in the US

Following the approach adopted in Chapter II, we will start this chapter with a brief overview of platform work in the US.

As we have largely observed in Chapter I, the US plays a pivotal role in the growth and development of the DLP economy accounting for a significant share (29%) of the global number of DLPs and attracting a substantial amount of investments.[197]

As far as US workers engaged in DLP work are concerned, interesting datapoints can be learned from surveys on location-based platforms. For examples, a study conducted in 2021 showed that 16% of Americans have provided a service via a platform in at least one of the following ways: driving for a taxi service app, delivering groceries or household items, delivering from a restaurant or store for a delivery app, performing on location household tasks, delivering packages to others via a mobile app or performing some other similar services. These workers are usually under the age of 30 and with a low household income.[198]

As far as the origin of those workers is concerned, Hispanic Americans make up a large amount (30%) of platform workers and in general individuals born outside the US are more likely than those born in the US to have performed some kind of digital labour platform work (21% vs. 16%).[199]

With respect to online web-based platforms, the ILO reported that the participation of women on online web-based platforms in the United States is in line with the global trend, amounting to 41%.[200]

Furthermore, a study of the United Nations Economic Commission for Latin America and the Caribbean[201] focusing on a specific crowdworking platform (Amazon Mechanical Turk) and on a specific taxi service platform (Uber) provides relevant data on the demographic characteristics of the workers performing services through these two platforms in the United States: in the case of Amazon Mechanical Turk, workers have a median age of around 31 years,

[197] International Labour Organization (2021), op. cit.
[198] M. Anderson et al. *The State of Gig Work in 2021*, Pew Research Center, December 2021
[199] Ibid
[200] International Labour Organisation (2021), op. cit
[201] R. Artecona, T. Chau, *Labour issues in the digital economy*, United Nations publication, August 2017

whilst the overall labour force is on average 41.9 years old; the majority of Uber drivers (30.1%) are between the ages of 30 and 39, whilst most of traditional taxi drivers (36.6%) are between 50 and 64.[202]

The study also provides data on the level of education of those workers. Both the crowdwork platform and the taxi service platform have a mostly highly educated workforce, with 37.3% and of 40% of the workers having some college education and 34.1% and 36.9% of the workers having a college degree.[203]

3.2 Features of misclassification in the US

In the United States, the problem of misclassification has been greatly debated in civil society as well as the political arena. Indeed, the scale of the misclassification phenomenon in the US is quite prevalent, with employers routinely misclassifying workers at large: a survey commissioned by US Department of Labor conducted amongst employers in 2000, found that between 10% and 30% of the respondents misclassified some workers.[204] More recent studies have shown that these percentages have increased over the past years with between 30% and 47% of employers misclassifying at least some workers. In addition to that, it has been found that a high percentage of workers is misclassified in general (between 10% and 19%) and that in some industries the percentage of misclassification can even amount to 50% of the workers.[205] Industries in which misclassification is more frequent include construction, trucking, in-home care, housecleaning and digital platform work industries.[206]

As in the case of the EU, US employers may accidentally misclassify their employees because of the often-blurred lines between employee and independent contractor statuses.[207] Other times, however, the misclassification may have been made intentionally. Indeed, US employers have significant financial incentives to do so: they can save between 20% and 30% of payroll expenses since they don't have to pay for unemployment, pension or medical insurances, social

[202] Ibid
[203] Ibid
[204] L. Rhinehart et al., *Misclassification, the ABC test, and employee status: The California experience and its relevance to current policy debates*, Washington: Economic Policy Institute, June 2021
[205] K. G. Dau-Schmidt, *The Problem of 'Misclassification' or How to Define Who is an 'Employee' Under Protective Legislation in the Information Age* in *The Cambridge Handbook of U.S Labor Law: Reviving American Labor for a 21st century economy*, Cambridge University Press, 2019. Available at: https://ssrn.com/abstract=3143296 or http://dx.doi.org/10.2139/ssrn.3143296
[206] R. Artecona, T. Chau, op. cit.
[207] M. Carboni, op. cit.

security and workers' compensation, nor do they have to comply with basic labour laws such as paid sick leave, minimum wage or overtime pay.[208] Furthermore, by misclassifying, employers benefit from the reduction of the firm's responsibilities and the shift of risks to the workers as well as the fact that they are relieved of liability with respect to damages to third parties caused by independent contractors.[209]

Moreover, independent contractors are not entitled to the right of collective action and bargaining, nor to be represented by labour unions, thus giving the employers an additional business advantage.[210]

3.2.1 Effects of misclassification on US workers

If on one hand, as we have seen, misclassification in the US can be of a substantial advantage for employers, on the other hand its consequences on workers can be quite harsh. Indeed, independent contractors are deprived of all the above-mentioned rights and protections which are afforded, by federal and state labour and employment laws, generally only to employees.[211]

Amongst those regulations, some federal labour and employment acts are worth mentioning also in view of the notion of 'employee' under US law which will be addressed in the next paragraph.

The first regulation is the Fair Labor Standards Act (FLSA)[212]**,** under which employers have to ensure their employees the minimum-wage and overtime compensation at a rate of 150% of their regular wage after forty hours worked per week.[213]

[208] Ibid | D. L. Belman, R. Block, *Informing the Debate: The Social and Economic Costs of Employee Misclassification in Michigan*, Michigan State University, 2009 | K. Miller, *The Misclassification Trend: How Independent Contractor Status Could Affect Consumers*, 28 Loy. Consumer L. Rev. 333 (2016) | Moreover, the practice of misclassifying workers gives employers who do so an advantage over honest non-misclassifying competitors who are faced with the choice of either leaving the market or emulating the dishonest practices. (K. G. Dau-Schmidt, op. cit.)
[209] R. Artecona, T. Chau, op. cit. | K. Miller, op. cit.
[210] Ibid | K. G. Dau-Schmidt op. cit.
[211] J. O. Shimabukuro, *Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC Test*, Congressional Research Service, April 2021
[212] 29 U.S.C. §§ 201 *et seq.*
[213] L. Rhinehart et al., op. cit.

The second relevant regulation is the National Labor Relations Act (NLRA)[214] which grants employees the right to self-organize, to form, join, or assist labour organizations and the right to collective bargaining.[215]

Other federal laws that afford social and employment rights to employees but not to independent contractors are: the Family and Medical Leave Act (FMLA)[216] under which eligible employees in certain critical life situations are entitled to up to 12 weeks of unpaid leave per year, the Age Discrimination in Employment Act (ADEA)[217] under which employees cannot be discriminated on the basis of their age, and the Federal Unemployment Tax Act (FUTA)[218] under which employers must pay their share for the unemployment benefits to displaced workers.[219]

Since, as we said, the application of those and other laws rely on the classification of workers as employees rather than independent contractors, such classification turns out to be important for the entitlement of rights and claims against employers.[220]

3.3 The notion of "employee" in the US legal system

In the US the definition of employee (or independent contractor) depends on the federal or state law at issue.[221] Indeed, labour and employment laws generally include a statutory definition of employees which is applicable for the purposes of each specific law. However, these definitions are often vague or self-referential, thus making it difficult for courts to determine if a worker has to be regarded as an employee or as an independent contractor with respect to the application of the law at stake.

[214] 29 U.S.C. §§ 151 *et seq.*
[215] J. O. Shimabukuro, op. cit.
[216] 29 U.S.C. §§ 2601 *et seq.*
[217] 29 U.S.C. §§ 621 *et seq.*
[218] 26 U.S.C. §§ 3301 *et seq.*
[219] K. G. Dau-Schmidt op. cit. | C. J. Muhl, *What is an employee? The answer depends on the Federal law*, Monthly Labor Review, January 2002
[220] J. O. Shimabukuro, op. cit.
[221] General legal definitions of those terms can be found by the Black's Law Dictionary which defines "employee" as «a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed» (H. C. Black, *Black's Law Dictionary*, St. Paul, MN: West Publishing Co, 1991, p. 363) and "independent contractor" as a person who «in the exercise of an independent employment, contracts to do a piece of work according to his own methods and is subject to his employer's control only as to the end product or final result of his work» (H. C. Black, op. cit., p. 530). See C. J. Muhl, op. cit.

For instance, the FLSA simply defines the term employee as «any individual employed by an employer»[222] and the verb "to employ" as «to suffer or permit to work»[223].
The NLRA, instead, states that

> the term 'employee' shall include any employee and shall not be limited to the employees of a particular employer [. . .] but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor […].[224]

Due to the circular and vague nature of those definitions, courts and administrative bodies, for the purpose of making their assessments on workers' classification, have developed and adopted various tests which focus on the reality of the working situation rather than on the wording of the contracts.[225]
The most used amongst those tests are known as the "Common law agency test" (or "right to control test"), the "economic reality test," and more recently, the "ABC test."
Hybrid tests which incorporate various elements of the abovementioned tests have also been adopted.[226]
As we will see, courts have used one of those tests depending on the statute to which the characterization of a worker as an employee or an independent contractor has to be applied. Consequently, under the US legal system it is even possible for a worker to be classified as an employee for the purposes of one particular law and as an independent contractor for the purposes of another.[227]

3.3.1 The common law agency test (Right to control test)

The common law agency test was the first of the three tests to be established. Indeed, judges developed that test in the 19th and early 20th centuries in the context of tort cases. In order to assess whether the employer was to be held liable for the tortious actions of the employee, judges looked at whether the hiring party exercised control over the actions of the worker.[228]

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[222] 29 U.S.C. § 203(e)(1)
[223] 29 U.S.C. § 203(g)
[224] 29 U.S.C. § 152 (3)
[225] J. O. Shimabukuro, op. cit. | R. Artecona, T. Chau, op. cit.
[226] C. J. Muhl, op. cit.
[227] Ibid
[228] E. Markovits, *Easy as ABC: Why the ABC Test Should Be Adopted as the Sole Test of Employee–Independent Contractor Status* (2020). Cardozo Law Review de•novo. 79. Available at: https://larc.cardozo.yu.edu/de-novo/79

Over the years the uses of the test expanded up to being applied for discerning employers from employees in cases concerning protection legislation.[229] Nowadays the test is mostly used in cases concerning the application of the NLRA and it is rooted in the Restatement (Second) of Agency § 220. Under the latter, the control, or right to control, of the employer over the worker is the key element in determining whether a worker is an employee or not.[230] At the same time, it provides a non-exhaustive list of ten factors which should be taken into consideration when determining the status of a workers. Those factors are:

> (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.[231]

According to the National Labor Relations Board (NLRB) (the agency administrating the NRLA) and the courts, when applying the common law test, no one of those factors is determinative, rather, the totality of the circumstances should be evaluated.[232]

3.3.2 The Economic Reality Test

The economic reality test has its roots in the common law agency test and is mostly used for determining the status of a worker for purposes of the FLSA. The focus of that test is on the

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[229] Ibid

[230] The statement refers to "servants" but nowadays the term it is generally understood as employee (See E. Markovits, op. cit.)

[231] Restatement (Second) of Agency § 220

[232] J. O. Shimabukuro, op. cit. | A simplified version of the right to control test is provided by the the Internal Revenue Service (IRS) which suggests three categories of facts that give evidence of the degree of control and independence in the worker-emlpoyer relationship: behavioral control (whether the employer has the right to direct and control how the work is completed through instructions, training, or any other means), financial control (whether the employer have the right to control the fiscal and business aspects of the job, including for instance whether the worker can invest in the facilities or tools used in performing services) and relationship of the parties (facts that show the type of relationship existing between the parties, including for instance written contracts or oral agreements). (K. Miller | IRS, *Topic 762 - Independent Contractor vs. Employee*, https://www.irs.gov/taxtopics/tc762.html)

economic relationship between the worker and the employee and more specifically on the economic dependence of the latter on the first: the higher the degree of this dependence is, the more likely the worker will be considered an employee by courts. In order to assess whether a worker is economically dependent on the employer, courts look at the economic reality of the working relationship, generally considering the six factors developed by the Third Circuit Court of Appeal in *the Donovan v. DialAmerica Marketing, Inc.* case [233]. These factors are:

> 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business.[234]

This test is generally used for the purposes of statutes where the definition of employee or to employ is elaborated in a circular manner that shows the intention of a broad coverage (like in the FLSA), therefore, to preserve that intention, the economic reality test is also conceived in a way that makes it likely for courts to find a worker to be an employee.[235]

3.3.3 The ABC test

The last test which will be addressed here, is the so called "ABC test". This test dates back to 1935 and is rooted in the Maine Employment Security Law[236], a piece of unemployment compensation legislation.[237]

Since then, more than 20 states, dissatisfied with the vagueness of the other tests, have adopted the ABC test for determining whether an individual is an employee or an independent contractor for purposes of the application of workplace state laws.[238] A first element of distinction between the ABC test and the other ones previously considered is, indeed, the fact that state legislatures have been the primary movers for its adoption.[239]

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[233] *Donovan v. DialAmerica Mktg., Inc*., 757 F.2d 1376 (3rd Cir. 1985)
[234] *Donovan v. DialAmerica Mktg., Inc*., 757 F.2d 1376, 1382 (3d Cir.), cert. denied, 474 U.S. 919 (1985).
[235] E. Markovits, op. cit
[236] Other sources report a different origin of the ABC test. See for instance L. Rhinehart et al., op. cit.
[237] E. Markovits, op. cit | K. G. Dau-Schmidt op. cit.
[238] K. G. Dau-Schmidt op. cit. | L. Rhinehart et al., op. cit.
[239] K. G. Dau-Schmidt op. cit.

However, the most relevant feature that distinguishes the ABC test from the others is the fact that it establishes a presumption that the worker is an employee. The presumption is rebuttable, and the burden of proof is on the employer who, in order to prove the independent contractor status of the worker, has to establish all of the following three factors (from which the test takes its name):

> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. (B) The person performs work that is outside the usual course of the hiring entity's business. (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[240]

If the employer cannot satisfy all those three elements, the worker is to be classified as an employee.

Whilst the first element is easily understandable due to its similarity to the right to control test, the other two factors can be understood through the following example:

> When a law office hires a lawyer, they are hiring someone to do work that is within their usual line of business, namely practicing law. Under prong B of the ABC test this lawyer would be an employee of the law office. When the law office hires a plumber to fix a sink in their break room however, the plumber is not doing work within the law office's usual line of business because they are not practicing law, and thus the B prong would be satisfied and this person could still be an independent contractor. Furthermore, the plumber would likely be found to be engaged in an independent trade under prong C. Presumably, when this plumber is done fixing the law office's sink, they will go to one of many other clients they work for and have solicited, and are thus engaged in business independent from the law office.[241]

Notable examples on how the ABC test is applied in courts are provided by the case law of California which, being the largest US state economy by GDP with a labour force of about twenty million people, is pretty extensive.[242] Furthermore, California being the home of Silicon Valley - where most of the technology companies, comprising those operating through digital labour platforms, are based – many of those applications of the ABC tests notably concerns platforms workers' misclassification.[243]

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[240] *Dynamex Operations West, Incorporated v. Superior Court of Los Angeles County*, 416 P.3d at 35-36
[241] E. Markovits, op. cit., p. 239
[242] E. Markovits, op. cit.
[243] Ibid

In addition to the abovementioned, it is worth focusing on the way California applies the ABC test because the "Golden State" has a history of leading the country and inspiring other state legislatures when it comes to worker protections.[244]

3.4 The Dynamex case

The most relevant case for the application of the ABC test in California is the Dynamex case.[245] Before Dynamex, a different test has usually been applied by Californian courts when dealing with cases concerning the status of workers. That test was the so-called "Borello test", a multifactor test developed by the California Supreme Court in the *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* case.[246] Being a multifactor test, no single factor of the Borello test is determinant in deciding whether a worker is an employee or an independent contractor thus resulting in being less predictable than the more straightforward ABC test.[247]

Having the Borello test being consistently applied by Californian courts for 15 years before the introduction of the ABC test, Dynamex case certainly represents a turning point in California labour case law.

Dynamex is a nationwide courier delivery company which provides on-demand same-day delivery services. In 2004, Dynamex converted all its drivers, which were previously classified as employees, into independent contractors for economic savings reasons. Under that policy all Dynamex Drivers were required to use their own vehicles and to pay for related transportation expenses.[248]

As a general matter, Dynamex set the rate to be charged to its customers for deliveries, and it negotiated the amount to be paid to drivers on an individual basis. Drivers were generally free to set their working schedule but had to notify Dynamex about it, in addition to that, they had to maintain contact with Dynamex through a specific cellular phone at their own expense.[249]

Drivers were assigned deliveries at Dynamex's sole discretion, although they could choose to accept or reject the assignment. In the latter case they had to promptly notify Dynamex,

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[244] E. Markovits, op. cit. | W.B. Gould IV, M. Biasi, op. cit.
[245] *Dynamex Operations West, Incorporated v. Superior Court of Los Angeles County*, 416 P.3d
[246] *S.G. Borello & Sons v. Dep't of Indus. Relations*, 769 P.2d 399 (Cal. 1989).
[247] CA.gov website - Labor & Workforce Development Agency, *Independent Contractor vs. Employee – FAQ*, https://www.labor.ca.gov/employmentstatus/faq/
[248] See See *Dynamex Operations W., Inc. v. Superior Court of Los Angeles County*, 416 P.3d, 8-9
[249] Ibid

otherwise, if they accepted, the delivery had to be completed on that day (even though they were generally free to decide in which sequence and through which routes making the deliveries).[250]

Drivers were expected to wear Dynamex shirts and badges when making deliveries and sometimes to attach Dynamex decals to their vehicles. However, they could hire other persons to complete deliveries assigned by Dynamex (although they could not divert them to a competitive delivery service). Drivers, furthermore, were allowed to make deliveries for another delivery company, or their own personal delivery business.[251]

Finally, although the agreements between Dynamex and the drivers were generally set for an indefinite period of time, Dynamex could terminate its relationships with any driver without cause on three days' notice.[252]

In January 2005, after the conversion of Dynamex drivers into independent contractors, one of those drivers brought a lawsuit against Dynamex on behalf of himself and a class of other Dynamex drivers, challenging their alleged misclassification and the resulting failure to comply with California's Labor Code provisions on overtime payments, itemized wage statements, and compensations for business expenses, as well as unfair and unlawful business practices.[253]

The case came before the California Supreme Court following an appeal brought by Dynamex.[254]

The question the court was called upon to rule concerned the definition of "employ" which could be used to determine whether a worker is an employee for purposes of wage and hour laws. In that regard, the court decided to adopt as a definition of "employ" the broad and already mentioned "to suffer or permit to work".[255]

[250] Ibid
[251] Ibid
[252] Ibid
[253] E. Markovits, op. cit.
[254] According to the trial court, in order for the drivers to be certified a class they had to meet one of the following two alternative definitions of "employ": "to suffer or permit to work" or "to exercise control over wages, hours, or working conditions". The appellate court, then, upheld the use of the alternative definitions of "employ" with respect to the drivers' claims for unpaid overtime and failure to provide itemized wage statements, but not for the others. It is precisely the latter appellate court's ruling that Dynamex appealed to the California Supreme Court. (E. Markovits, op. cit.)
[255] E. Markovits, op. cit.

The court explained that decision on the ground that the purposes of wage and hour laws (i.e. providing workers with a subsistence standard of living and protecting their health and welfare) are so important that they require a broad definition of employee.[256]

Once the definition of employee was established, the court needed to decide which test to use for the purpose of determining if Dynamex 'suffered or permitted its drivers to work for themselves'. In that regard the court noted that in cases regarding the application the FLSA, from which, as we know, the "suffer or permit to work" definition comes, federal courts had generally applied the economic reality test. However, the court decided not to adopt such test because of its many factors that could be easily exploited by employers and decided, instead, to adopt the simpler ABC test.[257]

According to the court, the ABC test minimizes the disadvantages brought by the economic reality test or other multifactor tests. Those disadvantages are represented by the fact that such tests a) make it difficult for both hiring entities and workers «to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision»[258]; and b) grant an hiring entity «greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its work force into disparate categories and varying the working conditions of individual workers within such categories with an eye to the many circumstances that may be relevant under the multifactor standard.»[259]

3.5 California Assembly Bill 5

Following the wake of California Supreme Court's decision, in 2019 California's legislators passed and the governor signed into law the California Assembly Bill 5, commonly known as

[256] Ibid
[257] Ibid
[258] *Dynamex Operations W., Inc. v. Superior Court of Los Angeles County*, 416 P.3d, 62-63
[259] *Dynamex Operations W., Inc. v. Superior Court of Los Angeles County*, 416 P.3d, 63 | As far as the application of the ABC test to the specific case of Dynamex is concerned, the court mainly focused on part B of the test: whether the work performed by the drivers was outside the usual course of the hiring entity's business. The court pointed out that since Dynamex's entire course of business was that of a delivery service, «whether a class of delivery drivers performed work outside the usual course of business could be determined in a class-wide manner» (E. Markovits, op. cit., p. 246). Furthermore, the court held that «because each part of the ABC test may be independently determinative of the employee or independent contractor question, [the] conclusion that there is a sufficient commonality of interest under part B of the ABC test is sufficient in itself to support the trial court's class certification order» (*Dynamex Operations W., Inc. v. Superior Court of Los Angeles County*, 416 P.3d at 80)

"AB5".[260] The bill, which entered into force as of January 2020, was drafted with the intent of providing interpretative consistency and promoting predictability across California, while ensuring that «workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law.»[261] Indeed, AB5 has *de facto* codified the Dynamex decision establishing that the ABC test is the applicable test for determining the status of workers, not only for the purposes of California's wages and hours laws (as for the case of Dynamex) but also for the purposes of other California's labour laws, concerning for instance unemployment insurance and workers' compensation.[262] Although some categories of workers are excluded from the application of the AB5 (notably those for which it is essential to preserve the independent contractor status because of their professional activity and self-sufficiency, such as certain health care professionals, lawyers, commercial fishermen, investment advisers, artists and freelance writers and photography), reports and analyses have shown that the passage of AB5 have afforded protection to approximately 1 million California's workers (mainly in the sectors of transportations, retail, cleanings and childcare) which have been (mis)classified as independent contractors.[263]

The consequence for employers is that they have now the burden of meeting all the three factors of the ABC test if they want to preserve the independent contractor status of people working for them.[264]

3.5.1 Resistance to AB5 and proposed alternatives

Of course, the introduction of the bill caused some resistance amongst industries and employers and, notably, amongst platform-based companies. In fact, despite the bill being «facially neutral» [265] with respect to those companies, as soon as the legislation passed, debates arose as to whether the AB5 would apply to platforms workers and before the question could be fully

[260] Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621)
[261] Ibid | *California adopts the ABC test to distinguish between employees and independent contractors*, 133 Harv. L. Rev. 2435, (May 10, 2020)
[262] L. Rhinehart et al., op. cit. | W.B. Gould IV, M. Biasi, op. cit.
[263] Ibid | E. Markovits, op. cit.
[264] L. Rhinehart et al., op. cit.
[265] E. Markovits, op. cit.

resolved, platforms companies in California started a strenuous battle against the application of the bill to their riders and drivers.[266]

The main argument put forward by those platforms was that granting employment status to their workers would have resulted in the elimination of their business model and in increased labour costs which would have eventually led to increased tariffs.[267] Furthermore, they added that the employee status would have been detrimental also for drivers and riders themselves which may prefer to be independent contractors and work their preferred working times: companies would have been required to only employ full-time drivers and riders displacing those available only for a short period of time.[268]

Indeed, companies can of course operate more efficiently by not bearing the cost of social contribution and health insurance and this can be extremely beneficial to start-ups which most of the time are not able to pay salaries.[269] Moreover, platform-based companies usually deal with fluctuating demand for service and their business model is constructed in a way that « they can meet demand by offering higher paying tasks and incentivizing more workers to take on those tasks.»[270]

On the other hand, obliging those companies to hire their drivers/riders as employees would mean that those workers would likely lose their flexibility which is exactly the primary factor that attracts the majority of workers into platform work.[271] Indeed, as Uber admitted, the classification of drivers as employees would likely lead to working shifts, the deployment to specific areas, a minimum number of hours per week and the inability to work multiple platforms.[272] Furthermore, as it is not feasible for platform-based companies to pay social benefits for all their workers, they would likely keep just a quarter of them, those willing to work under the new conditions, dismissing the others.[273]

[266] L. Rhinehart et al., op. cit. | Freshfields Bruckhaus Deringer, op. cit.
[267] W.B. Gould IV, M. Biasi, op. cit.
[268] Ibid
[269] P. Buckley, *Bill AB5 and the Gig Economy*, 29 U. Miami Bus. L. Rev. 49 (2021)
[270] Ibid, p. 54
[271] P. Buckley, op. cit
[272] Ibid | *California adopts the ABC test to distinguish between employees and independent contractors,* op. cit.
[273] P. Buckley, op. cit.

However, while platform workers want to keep their flexibility, they also want the same benefits that are afforded to employees, like health insurances, paid time off and workers' compensation.[274]

For these reasons, in order to meet these needs and at the same time to ensure the keeping of their business model, a group of platforms led by Uber and Lyft[275] fund and launch a ballot initiative campaign to prevent the application of AB5 to their workers, if a specific legislative exemption was not introduced.[276]

3.5.2 Proposition 22 and the "third way"

The ballot at stake eventually took place and the proposed measure, officially called App-Based Drivers as Contractors and Labor Policies Initiative and better known as "Proposition 22", was approved by Californian voters in November 2020.[277]

The measure tried to carve out a third classification for drivers and riders, granting them some benefits while keeping their classification as independent contractors.[278]

Indeed, the passage of Proposition 22 made certain platform workers (those providing app-based transport and delivery services) not subject to the application of AB5 and therefore not entitled to the status of employees and all the related rights, but, at the same time, granted them a limited number of employee-like benefits promised by platforms.[279] Those benefits comprised an hourly income higher than the minimum wage and an insurance for on-the-job injuries which granted workers unable to work 66% of the weekly wage for up to two years.[280]

That provision, although imperfect, seemed to finally lead the way for the so called "third way" that scholars have been promoted for a long time: a third legal classification of workers which would have allowed courts «to find a happy medium between employee protections, flexibility

[274] S. Ghaffary, "Some Uber and Lyft drivers say they were misled into petitioning against their own worker rights", Vox, Jun 27, 2019 https://www.vox.com/recode/2019/6/27/18759387/uber-lyft-drivers-misled-companies-political-campaign
[275] Another California-based rideshare company
[276] L. Rhinehart et al., op. cit. | Freshfields Bruckhaus Deringer, op. cit.
[277] L. Rhinehart et al., op. cit. | Freshfields Bruckhaus Deringer, op. cit.
[278] K. Conger, "California's Gig Worker Law Is Unconstitutional, Judge Rules", The New York Times, August 20, 2021 https://www.nytimes.com/2021/08/20/technology/prop-22-california-ruling.html
[279] L. Rhinehart et al., op. cit. | Freshfields Bruckhaus Deringer, op. cit. | W.B. Gould IV, M. Biasi, op. cit.
[280] W.B. Gould IV, M. Biasi, op. cit. | On the other hand, however, drivers and riders were deprived of unemployment compensation, family leave and sick pay, overtime pay, disability insurance and other contributions and, furthermore, the true guaranteed hourly wage was found to be in facts lower than minimum wage due to deductions for taxes and expenses and the non-provision of compensation for waiting time. (W.B. Gould IV, M. Biasi, op. cit. | L. Rhinehart et al., op. cit.)

in the workplace, and employer business needs, like predictability and growth. » [281] Such a third category, which has been called either "independent worker"[282] or "dependent contractor"[283] would have likely «lessen the burden on both the employers and the workers in the sharing economy.»[284]

However, the project of a third category of workers envisaged by Proposition 22 went up in smoke in 2021 when a California judge declared the measure unconstitutional and unenforceable as restricting California Legislature from making platform workers eligible for worker's compensation.[285]

3.6 Further developments on the adoption of the ABC test

As we have already said, California has a reputation for leading and inspiring the country when it comes to adopting policies on workers protection. That was the case, despite the abovementioned debates, also for the adoption of the ABC test and state legislations comparable to AB5. A step forward in this process has been taken by the Representative for Virginia's 3rd congressional district, which, during the 117th Congress, has introduced the Protecting the Right to Organize (PRO) Act[286] which would amend the NLRA's definition of the term "employee" applying instead, for purposes of coverage under the act, the ABC test. For its sponsor that amendment would prevent employers «from misclassifying employees as independent contractors in order to prevent their workers from organizing.»[287]

The PRO Act already passed the U.S. House of Representatives in March 2021 and is currently pending in the U.S. Senate.[288] The passage of such an act would have significant implications

[281] M. Carboni, A New Class of Worker for the Sharing Economy, 22 Rich. J.L. & Tech 11 (2016), p. 37 Available at: http://scholarship.richmond.edu/jolt/vol22/iss4/2
[282] S. D. Harris, A. B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The" Independent Worker"*. Washington, DC: Brookings, 2015
[283] M. Carboni, op. cit.
[284] Ibid, p. 37
[285] K. Conger, op. cit. | *Castellanos v. Hagen*, No. RG21088725, 2021 Cal. Super. LEXIS 7285 at *18 (Cal. Super. Ct. August 20, 2021)
[286] H.R. 842/S. 420
[287] Press Release, Hon. Bobby Scott, Scott Urges Passages of the Protecting the Right to Organize Act (Mar. 9, 2021), https://bobbyscott.house.gov/media-center/press-releases/scott-urges-passage-of-the-protecting-the-right-to-organize-act
[288] L. Rhinehart et al., op. cit.

for both workers and companies, giving, in essence, most platform workers the right to unionize and making it easier for the NLRB «to crack down on rule-breaking companies».[289]

However, as in the case of AB5, the PRO Act is facing a fierce resistance from platform companies which are lobbying against the passage of that act too and, in general, are carrying on their fight against the ABC test.[290] Indeed, those companies are striving to pursue initiatives like Proposition 22 in other US states. In that regard, in 2020 the CEO of Uber said: «You'll see us more loudly advocate for new laws like Prop 22».[291]

In addition to that, in California more and more companies resist to comply with AB5 and claiming for their own exemptions thus threating the application of the ABC test and therefore workers' full enjoyment of its benefits.[292]

The practical uncertainty on the application of the ABC test, however, is in contrast to the strong support that the test receives from the academic world. Indeed, several academics believe that the ABC should be the sole test used throughout the United States for assessing the status of a workers as either an employee or an independent contractor.[293] This belief is supported by at least three reported beneficial characteristics of the test: the presumption of employee status, the use of cumulative elements instead of equally weighted factors, a narrower and more straightforward definition of its elements.[294]

According to supporters, the first characteristic of the test makes it easier for workers to be aware of their rights, since they can presume to be employees until that presumption is rebutted by the employer and at the same time discourages employers from misclassifying as they know that the burden of proof is on them.[295]

As for the second factor, they say that it limits the risk, which instead is great when it comes with multifactor tests, of having discrepancy in rulings which would make it difficult for a worker to know in advance how a judge will decide. Furthermore, multifactor tests can be easily

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[289] R. Grim, "Sen. Mark Kelly is emerging as an obstacle to the PRO act", The Intercept, April 13, 2021 https://theintercept.com/2021/04/12/pro-act-mark-kelly-angus-king-dsa/ | Z. Cassel, R. Adams, "Opposing PRO Act, Uber and Other Gig Companies Spend Over $1 Million Lobbying Congress." The Intercept, May 6, 2021 https://theintercept.com/2021/05/06/pro-act-uber-lyft-doordash-instacart-lobbying/

[290] L. Rhinehart et al., op. cit.

[291] J. Eidelson, "Election Day Gave Uber and Lyft a Whole New Road Map" Bloomberg, November 8, 2020 https://www.bloomberg.com/news/articles/2020-11-08/prop-22-gives-uber-and-lyft-a-new-model-for-gig-economy-workers#xj4y7vzkg

[292] L. Rhinehart et al., op. cit. | W.B. Gould IV, M. Biasi, op. cit.

[293] E. Markovits, op. cit.

[294] Ibid | L. Rhinehart et al., op. cit.

[295] E. Markovits, op. cit.

manipulated by employers which could fraudulently structure the employment relationship so that it gives the impression of complying with those tests.[296]

Finally, the last characteristic of the ABC test makes the judges focusing on the heart of the matter (whether the worker is in business for him/herself), avoiding «a mechanical counting of factors» [297].

The extensive application of the ABC test advocated by academics, however, is still not yet a reality due to the mentioned resistances and the «sprawl of different approaches»[298] currently adopted throughout the US, facts that likely set the stage for years of policy disputation and litigation.[299]

3.7 The EU proposal for a directive on platform work: a comparison with the ABC test

Whilst the US are still fragmented as to approaches adopted in the field of platform workers' protection, the EU is trying to reach a common framework through a proposal for a directive on improving working conditions in platform work [300] advanced by the European Commission in December 2021.

The purpose of that directive is to improve the working conditions and social rights of all platform workers, through three specific objectives: (a) ensuring the correct determination of their employment status, (b) promoting, fairness, transparency and accountability in platform work's algorithmic management, and (c) improving transparency, traceability and awareness of development in platform work as well as enforcement of the applicable rules.[301]

A first important characteristic of that Directive is that, contrary to US tests, which apply indistinctively to all workers (anyone who carries out a working activity, either through platforms or not), it addresses only a specific segment of the workforce: «persons performing platform work.»[302]

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[296] E. Markovits, op. cit.
[297] Ibid, p. 254
[298] Ibid, p. 92
[299] E. Markovits, op. cit.
[300] European Commission, Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, 9 December 2021, COM (2021), 762 final
[301] T. Timmermans, R. Hardy, "EU Platform Work Package: What Does It Mean for Platform Businesses ?", National Law Review, December 3, 2021 https://www.natlawreview.com/article/eu-platform-work-package-what-does-it-mean-platform-businesses#google_vignette
[302] European Commission, Directive Proposal, COM (2021), 762 final, of 9.12.2021

Secondly, unlike most national legislative initiatives, which, as we have analysed, address only specific categories of platform workers (usually riders), this Directive would apply to every kind of platform workers, ranging from those providing ride-hailing services or cleanings to those performing crowdwork. Indeed, article 2 of the proposed Directive specifies that for its purposes it is irrelevant whether platform work is performed online or in a certain location.[303]

Thirdly, the directive would address both platform workers in a strict sense i.e. those who are employed by platforms and persons who work through platforms as independent contractors.[304] Indeed one of the main goal of the directive is to clarify the employment status of persons performing platform work when such status is not clear.[305]

In that regard the European Commission proposed a rebuttable presumption of employment subordination, which, however, largely differs from the presumption set by the ABC test.

Indeed, the EU presumption is not automatic and requires, instead to be triggered by the meeting of at least two of the following conditions (to be proven by the claimant):

> (a) the platform effectively determines or sets upper limits for the level of remuneration;
> (b) the platform requires the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
> (c) the platform supervises the performance of work or verifying the quality of the results of the work including by electronic means;
> (d) the platform effectively restricts the freedom, including through sanctions, to organize one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;
> (e) the platform effectively restricts the possibility to build a client base or to perform work for any third party.[306]

As it is possible to notice, the abovementioned indicators are quite controversial. Indeed, whilst circumstances c) and d) can be seen as classic indicators of control and therefor of employment subordination, indicators a), b) and e) can be considered as typical features of platform work not necessarily entailing the necessity of an employment relationship.[307]

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[303] V. De Stefano, A. Aloisi, *European Commission takes the lead in regulating platform work*, Social Europe, December 9, 2021 https://socialeurope.eu/european-commission-takes-the-lead-in-regulating-platform-work
[304] W.B. Gould IV, M. Biasi, op. cit.
[305] V. De Stefano, A. Aloisi, op. cit.
[306] W.B. Gould IV, M. Biasi, op. cit., p. 93
[307] W.B. Gould IV, M. Biasi, op. cit.

Furthermore, the controversy of that mechanism is supported by the fact, pointed out by some scholars, that when the control elements are met, «the worker would be arguably entitled to be directly classified as an employee in almost any jurisdiction»[308] and «the fact that the same elements are part of a rebuttable presumption mechanism might thus complicate rather than simpl[if]y the classification process.»[309]

Accordingly, it has been suggested that the European legislator should rethink such list of indicators and maybe adopt a solution more similar to the ABC test which is simpler because the complaining worker has only to demonstrate the existence of the working activity performed for the hiring entity, whilst the greatest part of the burden of proof is on the latter.[310]

However, as scholars pointed out, if such a solution was adopted in the EU, there would be a high risk that it might face the same harsh opposition experienced in the US.[311]

[308] Ibid p. 94
[309] Ibid
[310] W.B. Gould IV, M. Biasi, op. cit.
[311] Ibid

Conclusion

Misclassification of workers affects a consistent share of the workforce of countries where the boundaries between traditional categories of workers are becoming more and more blurred due to changes in the labour market. Those changes are largely the result of the recent developments in the technology and digitalisation process. This is particularly true for platforms workers, who are more directly affected by those changes. For those workers, whose work performance is often controlled and guided by algorithms, having access to social and labour rights and protections is becoming increasingly difficult because of the "hybrid" nature of their working relationship which for some aspects may resemble that of an employee whilst for others that of an independent contractor. This blurred line results in the risk – and sometimes in a temptation – on the part of digital labour platforms of misclassifying platform workers as independent contractors instead of employees.

The issue is nowadays at the forefront of public debate at the national and international level both in the EU and the US, with international organisations trying to propose solutions to a problem which is destinated to deteriorate over the years if not addressed on time, due to the prominent role that platform work is gaining in the labour market.

This thesis has attempted to provide the reader with an overview of the approaches adopted in the EU and in the US in order to address the challenging issue of platform workers misclassification. As we have seen throughout the dissertation, those approaches are quite fragmented and substantial differences exist not only at a larger level between the EU and the US, but also internally, between single states.

Indeed, at an EU level, the debate on platform workers has been largely focused on the rights and protections to be afforded to platform workers. Over the last years the EU has tried to do so by implementing a set of soft law instruments encouraging member states to ensure adequate social protection to all workers. More recently, however, the EU seems to have switched to a new, probably more effective, approach by proposing a directive expressively tackling platform workers' rights and protection and the issue of misclassification.[312] On the other hand, not every member state has addressed platform work at national level, and amongst those that did so, the solutions adopted vary substantially, ranging from affording platform workers specific rights

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

(like in France) to introducing a presumption of employment relationship (as in Spain). In the meanwhile, in the absence of specific legal frameworks, judges play a pivotal role in defining the destiny of platform workers, since the power of deciding whether they must be deemed employees or independent contractors is *de facto* in their hands.

In the US, the situation is just as complicated as in the EU. The matter mostly revolves around the definition of employee and the tests to be used in order to ascertain that status. Definitions and tests adopted vary based on different laws that are not applied uniformly. As a result, platform workers in the US can be deemed both employees for the purposes of a particular law and independent contractors for the purposes of another. Furthermore, the process of ascertaining the status of platform worker in US can be quite complicated and lead to different results since tests used are usually "multifactor" meaning that no one single factor is decisive for the assessment. Attempts to make the process of the employment status assessment easier and more predictable have been pursued, in particular, by the state of California, home of most of the companies operating through digital labour platforms. An important attempt mentioned in this work, is that of California Assembly Bill 5 which has codified the straightforward ABC test in order to provide interpretive consistency and predictability when determining the status of a worker in California's courts. The attempt, however, has encountered some resistance, mainly on the part of platforms, thus demonstrating that the path towards a satisfactory solution to the issue of platform workers misclassification is still long and far from straightforward.

As the two traditional categories of worker – that of employees and that of self-employed workers – seem to be too tight for platform workers, scholars propose the introduction of a third category of workers which could better respond to the needs of both platforms and workers, granting the latter adequate rights and protections and at the same time guaranteeing the flexibility typical of platform work.

This solution, although it has attracted some criticism as well, seems to be, at the present time, the most accessible way towards a concrete and practical solution to the matter, although certainly not the easiest one.

Indeed, the solutions proposed so far both in the US and in the EU still contain many loopholes. On the one hand, granting platform workers more social protections without addressing the question of their classification as employees or self-employed workers would not entirely solve the problem since platforms would be always free to choose how to classify their workers and the differences between employees and self-employed workers would always exist, even if

certain social rights are granted to platform workers irrespective of their status. For instance, independent contractors would always be (at least at a theoretical level) free to set their rates and to organise their work and working time as they wish, whilst employees would not, being subject to the direction of the employer. Employees would be protected against unfair dismissals whilst independent contractors obviously not. The classification of platform workers as either employees or self-employed workers entails different consequences for both workers and platforms regardless of the fact that these workers are entitled to some additional benefits. The fact, for instance, that a self-employed platform worker is entitled to some employee-like benefits, such as an insurance against work injuries, doesn't change the fact that he can have been misclassified as self-employed not having access to other benefits. Platforms, on the other hand, would be burdened by the payment of such insurance even in the case where the classification as independent contractor is appropriate, thus having to face an unnecessary expense.

On the other hand, the introduction of some kind of presumption on the employee status of platform workers can be probably more problematic than the solution of granting specific protections to platform workers. Indeed, such a solution can be detrimental both for platforms and for workers. Firstly, platforms may not be able to pay social benefits for all of the workers providing services via these platforms and, in addition to that, they would be forced to change their business models since they would need to adapt to fixed working times entailing, probably, less efficiency and less customer friendly services. Secondly, workers would probably lose their flexibility on time schedules and routes, on the order in which executing tasks, on the possibility of picking up other jobs and so on. For workers, furthermore, it would no longer be so easy to enter the gig economy since being classified as an employee would require more steps and bureaucracy, more contractual terms to be signed. Moreover, the hiring procedure may entail a selection process since platforms may want to hire only the "best" workers, given that they would be obliged to pay for them a substantial amount of money in terms of social benefits. Likewise, it would be more difficult for workers to quit, or simply taking time off. Additionally, all these limitations on hiring and dismissing would be a burden in terms of time, human resources, and money for platforms.

Given those considerations, the solution that would better respond to the problem of platform worker misclassification in the US and in the EU, would be that of introducing a third category of workers. Indeed, such a solution would, at a stroke, both tackle the issue of the status of platform workers and provide them with adequate protection.

Indeed, a third hybrid category of workers would eliminate «the uncertainty that goes along with litigation connected to the "all or nothing" scheme»[313] related to the traditional binary distinction between employees and self-employed workers. Furthermore, it would offer some labour protections to platform workers presenting certain characteristics of employees and others of independent contractors.[314]

Under the hybrid category, which, as mentioned in Chapter III, has been called by proponents either "independent worker" or "dependent contractor", workers should be able to keep the flexibility of independent contractors and, the same time, gain some of the protections typically assigned to employees.

To begin with, as it has been proposed, the worker belonging to the 'hybrid category' should work subject to at least some of his/her own criteria, notwithstanding the platform's prerogative to set some organizational criteria, should perform the work autonomously, should possess at least some of the equipment or infrastructure necessary for the performance of the tasks and should be paid based on the quantity and quality of the work performed.[315]

When it comes to the rights which should be afforded to platform workers, probably the most complete proposal in terms of in-depth studies is the one written by former Deputy Secretary of Labor Seth Harris and the economist Alan Krueger.[316]

From my point of view, which is aligned with that of reputable authors[317], the abovementioned proposal, written in 2015, is too little generous to platform workers, making the new category of workers more similar to that of independent contractors rather than that of employees, especially as far as the position taken on minimum wage is concerned. Indeed, in the proposal Harris and Krueger state that under the new category, workers should not be granted minimum wage on the basis that in the gig economy it is difficult to calculate the hours worked. Contrary to this view, in my opinion, the minimum wage should be one of the main rights granted to platform workers and amongst those included in a hypothetical third category. Indeed, the lack of a living wage or decent pay is one of the major complaints that platform workers have brought forward in law suits against platforms.[318] Calculating the hours worked, furthermore,

[313] M. A. Cherry, A. Aloisi, *"Dependent Contractors" In the Gig Economy: A Comparative Approach*, American University Law Review, Vol. 66, Iss. 3, 2017, p. 647. Available at: http://digitalcommons.wcl.american.edu/aulr/vol66/iss3/1
[314] M. A. Cherry, A. Aloisi, op. cit.
[315] M. Carboni, op. cit.
[316] S. D. Harris, A. B. Krueger, op. cit.
[317] See M. A. Cherry, A. Aloisi, op. cit.
[318] M. A. Cherry, A. Aloisi, op. cit.

should not be so difficult nowadays, thanks to the tracking systems already implemented by platforms.[319] Along with minimum wage, an important right that should be included in the third category is that to organise and to bargain collectively in order for workers to improve their working conditions, their wage and obtain more benefits from platforms. Platform workers, furthermore, should be entailed with antidiscrimination protections prohibiting platforms from discriminating against them on the basis of race, national origin, colour, sex, religion, age, and disability. Granting transparency on algorithmic management and platform's rules, as proposed by the European Commission (§3.7), is also fundamental. The right to be covered by insurance against work-related accidents and diseases should also be granted, whilst providing health insurances could be voluntary. Protection in case of unemployment due to business failure should also be included amongst independent workers' rights.

As far as maternity and sick leaves are concerned, those benefits are particularly burdensome for platforms which may not be able to bear those costs for every single worker. Therefore, apart from completely excluding those benefits from the set of rights afforded to independent workers, another solution could be that of guarantying those rights only to workers who overcome the threshold of a certain number of hours worked per week (for instance thirty hours per week). The granting of other benefits could likewise be related to such a threshold.

The balance between the right number of rights to be afforded to platform workers and the preservation of platforms' business models is certainly not easy to reach and, as it has been pointed out, constructing a third category with too few rights may incentivise the classification of workers into the third category (in order to lower costs), whilst making the third category too generous and therefore too burdensome for platforms may disincentivize its use.[320] For these reasons legislators should be cautious in outlining the third category or, as an alternative, they may introduce a presumption that all platform workers are by default independent workers (or dependent contractors) thus eliminating every risk of arbitrage on the part of platforms.

The above mentioned are, of course, just general suggestions that should be adapted to the specific legal systems taking into considerations all the differences existing especially between the US and the EU.

With regard to the EU in particular, however, for the present time, it has not expressly adopted such a path due to resistance on the part of trade unions and the fact that EU-level initiatives on

[319] See M. A. Cherry, A. Aloisi, op. cit.
[320] M. A. Cherry, A. Aloisi, op. cit.

platform work are set up to rely on national concepts of workers statuses (which to date, in most of the cases, are based on the traditional binary distinction).[321]

Nevertheless, both individual states and international institutions should look beyond the resistance and the fear of change for the sake of a category of workers that is destinated to grow in the next years. Indeed, a large share of new generations' workforce (especially Gen Alpha[322]) will join the gig economy due to its ability to provide flexibility, opportunities and extra incomes.[323] Furthermore, as for actual generations, a Deloitte's survey conducted in 2019 showed that 84% of Millennials[324] respondents and 81% of Gen Z[325] respondents would consider joining the gig economy,[326] thus making it possible to predict a significant increase in the number of platform workers in the years to come.

Therefore, it seems urgent for individual states and international organisations to firstly solve the issue of platform workers misclassification, possibly introducing, for the motivations given above, a third category of workers, and, secondly and more generally, tackle the other challenges brought by platform work - such as the increasingly relevant role of artificial intelligence and algorithms - in a prompt and adequate manner.

[321] European Commission, *Commission Staff Working Document* SWD (2021) 143 final of 15.6.2021
[322] Born between 2010 and 2025
[323] M. A. S. Raja et al., *The Future of the Gig Professionals: A Study Considering Gen Y, Gen C, and Gen Alpha*, in A. Gupta et al. (eds.), *Sustainability in the Gig Economy. Perspectives, Challenges and Opportunities in Industry 4.0*. Singapore: Springer, 2022. Available at: https://doi.org/10.1007/978-981-16-8406-7
[324] Born between 1981 and 1996
[325] Born between 1997 and 2010
[326] Deloitte, *The Deloitte Global Millennial Survey 2019. Societal discord and technological transformation create a "generation disrupted"*, 2019 | The cited reasons for considering joining the gig economy most typically are: to earn more money/increase income, to work preferred hours, to achieve a better work-life balance. (Deloitte, op. cit.)

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3. Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1938)
4. Family and Medical Leave Act, 29 U.S.C. §§ 2601 et seq. (1993)
5. Federal Unemployment Tax Act, 26 U.S.C. §§ 3301 et seq. (1939)
6. H.R. 842/S. 420
7. National Labor Relations Act, 29 U.S.C. §§ 151 et seq. (1935)
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