INTRODUCTION ON HOW TO MATCHMAKE GIG ECONOMY WITH LABOUR STANDARDS

by Michele Faioli

1. The gig economy is a matchmaking process in the labour market

What about the link between the gig economy[1] and Italian Law no. 81 dated 22 May 2017 concerning self-employment and smart working regimes? Is there an original contribution to which the Italian scholars can draw comparative labour law scholars' attention, analysing the gig economy in relation to the sets of rules established by Law no. 81/2017 concerning self-employment and smart working? The most recent studies have focused on the classification of the working activities carried out by the so-called "riders", differentiating between self-employment and employment, suggesting the reintroduction of other types of working arrangements (so-called "quasi-subordinate" or "coordinated" employment), or pointing to the inadequacy of domestic legal frameworks in enforcing protection in relation to wage, working time, monitoring, union freedoms, and strike[2].

The present essay is centred on another issue: it is assumed that the jobs carried out through digital platforms – in the specific case of working activities performed for gig economy companies delivering goods (e.g. *Deliveroo*, *Foodora*, *Just Eat*, etc.) or providing services to individuals and households (e.g. *Vicker*, *Task Rabbit*, etc.) – fall under temporary agency work as per Italian Laws nos. 81 dated 15 June 2015 and 276 dated 10 September 2003[3]. The reasons behind such theoretical framework stem from some scientific surveys performed on facts and companies of the gig economy, as well as from interviews with managers and workers/riders and from discussions with trade unions and scholars. How does the *Deliveroo* or *Foodora* model actually appear to labour law scholars? The digital platform (e.g. *Foodora*) coordinates, manages, monitors, and sanctions the worker/rider with a view to meeting a user request (e.g. a restaurant or coffee bar that joins the platform) in relation to the delivery of food to clients. In this way, restaurant managers do not avail themselves of an employee but of a temporary agency worker by accessing the

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[1] The gig economy at global level is calling for a theoretical reflection by scholars, as well as for a practical analysis by trade unions, courts, and the legislator, on the protection of workers managed through digital platforms. Cf. Faioli (2017) and Prassl (2017).

[2] In addition to the contributions included in the monographic section of the present issue, cf.: De Stefano (2016); Means and Seiner (2016); Rogers (2016); and Stone (2016)".

[3] In this regard, cf. the interview with T. Treu and S. Sacchi in "la Repubblica", 25 June 2017, p. 18, and the contribution by T. Treu and M. Faioli in "ASTRID" (2017).

digital platform (*Foodora*)[4]. This entails a double conceptual shift: on the one hand, *de iure condendo*, if the digital platform (*Foodora*, *Deliveroo*, etc.) became a temporary work agency, it would be subject to the provisions set out in Laws nos. 81/2015 and 276/2003 (with some necessary law amendments concerning sanctions and references to collective bargaining); on the other hand (and this is the most important aspect of the present analysis), such digital platform (*Foodora*, *Deliveroo*, etc.) would be part of the unified (or, better, unitary) network of active labour market policies, being enabled to take part in job placement activities and matchmaking (i.e. matching of labour demand and supply) in relation to both traditional jobs (as already known) and gig economy jobs.

According to economic sciences, matchmaking is an application and selection process, within a pre-set framework, of subjects that can produce goods or provide services[5]. In the case under examination, the pre-set framework for the gig economy is the labour market, which is governed by a complex set of rules (as an example concerning Italy, cf. the national legislation, the regional systems, and the EU legislation)[6]. It is stated that raw materials markets are based on prices, whereas the markets based on matchmaking are shaped by the choice made by one of the parties thereto: such party decides what they need, whether they can afford it, and how to get it. In the former case (raw materials), the market is almost completely shaped by prices, which allow for the matching between demand and supply. In the latter case (gig economy), the pattern is more complex as the parties need to be matched, i.e. a selection needs to be carried out on the basis of an application. In some situations, matchmaking stems from exchange practices and takes root over time in relation to the existing reality. This has not been the case for the labour market (Treu, 2013). It can be assumed that it will be difficult also for the market of those jobs that are performed through a digital platform (henceforth "*Jobs App*"). Regulation aimed at market design has been necessary for the labour market and will be necessary for the market of those jobs that are provided through a digital platform[7].

It has been assumed that the work carried out through digital platforms (as in the case of *Deliveroo*, *Foodora*, etc.), specifically aimed at delivering goods[8], can be considered as temporary agency work. As a consequence, the Italian and EU legislator should depart from this aspect in order to: (i) extend to the workers of such digital platforms a set of already established labour law, social security, and union protection measures, making reference to collective bargaining for the definition of some aspects concerning wages and

[4] The French legal framework already includes such an approach. Cf. Article L7342-1 (introduced by Article 60 of Law no. 1088 dated 8 August 2016), which envisages a specific form of intermediation with social responsibility upon the digital platform ("*Lorsque la plateforme détermine les caractéristiques de la prestation de service fournie ou du bien vendu et fixe son prix, elle a, à l'égard des travailleurs concernés, une responsabilité sociale qui s'exerce dans les conditions prévues au présent chapitre*").

[5] For the economic and legal theory on matchmaking, cf. Shapley and Scarf (1974) and Roth, Sonmez and Utku Unver (2004).

[6] Cf. Varesi (2016).

[7] At least two theories clash on this issue. On the one hand, Sundararajan (2017) states that it is not necessary to regulate such market, otherwise its capacity to generate employment would disappear; on the other hand, Benkler (2017) holds that the phenomenon should be somehow regulated, making reference to corporate law, which is at the core of the entrepreneurial system of platforms ("*On-demand economy sites like Uber or TaskRabbit suggest that the model of market clearance of routine labor from end consumers to workers is also becoming very low friction, and information systems are replacing managerial control for monitoring and quality control*" – p. 264).

[8] As to the differentiation, cf. Prassl (2017). For further simplification, in compliance with the abovementioned differentiation concerning the work carried out through digital platforms merely aimed at delivery, *Uber-Pop* (taxi service) does not fall under the rules on temporary agency work, whereas *Uber-Eats* (food delivery service on behalf of restaurants at the consumer's request) can be similar to the three-way relationship characterising temporary agency work.

labour costs; and (ii) take the opportunity to improve employability through the promotion of smart and efficient matchmaking mechanisms. Such theory stems from the idea that, as to work performed through digital platforms, it is necessary to introduce a specific set of rules making reference to the legislation on temporary agency work (market design). The market of digital platforms features a large number of participants (workers/riders, digital platforms, and entrepreneurs that intend to market goods/services); each subject can theoretically benefit from the most advantageous contract. Economists define such phenomenon as "market density": a high-density market can offer so many options as to engender congestion, i.e. an unmanageable outcome. In the case at hand, the marketplace of digital platforms benefit, on the one side, from job applications (workers/riders) and, on the other, from requests for services (e.g. a restaurant that joins the platform and a consumer that wants to have a dish at a specific time). The digital platform managing legal relations liaises between workers, the restaurant/retail or catering business, and the consumer. The digital platform has to deal with a growing number of applicants; it does not have any interest in getting to know them; it is only interested in meeting its members' needs (e.g. restaurant managers, managers of commercial activities, etc.) as well as the consumer's needs. The platform avoids congestion through an algorithm that tracks the reference market, manages workers/riders, anticipates consumers' needs, and sends alerts to restaurant managers or managers of similar businesses joining the platform. The management of workers is based on patterns stemming from the game theory, with the goal of implementing proper market design aimed at making the market freer, safer, and smarter. It has already been said that the platform is an "algorithmic" employer (Faioli, 2017, p. 296). It can be added that the gig economy creates a marketplace where all participants carry out commercial and working activities, with a digital connection and a price that will be paid through e-money.

The gig economy is incorporated into an atypical market, where marginal or casual working activities are carried out through a sophisticated digital environment that matches demand and supply (both of which are growing), coordinates working activities, measures their quality, and forecasts the needs of consumers and sellers of goods/services. The price plays a minor role: the consumer is not interested in it, except insofar as it can help compare a good or a service (I choose that pasta dish from that restaurant); nor is the seller of goods interested in it: they are only interested in having access to a digital showcase; the platform, too, is not interested in the price since several workers are available. The price, stemming from this legal pattern, has an impact on labour costs: the lower the labour costs, the lighter the burden entailed by the value chain (platform, seller, and consumer). Abuses should be tackled by the legislator (in this regard, cf. the proposal referred to above concerning temporary agency work in consideration of the three-way relationship involving the worker, the platform, and the restaurant/retail or catering business, which can be applied also in this case; the platform is obliged to acquire the status of temporary work agency and is subject to applicable legislative and collective bargaining provisions).

The most interesting aspect is the increase in employability, which can originate from such platforms/temporary work agencies. In other words, as to casual work, it appears more efficient to have a so-called "top trading cycle", i.e. a best-performing trading cycle deriving from a digital triangulation that ensures that no demand from consumers, sellers, or workers is unmet; the opposite can be stated: the consumer will receive their dish at home; it will be delivered by a rider/worker who receives a *pro rata* decent wage (including social security contributions) for the working activity performed. From their part, the seller

is satisfied with the larger volume of food sold through the digital platform. This labour law perspective is not a complement to that theoretical framework that is currently trying to classify working activities performed through digital platforms according to the categories of self-employment or employment[9]. The goal is not to understate the problem of job classification but to go beyond it, starting from the assumption that some types of *Jobs App* (work performed through a digital platform in case of delivery of goods or of provision of services – *Deliveroo*, *Foodora*, etc.) fall under temporary agency work. Going beyond means becoming aware that it is almost impossible to stop such phenomenon within the reorganisation processes of today's businesses. It is thus deemed that regulation (market design) should not be repressive but rather consist of promotional measures: this means working towards higher employability, albeit in a context of monitoring and assessment against the Italian legislative framework.

Based on the remarks referred to above, the reasoning on matchmaking will be applied in two specific cases. In particular, active labour market policies as reformed in 2015, as well as that of casual work as reformed in 2017, outline avenues for further reflection on the reconstruction (also practical in nature) of the conclusions just drawn.

2. Challenging the gig economy: Law no. 150 dated 14 September 2015 with Article 117 of the Italian Constitution remaining unchanged

The principle deriving from the top trading cycle of the gig economy could be applied to active labour market policies redesigned in 2015. From this perspective, attention should be paid to the organisational aspects of administrative decentralisation and of the establishment of territorial agencies. There could emerge new scenarios for employment services and active labour market policies, with specific reference to the gig economy and, more in general, to the traditional production and distribution sectors.

It can be assumed that, since Article 117 of the Italian Constitution has not been amended, it would be useful to conclude – within the State-Regions Joint Conference, pursuant to Article 1, paragraph 91 ff. of Italian Law no. 56 dated 7 April 2014 – a protocol aimed at defining the contents of a law on minimum service levels, the tasks of the National Agency for Active Labour Market Policies (ANPAL), and the financial resources to be transferred from ANPAL to the Regions, in accordance with the protocols/agreements already in force[10]. In consideration of the situation following the constitutional referendum in 2016[11], although active labour market policies are among the areas of shared competence between the State and the Regions, it can be stated that – pursuant to Article 1, paragraph 93 of Law no. 56/2014 – ANPAL is solely responsible for the administrative

[9] As to the Italian context, cf. the recently conducted semi-monographic scientific surveys accounted for in "Riv. Giur. Lav.", 2017, 2 and in "Dir. Rel. Ind." 2017, 4. Cf. also Dagnino (2016) and Biasi (2018), who, also in consideration of scholars' commentaries on the recent labour market reform of 2015, outline a legal framework that could be applied to riders, leaning towards the so-called "coordinated self-employment". In the framework of comparative law, cf. Davidov (2014 and 2016).

[10] More specifically, cf. the Framework Agreement dated 11 September 2014 with the related Decree of the President of the Council of Ministers no. 76960 dated 26 September 2014, as well as the general cooperation pattern that is renewed on an ongoing basis through memoranda of understanding (State-Regions Framework Agreement dated 22 December 2016 and Framework Agreement dated 30 July 2015) – all of them are published on the website of the State-Regions Joint Conference.

[11] Cf.: Ricci (2017); Filì (2016); and Gragnoli (2016). For a more general overview of this topic, cf. also Varesi (2015).

aspects of active labour market policies. As a consequence, employment centres (and their staff) could be covered by a unified national framework and be enabled to deal with – on a trial basis – the jobs carried out through digital platforms (*Jobs App*) and, in a future perspective, the other (more traditional) jobs.

In practical terms, this means that, in the absence of an agreement between the State and the Regions, the State's substitutive power will be exerted in compliance with Article 8 of Italian Law no. 131 dated 5 June 2003 (cf. the reference made by Article 1, paragraph 95 of Law no. 56/2014). Such substitutive power could be targeted at the establishment of a unified national network, coordinated by ANPAL, covering the digital platforms that are already operational (*Foodora*, *Deliveroo*, etc.). These would be subjected, on a case-by-case basis, to the authorisation system in relation to the performance of activities pertaining to temporary agency work, intermediation between labour demand and supply, and/or staff selection and recruitment. The different cases would hinge upon the type of entrepreneurial activity of the digital platform: in the case of delivery of goods (e.g. *Deliveroo* or *Foodora*), it will be possible to apply the authorisation scheme for temporary agency work; in the case of mere intermediation (the already existing *Vicker* model), reference will be made to the set of rules governing the matching between labour demand and supply.

Workers' data would in this way be managed by the unified/unitary national network, which would benefit from inputs from private digital platforms and would provide – also along the lines of Laws nos. 150/2015 and 151 dated 14 September 2015 – close supervision on cases of abuse.

3. Can the new framework on casual work (Law no. 96 dated 21 June 2017) be a prototype of regulation of the labour market in the gig economy?

Having a closer look at our legislative framework, the top trading cycle of the gig economy has already been dealt with in relation to the technical and digital aspects of the management system of the National Institute of Social Security (INPS). This system was reformed by Article 54 of Law no. 96/2017 concerning casual work. It is known that judgment no. 28 dated 27 January 2017 – through which the Constitutional Court ruled the admissibility of the referendum on the set of rules governing voucher-based work, setting out that it is necessary, from a constitutional perspective, to establish rules on this type of work – also points to legitimacy[12]. The Constitutional Court indirectly refers to the case law developed since the 1990s on (judgments nos. 121 dated 29 March 1993, 115 dated 31 March 1994, and 76 dated 7 May 2015), according to which neither the legislator nor the parties to the individual contract are allowed to use a specific contractual pattern (self-employment or employment) with a view to stripping workers of a minimum set of protection (so-called

[12] Cf. in particular the passage, in the abovementioned judgment, that clarifies that: "The question [...] does not pertain to provisions that can be considered necessary from a constitutional perspective as they relate to casual work, which must be regulated by law. The evolution of casual work, going beyond the occasional nature of the business need that it was initially supposed to meet, has turned it into an alternative to contractual patterns governed by other labour law provisions; this type of work has thus become unnecessary. Indeed, through the abovementioned legislative interventions, the original set of rules on casual work – consisting of working activities being merely occasional in nature and limited, in subjective terms, to specific categories of workers and, in objective terms, to specific activities – has modified its original function, i.e. being a tool that, by virtue of its features, is targeted at meeting marginal and residual needs of the labour market". Commentaries were first provided by Romboli (2017) and Zilli (2017). For the analysis of casual work, cf. Balletti (2015) and Pinto (2015).

"principle of impossibility to choose the contractual pattern")[13]. In the case of vouchers, the Constitutional Court's case law points to the existence of working activities that, falling (almost) completely outside of the labour market, "need" some form of regulation. Such regulation, however, according to the Constitutional Court's case law, should not become a tool that allows the parties to choose between the necessary pattern (employment) and the flexible pattern (voucher). This would indirectly breach the abovementioned principle of impossibility to choose the contractual pattern. Such regulation should instead be aimed at guaranteeing and improving protection, albeit reasonably differentiated pursuant to Article 3 of the Italian Constitution, for those workers who would otherwise lack it. The core issue that the legislator had to tackle in 2017 was thus to be found in the link between the increase in protection (to be implemented by such legislation) and the subjective scope of application. Article 54 of Law no. 96/2017 unravels this knot, extending the existing forms of protection to casual work, which would otherwise not be protected (increase in protection), as well as setting criteria to identify the subjects such set of rules is to be applied to (thresholds, household chores, small enterprises, etc.)[14].

The aspect relevant to the present issue, in consideration of what has been stated above, concerns market design, which is implemented by the legislator through the INPS digital platform. This can provide food for thought in relation to work in the gig economy. In other words, it should be noted that casual working activities and the wage to be paid to this category of workers are managed by a digital platform operated by INPS. Administrative obligations related to registration by employers and workers, as well as the notification of data concerning the working activity performed can be fulfilled through a digital portal – INPS PIN, Public System of Digital Identity (SPID) login credentials, and the National Services Card (CNS), with technical support from employment advisors and trade union one-stop shops. A digital portfolio is set up for each worker, through which the wage to be paid by the employer in the framework of a work contract registered and submitted in electronic format is transferred to the worker's bank account. INPS pays the wage by bank transfer with the support of Poste Italiane. The latter informs the worker about the sum no later than the 15th day of each month.

Going straight to the point, such legal framework should be considered as a prototype of market design also for gig economy jobs. In detail, when opting for casual work, the INPS digital platform makes it possible to handle the data related to the worker's and the employer's identity, as well as to the wage, the place where the working activity is performed, the date and time of the working activity, as well as the production sector concerned. Such INPS platform can be activated with an sms message and sends notifications in the form of sms messages.

[13] Schematically speaking, this means that: (i) the definition of employment as per Article 2094 of the Italian Civil Code has never been enshrined in the Constitution; (ii) there are no constitutional constraints to the revision of the criteria allowing for the granting of protection to workers; and (iii) the legislator, beyond the classification of the working relationship, may introduce or modify the forms of protection applying to a certain type of work. Cf. Napoli (1995) and D'Antona (1995). Cf. also Magnani (2009).

[14] The recently introduced set of rules differentiates between the so-called "family booklet" and the casual work contract. The family booklet covers casual working activities related to household chores, care of elderly people or children, and private teaching. The value of each payment (hourly wage) is EUR 10 (including social security contributions). Casual work contracts can be used by employers (professionals, self-employed workers, entrepreneurs, associations, and public organisations) that are staffed with over five permanent employees, do not operate in the construction sector, and are not involved in the execution of public procurement contracts. The hourly wage amounts to EUR 9 and can never be lower than EUR 36 for a full working day. These sums include social security contributions. Cf. also INPS's Circular Letter no. 107 dated 5 July 2017 for administrative aspects.

Focusing on the issue outlined at the beginning, it is possible to understand why such public digital platform can not only be connected to private digital platforms (*Deliveroo*, *Foodora*, etc.) – with some quite obvious consequences on the monitoring of the working activity carried out in the framework of the gig economy[15] – but also become a prototype for a public/private digital platform for the management of work contracts in the gig economy. Thus, in the Italian legal framework, there already exists a digital system that allows for the implementation of an integrated model of labour demand/supply between the public and the private sectors for matchmaking purposes in the gig economy.

4. Conditionality, matchmaking, and the gig economy. Concluding remarks

The theoretical framework of the work carried out through digital platforms faces two core challenges.

The first one concerns trade unions' capacity to set – through collective bargaining – a wage level that, on the one hand, protects workers' dignity and, on the other, ensures a good market performance of digital platforms within the value chain in distribution and services. Too high a wage compared with its current (too low) *pro rata* value would risk driving platforms out of business; a low wage would engender a range of problems in the temporary agency work system, given the attempts to attain the equivalence between wage levels in the production sectors that benefit from temporary agency work.

In this case, trade unions and employers' organisations of reference would be the only protagonists of an industrial system characterised by a phenomenon – the *Jobs App* – showing features and challenges that can actually be dealt with (albeit with some difficulties) through innovative collective bargaining.

The second issue concerns conditionality and the set of rules established by Law no. 150/2015. Unemployed people, within 30 days from the statement of availability for work, sign a customised pact and are profiled. Through this pact, the workers commit themselves to taking part in training activities and to accepting suitable job offers (Article 25). Furthermore, should people benefitting from income support allowances not accept suitable job offers, a set of measures aimed at strengthening conditionality, as well as of sanctions, will be applied (Article 21).

The issue is easy to understand: should the offer of a job to be carried out through a digital platform (*Foodora*, *Deliveroo*, etc. – also called "*Jobs App*") be considered as "suitable" pursuant to Article 25 of Law no. 150/2015?

The concept of suitability shall be defined in the framework of the areas of shared competence between the State and the Regions. The quality level of suitability cannot but be harmonised throughout the national territory also in relation to *Jobs App* cases; such quality level, albeit harmonised, could actually trigger problems in those regional territories or areas where the amount of the wage originating from *Jobs App* cases would equal (or be higher than) the one paid in the framework of "traditional" jobs. This issue could be tackled by differentiating between *Jobs App* working activities (*Deliveroo*, etc.)

[15] The INPS platform would thus become a unified integrated system for the performance, on a regular basis, of casual working activities (including those of a digital nature), with mandatory registration for workers and operators (*Deliveroo*, *Foodora*, etc.) as well as with the notification of the working time, wage, social security contributions, and any other aspects that can make it possible to conduct inspections on, and monitor, the proper application of the various forms of protection.

and traditional jobs, with a view to defining the amount of wage that should not be taken into account in the application of the conditionality regime.

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