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Not So Easy, Riders: The Struggle For The Collective Protection of Gig-Economy Workers

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Abstract

The contribution aims at critically analyze the Labour Tribunal of Florence decision, which in February 2021 stated that Art. 28 of the Italian Workers' Statute could be actioned only in relation to anti-trade unions practices arising from employment relationships and identifying the employer as the counterpart, exempting a similar protection to gig-economy riders and their trade unions. On the one hand, in fact, the ruling moves along the increasingly numerous disputes on the qualification of the work relationship of platform workers, and on the other hand it offers the chance to assess the legal relevance of the collective interests of platform workers, and more in general of those who fall outside of the employment relationship's scope.

Keywords: Platform work; Employment relationship; Self-employment; Gig-economy; Collective rights; Litigation.

1. Preliminary remarks.

At the beginning of February, the Labour Tribunal on Florence ruled on a case concerning a claim for anti-trade unions behaviour, brought against Deliveroo Italy by three CGIL Federations (Nidil, Filt, Filcams, representing respectively precarious workers, transport sector employees and trade sector employees).[1]

The dispute followed the signing of a sectoral collective agreement for platform workers by the entrepreneurial association AssoDelivery (which at the time represented all the major food delivery platforms) and the trade union UGL Riders, denounced as a 'yellow' union.[2]

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[1] Tribunale Firenze, decree 9 February 2021.

[2] The UGL riders union had taken over a thousand riders already organized by Anar (*Associazione Nazionale Autonoma Rider*), an independent association, so close to the platform requests to be the only trade union invited to negotiate said collective agreement.

The agreement, in particular, was aimed to qualify all the riders working for the represented platforms as independent contractors and provide for a delivery-rate pay, with the possibility for the parties involved to include additional parameters.[3]

As consequence of its entry into force, a corporate communication was sent out, requiring the riders to accept the new provisions as a condition to continue working, thus breaching, according to the claimants, the trade union rights of information and consultation for such collective (dismissal) measures. The judge, however, did not assess the platform decision on its merits, but accepted a preliminary objection that a claim for anti-trade unions behaviour, pursuant to Art. 28 of Law no. 300/1970 (from hereon, Workers' Statute), could be actioned only in relation to conflicts arising from employment relationships and identifying the employer as the counterpart, while conflicts relating to the rights of freedom, trade union activity or the right to strike of self-employed or para-subordinate workers, such as gig economy riders, would not fall within the scope of the statutory provision, not even through the extension provided for by the so-called Jobs Act (Art. 2, Legislative Decree no. 81/2015) or through the more recent Riders' Act (Law no. 148/2019).

The purpose of this article is therefore to critically analyze the Tribunal decision, whose content offers two interesting points for reflection. On the one hand, in fact, it moves along the increasingly numerous disputes on the qualification of the work relationship of platform workers, and on the other hand it offers the chance to assess the legal relevance of the collective interests of platform workers, and more in general of those who are outside of employment relationship protection, through the lens of the judicial declaration of trade unions' absence of the right to act pursuant to Art. 28 of the Workers' Statute.

2. What's in a name? Employment, self-employment and all that is in between.

Not earlier than couple of years ago, in the pages of this review, Massimo Pallini tried to take stock of the Italian framework regarding the traditional distinction between employed and self-employed work and, tracing the development of the notion of subordination as essentially referring to hetero-direction, noted how the recent introduction of the cd. hetero-organized collaborations - *i.e.*, those (non-subordinate) collaborations, in which the client has a unilateral power to define the methods of the job execution, as provided by the 2015 Jobs Act reforms - would result in the "systemic effect of repositioning the boundary between the scope of application of legal regime for the protection of subordinate work and that of autonomous work on the line of distinction between hetero-organized work".[4]

The Author was not presenting a new problem, and surely not just an Italian one. The contract of employment is a fundamental feature in any Labour law system, since it does not simply regulate the exchange of work and remuneration but, in addressing the inherent asymmetries in power between the employer (the 'stronger' party) and the employee (the 'weaker' party), it serves as a gateway to a protection guaranteed by the law. Labour law's

[3] For a general overview of its content, Dammacco P., *Assodelivery and Italian trade union UGL concluded the first agreement in the food delivery sector*, in *ADAPT Bulletin*, 30 September 2020.
[4] Pallini M., *Towards a new notion of subordination in Italian Labour Law?*, in *Italian Labour Law e-Journal*, vol. 12, n. 1, 2019, 18.

purpose, it can be argued, is precisely to provide for rules which limit the scope of autonomy of the parties involved, offering a set of rights for the employee - and accordingly, a set of statutory duties for the employer - that can be effectively enforced.

The legal recognition of the need for a regulation of the employment contract - and therefore of employee status – has been generally defined by a binary system (employment/self-employment), which separates those who need protection from those who do not. The distinction is often based on a clear positive/negative definition: in the Italian Civil Code, for example, Article 2094 identifies the "subordinate worker" on the grounds of working "under the direction of the entrepreneur", while Article 2222 defines self-employment through the absence of a bond of subordination. The bigger the protection granted, the more important the distinction becomes, up to the point that the traditional bipartite system of work relations could be described as relying on a "all-or-nothing" principle, due to the significance of the imbalance of protection standards. The boundary does not only provide for clarification, but also for exclusion, for example from the minimum wage or unlawful dismissal regulation.

It is for this reason that for a few decades this distinction, or rather, its identifying criteria, have struggled to cope with an increasingly fragmented and diversified reality, one in which "work has therefore lost its unity of place and action; it can no longer be represented unitarily, not even (perhaps even less) by its legal representation".[5] Platform or digital work is only the most recent of radical changes in the organization of production models that affect the way work is organized and therefore its notion and value.

For many Italian scholars, that has meant the need to discuss the "conceptual split" between a technical and functional subordination, as construed in the legal provisions, and its socio-economical effect, in the light of the growing social and economic dependency of workers.[6] This perspective has appeared to find an indirect endorsement in the, albeit isolated, Constitutional Court ruling which defined the *dependence* as the true trait characterizing subordination, in the shape of the "double alienation" of the employee, whose performance is not only given in the context of an organization which s/he does not own but whose output belongs only to said organization.[7] Case law has shown often a pragmatic approach, loosening up of the control test in the face of the qualification dilemma, accepting the idea of a "softer" subordination, which, with reference to highly skilled jobs or, at the opposite end of the spectrum, simple and repetitive ones, would appear less penetrating.[8]

However, a systemic intervention on the reported shortcomings of a traditional, even formalistic, notion of employment contract has been taken on by the Italian legislation

[5] Garofalo M.G., *Unità e pluralità del lavoro nel sistema costituzionale*, in *Giornale di diritto del lavoro e di relazioni industriali*, n. 117, 2008, 22.

[6] Roccella M., *Lavoro subordinato e lavoro autonomo, oggi*, in *WP CSDLE "Massimo D'Antona".IT*, n. 65, 2008, 34; Pallini M., *Il lavoro economicamente dipendente*, Cedam, Padova, 2013; Ghera E., *Il lavoro autonomo nella riforma del diritto del lavoro*, in *Rivista italiana di diritto del lavoro*, 2014, I, 501; with special emphasis on the platform economy, Perulli A., *Oltre la subordinazione. La nuova tendenza espansiva del diritto del lavoro*, Giappichelli, Torino, 2021.

[7] Corte costituzionale 5 febbraio 1996, n. 30, in *Rivista critica di diritto del lavoro*, vol. V, n. 3, 1996, 616; Persiani M., *Subordinazione e autonomia nel rapporto di lavoro*, in Scognamiglio R. (ed.), *Diritto del lavoro e Corte costituzionale*, Napoli, ESI, 2006, 193.

[8] D'Ascola S., *Non solo autonomia e subordinazione: uno guardo alla giurisprudenza sulla qualificazione del contratto di lavoro*, in *Argomenti di diritto del lavoro*, 2017, II, 277.

introducing some protection for some sub-sets of self-employed, the ones occupying a "grey area", on the fence between employment and self-employment.

For this purpose, a preliminary recognition of quasi-subordination status for litigation and jurisdictional purposes in 1973 (so called *coordinated and continuous collaborations*, Art. 409, no. 3 of Code of Civil Procedure) was followed by a number of legislative interventions, the last of which (the already mentioned Article 2 of Legislative Decree no. 81/2015) recognizes those (self-employed) workers who collaborate on a continuous basis, by providing (thanks to a November 2019 amendment) mainly personal work for a client who can organize their activity.

Without altering the binary scheme or the notion of employee, the new regulation set to extend employment protection to these workers inasmuch their collaboration with the client is so intensive to become a form of 'hetero-organization', not so distant from the traditional employer's directive power.[9] It must be also noted that Art. 2 covers also *"workers whose personal performance is organized by the client even by means of digital platforms"*, a perhaps superfluous clarification, which nonetheless could been regarded as a most fitting scheme for gig-economy workers.[10]

The provision, therefore, operates as an effect – a sanction, even – and, in a comparative law perspective, is equally distant from the UK's *worker*[11] and the Spain's *TRADE*[12]. Nonetheless, by solving some problems, Art. 2 has raised just as many, starting with the slippery lines dividing subordination, hetero-organization and mere coordination.

On the (up to this point) only occasion in which the Italian Court of Cassation has been called to such interpretation – perhaps unsurprisingly, on the topic of the qualification of food-delivery riders' work relationship[13] –, it has inferred that the 2015 lawmaker aimed to

[9] It should be noted that the Article 409 of the Code of Civil Procedure and the area of autonomous collaborations ended up being split, by introducing an interpretative norm (Article 15, paragraph 1 (a) of Law No. 81 of 2017), by which "a collaboration is meant to be coordinated when, in compliance with the coordination procedures established jointly by the parties, the collaborator organizes her working activities autonomously". As noted by Del Conte M., Gramano E., *Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under the Italian Legal System*, in *Comparative Labor Law & Policy Journal*, vol. 39, n. 3, 2018, 593, "new Article 409 and Article 2, Decree No. 81 of 2015 complete each other: if it is the principal's responsibility to organize the work, the applicable rule is that of subordinate work; if it is the worker's responsibility, the rule is that of self-employment, no longer abandoned to the general discipline of contracts but now object of a specific regulation itself".

[10] On the variety of the platform models and the need for a legal approach which poses the effectiveness of protective intervention ahead of the traditional qualification, *see* Donini A., *Il lavoro attraverso le piattaforme digitali*, Bononia University Press, Bologna, 2019.

[11] The new contractual "middle" category, the worker, placed in between the employee and the self-employed, was devised at the end of the '90s by modifying section 230 of the Employment Rights Act 1996. It is defined as an individual who undertakes to do or perform personally any work or services for another party to the contract, whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly". Consequently, the worker status does not give full employee rights, but it does give the right to annual paid holiday and the national minimum wage.

[12] Ley no. 20/2007 created the figure of the economically dependent autonomous worker (*Trabajador Autonomo Economicamente Dependiente*), defined mainly by economic dependency (at least 75% of the income must be obtained from the same client) and by ownership of the work tools. TRADE workers receive some legal protections, such as the minimum wage, annual leave, entitlements in case of wrongful termination, leave for family or health reasons, and collective bargaining.

[13] Biasi M., *The On-Demand Work (Mis)classification Judgments in Italy. An Overview*, in *Italian Labour Law e-Journal*, vol. 12, n. 1, 2019, 49.

"emphasize certain factual criteria deemed significant (personality, continuity, hetero-organization) and sufficient to justify the compliance with the employment relationship regulation, exempting the judge from any further investigation" (§ 24), so that "it makes little sense to question whether these forms of collaboration, with such characteristics and offered from time to time by the rapidly and constantly evolving economic reality, can be placed in the area of employment or self-employment, because what matters is that, with such blurry borders, the legal system has expressly established the application of the regulation of subordinate work" (§ 25).[14]

But even so, the ambiguous notion of hetero-organization[15] remains linked to what the judges call an "original autonomy", which, for platform workers, would consist of the rider's freedom to decide *if* (rather than *when*) to work, so to exclude any chance of a (direct recognition of) subordination: the voluntary nature of the service provided, as riders choose whether to make themselves available and, correspondingly, the platform "chooses" which ones to select and offer the proposed slots, would firmly stay in the non-employment area.

It is an idea which has permeated also the European Court of Justice doctrine, which, in the recent *Yodel* case, stated that EU Working Time Directive should be interpreted as stipulating that a person engaged by an organization as a self-employed independent contractor cannot be classified as a "worker" where that person is afforded discretion including the ability to accept or not accept the various tasks offered by their putative employer, or unilaterally set the maximum number of those tasks.[16]

Hence, the rider's freedom to offer services (and, equally, the platform's freedom not to require them) currently acts as the only watershed between the employment qualification (and protection) and the overcrowded space occupied by the now various forms of self-employment, from hetero-organized collaborators to genuine independent contractors. Such is the view of the Florentine decision which stops at the fact that "[Deliveroo] could dispose of the riders' work only if they decided to apply to carry out the delivery activity in the slots pre-established by the company itself, without such circumstance being decisive for the purposes of qualifying the relationships, taking into account that, in fact, the company could not in any case require the riders to work in such shifts, nor to have them revoke the given availability". And yet, an isolated evaluation of the genetic phase of the work relationship risks not adequately taking account of the full assessment of the organizational model of the platform, whose control, not only on the way the job tasks are performed and their consequences in terms of the rider's liability and "hidden" sanctions, but also on the distribution of the chances to work (*who can work and when*), could tell a different story regarding the actual freedom of the worker. The case law which has successfully recognized

[14] Corte di Cassazione, 24 January 2020, n. 1663; Mazzotta O., *L'inafferrabile etero-direzione: a proposito di ciclofattorini e modelli contrattuali*, in *Labor*, n. 1, 2020, 1; Razzolini O., *I confini tra subordinazione, collaborazioni etero-organizzate e lavoro autonomo coordinato: una rilettura*, in *Diritto delle relazioni industriali*, vol. 30, n. 2, 2020, 345.

[15] Elsewhere we have already argued claimed that the organizational power Art. 2, exercised at the discretion of the client or in fact required by the organizational context in which the service is called upon, remains, unlike the power of conformation in the employment relationship, external to the object of the contractual obligation: Recchia G.A., *La Cassazione consegna ai riders la collaborazione eterorganizzata*, in *Il Lavoro nella giurisprudenza*, n. 3, 2020, 251.

[16] CJEU, Case C-692/19, *B v Yodel Delivery Network Ltd* [2020] ECLI: EU: C: 2020: 288, on which *see* Aloisi A., *'Time Is Running Out'. The Yodel Order and Its Implications for Platform Work in the EU*, in *Italian Labour Law e-Journal*, vol. 13, n. 2, 2020, 67.

riders' subordination has succeeded precisely by going beyond the formal absence of a mandatory performance, assessing the substantial relationship between the rider and the platform, so to retroactively place the heavy interference of algorithmic management and its entrepreneurial powers at the signing of the work contract[17].

From a more general point of view, it should be briefly mentioned how new forms of production and work organizations pose the question whether a different notion of working time - not only flexible, but even freely organizable, in accordance with the "matching" of the needs of the parties involved - can respond exactly to an organizational interest of the entrepreneur (in this case, the gig-economy platforms) and for this reason it should be reconsidered in its legal relevance. As an essential trait of the employment relationship is the "enduring functional availability" of the employee to the organizational power of the entrepreneur, the fact that such power manifests itself not only when the clock starts counting the time of a job task being performed, but already when the rider chooses to be (or not to be) available, accepting the pervasive consequences that such contractual scheme entails, then the enduring functional availability should be recognized regardless of the clock hands actually moving.[18]

To add further complexity to the picture thus outlined, it is necessary to consider how at the end of 2019 the Italian lawmaker decided to intervene precisely on the regulation of gig-economy riders' work, defining a set of protection for "*self-employed couriers delivering goods by means of two-wheelers vehicles in urban areas*" (Law Decree No. 101/2019, so called Riders' Decree confirmed by Conversion Law No. 128/2019, introducing Art. 47-bis and ff. in the Legislative Decree No. 81/2015). Whether the aim was to create a protection "by exclusion", for those who could not fall within the scope of the subordination, or hetero-organization, or to address specific (and minimal) rights for the entire category,[19] provisions were established on information rights, data protection, health and safety, non-discrimination, and remuneration: the last one, in particular, required trade unions and employers' organizations, through collective agreements, to establish the criteria for calculating the overall remuneration that take into account the modalities of performing the service and the organization of the platform; in their absence, the Riders' Decree forbid per-drop payments and imposed that a minimum hourly remuneration should be based on the minimum salary established by national collective agreements in similar or equivalent sectors. It is precisely this chance to derogate from the law that the aforementioned AssoDelivery/UGL agreement

[17] A significant decision is Tribunale Palermo, 24 November 2020, n. 3570, whose points of interests are discussed in Barbieri M., *Il luminoso futuro di un concetto antico: la subordinazione nell'esemplare sentenza di Palermo sui riders*, in *Labour & Law Issues*, vol. 6, n. 2, 2020, R.61. Case law throughout European national courts has been increasingly acknowledging the riders' employee status: *e.g.*, in Spain, Tribunal Supremo Sala de lo Social, 25 September 2020, n. 805.

[18] Bavaro V., *Sul concetto giuridico di «tempo del lavoro» (a proposito di ciclofattorini)*, in *Labor*, n. 6, 2020, 671.

[19] The 2019 Act seemed to echo in scope the French *Loi n. 2016-1088* of 8 August 2016, which had introduced digital platforms' social responsibility, but appeared narrower in defining its beneficiaries. A completely different approach has been adopted by the recent *Real Decreto-Ley 9/2021*, amending the Spanish *Estatuto de los Trabajadores* and providing rights for those who are engaged in the delivery of goods sold through digital platforms, in particular with a legal presumption of an employment relationship, when the company exercises its organization, management and control prerogatives, through the algorithmic management of the service or of working conditions, through a digital platform.

had rested its premises on, with its (subjective and objective) suitability to reach such goal being contested by the other trade unions.

3. From qualification to protection: which individual and collective rights for the gig-economy riders?

Multiple qualification schemes inevitably affect the protection standards for the workers involved. As intermediate "classifications" have been added to the original "all-or-nothing" approach of the employment/self-employment dichotomy, the consequent scopes and levels of protection are not always so clear in the regulatory provisions. Dwelling here on the issues concerning riders and their platforms, it has already been mentioned how the ruling no. 1663/2020 of the Italian Court of Cassation - while not excluding a different qualification in the lights of the factual elements to be ascertained in court - proved nevertheless to be in favor of the applicability of hetero-organized collaboration scheme. However, when it comes to interpret the meaning of expression *"the discipline of the subordinate employment relationship applies"* which opens Art. 2 of Legislative Decree no. 81/2015, scholars and judges tend to either invoke the full set of employment rights[20] or to select those disciplines which would not affect the self-employed nature of the work relationship.[21]

The Supreme Court decision proved also to be indecisive as, on the one hand, the judges highlighted that the 2015 provision did not contain any suitable criteria to select the applicable discipline but, on the other hand, pointed out the possibility of "ontologically incompatible" (*i.e.*, selective)[22] application of the employment protections: consequently, case law is called to investigate the applicability of each right to riders' work relationships.

A first test of such case-to-case approach has been offered in the riders' claim to personal protective equipment (such as masks, gloves, sanitizing gels), which would allow them to carry out their activities safely, in the light of Covid-19 outbreak and spread; as pointed out, the hetero-organized labour relationship benefits from the same health and safety protections recognized to subordinate workers.[23].

The decision here examined investigates instead the collective dimension of the protections of non-subordinate riders and particularly whether a trade union representing gig-economy (hetero-organized) workers is entitled to activate the special procedure referred to in Art. 28 of the Workers' Statute against a platform engaging in anti-union behaviour. Once again, the issue at stake is the uncertain scope of Art. 2 and whether the legal regulations governing employment relationships are fully applicable to hetero-organized

[20] Santoro Passarelli G., *Sui lavoratori che operano mediante piattaforme anche digitali, sui riders e il ragionevole equilibrio della Cassazione 1663/2020*, in *WP CSDLE "Massimo D'Antona".IT*, n. 411, 2020, 7.

[21] Voza R., *La modifica dell'art. 409, n. 3, c.p.c., nel disegno di legge sul lavoro autonomo*, in *WP CSDLE "Massimo D'Antona".IT*, n. 318, 2017, 4. The Turin Court of Appeal, in the case that paved the way for the 2020 Court of Cassation ruling, adopted a cherry-picking approach, recognizing the right to a just remuneration but not the unlawful dismissal protection, ruling out the somewhat disciplinary nature of the non-renewal of the riders' collaborations with the platform (Corte d'Appello Torino, 4 February 2019, n. 26).

[22] §§ 40-41 of Corte di Cassazione, 24 January 2020, n. 1663.

[23] Tribunale Firenze, decree 1 April 2020, n. 886; Tribunale Bologna, decree 14 April 2020, n. 74; a commentary of these rulings is in Spinelli C., *Le nuove tutele dei riders al vaglio della giurisprudenza: prime indicazioni applicative*, in *Labour & Law Issues*, vol. 6, no. 1, 2020, 89.

work, including Art. 28, regarded as a cornerstone of the Italian trade union law, by which a judicial order can be issued, following a claim from the local organs of the national trade union, whenever *"the employer indulges in behaviours designed to deny or to limit the exercise of trade union freedom and union activity, as well as the right to strike"*, so that the anti-union practice must be immediately stopped and its effects cancelled.

The judge's rejection is based on two rather formalistic arguments.

Firstly, the non-applicability of Art. 28 to hetero-organized is deducted *a contrario* from one of the exceptions contained in the provision: in fact, according to Art. 2, paragraph 2, a) of Legislative Decree no. 81/2015 the extension of protection does not apply to those *"collaborations for which national collectives agreements signed by comparatively more representative unions at national level provide for specific disciplines governing the economic and regulatory treatment, based on the particular production and organizational needs of the relevant sector"*. On the premises that hetero-organized collaborators covered by a specific economic and regulatory discipline would remain "anchored" to the protections of self-employment, the judge therefore superimposes the "*discipline*" of the rule (Art. 2, paragraph 1) with the "*specific disciplines governing economic and regulatory treatment*" of the exception (Art. 2, paragraph 2, a) and therefore uses the latter as a clarification of the former. The textual comparison between the two paragraphs would therefore highlight, in the judicial viewpoint, only the *substantial* dimension of the protection, therefore excluding the Workers' Statute procedure.

Secondly, the assumption that the real aim of the 2015 reform would be to grant hetero-organized workers the same level of protection provided by the discipline of subordinate work, persuades the Tribunal in stating that its beneficiaries can be only those workers, individually considered, and not the collective organizations which may represent them. A further (literal) argument is also obtained from the wording of the protections aimed at self-employed riders in the 2019 Act, for which the explicit extension of the *"anti-discrimination discipline and the protection of the freedom and dignity of the worker"* envisaged for employees (Art. 47-quinquies) would be limited to the first Section of the Workers' Statute, precisely entitled "*On the freedom and dignity of the worker*".[24]

The judicial reasoning does not persuade, as we will try to prove shortly, but nevertheless discloses quite clearly how the access to trade union rights appears strictly linked to the qualification of the employment relationship, as the legal framework (and its practice) hamper social rights, such as collective bargaining and strike, to self-employed. Once again, it is not just an Italian trait; the Florence decision will ring a familiar bell to those aware of the 2017 dispute, the Independent Workers' Union of Great Britain (IWGB) seeking recognition of a collective bargaining unit representing the riders of the London borough of Camden), which the platform denied on the basis that self-employed, unlike employees or workers, did not hold trade union rights, pursuant the Trade Union and Labor Relations (Consolidation) Act of 1992.[25] At European level, Art. 11 of European Charter of Human Rights and Art. 28 of the Charter of Fundamental Rights of the European Union seem to be diminished by Art. 101 of the Consolidated version of the Treaty on the functioning of the

[24] For a general evaluation of the Workers' Statute, its gestation and its current relevance, *see* Carinci F., *Fifty years of the Workers' Statute (1970-2020)*, in *Italian Labour Law E-Journal*, vol. 13, n. 2, 2020, 1.
[25] *IWGB v. Deliveroo*, Central Arbitration Committee, 14 November 2017 and High Court of Justice, 5 December 2018; *see* Bogg A., *Taken for a Ride: Workers in the Gig Economy*, in *Law Quarterly Review*, n. 135, 2019, 219.

European Union prohibiting "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market", as the European Court of Justice embrace, for the purpose of the competition law, a binary scheme of employee/undertaking.[26]

Art. 28 of Workers' Statute undeniably references the "*employer*", but whether the choice of a term showing the sign of the times - 1970s work organizational models maintained a clearer distance between employment and self-employment - is sufficient to become a legal hindrance remains to be seen.

4. Collective interests (and their protection) as a transtypical feature of the Italian Labour Law.

The Florentine ruling's arguments to exclude riders' trade unions from the collective dispute are, at best, myopic and, at worst, incongruous.

Art. 28's textual reference to the employer's anti-union practice should be promptly put aside by the general applicability of the employment relationship discipline to the hetero-organized relationships referred to in Art. 2 of Decree no. 81/2015. Even accepting the thesis of a necessary selection of protections (of which, it must be stressed, there is no evidence in the 2015 provision), the "ontological" extension of employment relationship regulatory framework should ultimately leave out only those norms involving the exercise of a managerial and hierarchical power, but certainly not those linked to the collective dimension of workers' protection.

On a wider scale, a narrow reading of the Workers' Statute provision clashes with the recognition of collective discrimination on the grounds of belief, which broadly include the relations between the social partners and the way of dealing with the entrepreneurial side:[27] Legislative Decree no. 216/2003, which implemented Directives 2000/78/EC, applies to both self-employed and employed relationships and enables trade unions to initiate the proceedings and stand in court "either on behalf or in support of the complainant" but also on their own behalf, when no victims to support or represent are identifiable in a clear and direct way (*e.g.*, due to a hiring policy).[28] Moreover, with the Law no. 31 of 2019, the Italian lawmaker has amended Art. 840-bis of the Civil Procedure Code, providing a "*class action*" for the protection of "homogeneous individual rights" deriving also from the exercise of entrepreneurial activity, to be brought to courts by (non-profit) organizations or associations representing those rights: the broad scope does not distinguish – nor there would be any

[26] *See* Freedland N., Contouris N., *Some Reflections on the "Personal Scope" of Collective Labour Law*, in *Industrial Law Journal*, vol. 46, n. 1, 2017, 52.
[27] *See* Militello M., Strazzeri D., *I fattori di discriminazione*, in Barbera M., Guariso A. (eds.), *La tutela antidiscriminatoria. Fonti, strumenti, interpreti*, Giappichelli, Torino, 2019, 128.
[28] Art. 5 of Legislative Decree no. 216/2003; Santagata R., *Anti-discrimination Law In The Italian Courts: The New Frontiers Of The Topic In The Age Of Algorithms*, in *WP CSDLE "Massimo D'Antona".IT*, n. 440, 2021, 26-27.

reason for doing so – between employed and self-employed and has already been praised as a judicial bridge between the collective dimension of work relationships and its protection.[29]

In a different perspective, the Tribunal's argument that the 2019 special provisions for self-employed riders would only attract the (individual) rights of the first part of the Workers' Statute – argument used as a countercheck of the exclusion of trade union rights in the protection of self-employed workers – is inconsistent on three different levels: with the anti-discrimination prohibitions (both *in* the Workers' Statute[30] and *outside* its scope, as already mentioned); with the (internal) rationale of the providing a procedural norm such as the Art. 28 to protect the freedoms and union activities recognized in *all* the previous sections of the Statute; and lastly, with the recognition of a collective bargaining right both in Art. 2 and in Art. 47.

There is, however, a deeper and more important observation, which is hinted between the lines of the statement that the level of protection that is granted by Art. 2 *"finds its recipients in the individual workers engaged in a collaborative relationship organized by the client, and not the trade unions bearing collective interests"*. In other words, the distinction between the individual interests of the gig-economy workers and the collective interests of the trade unions which organize and represent them would result in a codified legal recognition (and protection) only of the formers. Such conclusion could even be upheld by the individual (even when plural) scope of protection of anti-discrimination law.[31]

However, Italian Labour Law explicitly recognizes collective interests in the Constitutional protection of freedom of association, collective bargaining and strike (Art. 39-40). Those rights belong not only to each labourer, but also to trade unions, whose interests differ as a result or the representative process and whose statutory relevance is rooted in the value given to work relationships. As a normative acknowledgment of the sociological observation that "*on the labour side, power is collective power*", Constitutional principles assume a collective dimension of protection in the evidence of the limited scope of the individual dimension.[32]

In this perspective, Art. 28 functions as the (procedural) means to the (substantial) right's effectiveness, its references to entrepreneurial practices willing "to hinder or limit the exercise of freedom of association and trade union activities, or the right to strike" a clear reflection of the Constitutional principles and the trade union's direct entitlement to stand in court is a consequence of the collective interest being protected, even if – it bears to notice – it ends up indirectly protecting the rights enshrined to each worker by the law.

Through the Workers' Statute, constitutionally recognized collective interests receive direct, immediate and complete protection: on the one hand, although the statutory provision highlights the procedural mechanism of the judicial cease and desist order, the object of

[29] Raimondi E., *Interesse collettivo, diritti individuali omogenei e la nuova azione di classe*, in Razzolini O., Varva S., Vitaletti (eds.), *Sindacato e processo (a cinquant'anni dallo Statuto dei lavoratori)*, Special Issue of *giustiziacivile.com*, 2020, 57; Razzolini O., *Azione di classe risarcitoria e azione collettiva inibitoria: novità anche per il diritto del lavoro?*, in *Argomenti di diritto del lavoro*, 2019, I, 81.

[30] *E.g.* Art. 15 of Workers' Statute.

[31] *See* Cassazione, 2 January 2020, n. 1, in *questionegiustizia.it*, 29 January 2020; Corte di Appello Roma, 9 ottobre 2012, in *Rivista critica di diritto del lavoro*, n. 3, 2012, 661.

[32] On the concept of collective interest and its judicial relevance, *see* Recchia G. A., *Studio sulla giustiziabilità degli interessi collettivi dei lavoratori*, Cacucci, Bari, 2018.

protection is certainly trade union freedom and action; on the other hand, the phrasing "*trade union freedom and union activity*" includes all the collective interests that trade unions aim to achieve.

As art. 28 Stat. Lav., in essence, is functional to bring the company/union conflict within the tracks of the Constitutional principles, it is within these principles that the scope of the protection must be investigated. As the most forward-looking scholars have pointed out, the Italian Constitution is oblivious to the rigid dichotomy between employed and self-employed work, protecting the worker status as such (Art. 35), and committing the legal framework to remove substantial inequalities that may affect the citizen/worker (Art. 3, § 2).[33] As Massimo D'Antona wrote over thirty years ago, the Constitution looked at work, "as a linguistic sign summing all manifestations of human labour's integration in the production process, not only within the framework of a type of contract, but in the entire range of juridical relations within which they happen".[34]

The need for (collective) protection, therefore, should operate regardless of the employment status: which is why in a famous judgement (17 July 1975, no. 222), the Constitutional Court held that small-scale entrepreneurs, as self-employed workers (without employees), were entitled to the right to strike of Art. 40 of the Constitution.

If the relevance of collective interests is transtypical, *i.e.* not exclusively pertaining to the employment relationship scheme but all work relationships in which a strong imbalance of powers between the parties involved exist or a social and economic dependence occurs, a constitutionally oriented reading of Art. 28 should go beyond its literal interpretation, or at least recognize, in the rationale of Art. 2 of Legislative Decree no. 81/2015, the reason for a widening of its scope.

5. Concluding remarks.

The case here commented lends itself to two general and final remarks about gig-economy and new forms of employment relationships.

Firstly, the Italian statutory framework seems to raise a few doubts on the actual benefits of introducing intermediate categories of work or contractual schemes: whether by definition or by protection, they don't make necessarily the space between employment and self-employment any clearer, as it is still subject to being tested in its scope. If anything, they may prove counterproductive by increasing the so-called "grey areas" and by offering reductive spaces for protection. Most of all, it may diminish the importance of rediscovering the essence of the notion of employment and its legal protection.

Secondly, on the collective dimension, the need for protection precedes the status and a more faithful interpretation of the Italian Constitution supports such reversal of perspective with a view to achieve substantial freedom of workers in all their forms.

[33] *See* Caruso B., *Statuto, conflitto, relazioni sindacali e organizzazione del lavoro, nel settore pubblico, oggi*, in *WP CSDLE "Massimo D'Antona".IT*, n. 437, 2021, 7; Tullini P., *La salvaguardia dei diritti fondamentali della persona che lavoro nella gig economy*, in *Costituzionalismo.it*, n. 1, 2020, 52.

[34] D'Antona M., *La subordinazione e oltre: una teoria giuridica per il lavoro che cambia* (1989), now in Caruso B., Sciarra S. (eds.), *Opere*, Giuffrè, Milano, 2000, III, 3, 1225.

Only a few weeks after the Florence decision, a Milan Labour judge was called to assess a message, directed from a shopping platform's CEO to his workers, inviting them to sign up for a newly created trade union, so to finalize a pre-prepared agreement on their working conditions. Without any hesitation the Court identified the practice as anti-trade union pursuant to Art. 28 of the Workers' Statute, by a justifiably extensive interpretation of Art. 2 of Decree no. 81/2015; as it was clearly remarked, *"as Art. 2 applies the discipline of the subordinate relationship to collaboration relationships, the extension must concern every aspect, both substantial and procedural. It would be reductive if the legislation had recognized a right devoid of any actual guarantee"*.[35] There is hope, yet.

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[35] Tribunale Milano, decree 25 March 2021.

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