Italian Labour Law e-Journal
Issue 2, Vol. 16 (2023)
ISSN 1561-8048
https://doi.org/10.6092/issn.1561-8048/18401

Collective Rights for Platform Workers. The Role Played by the Italian Workers' Statute in a Comparative Perspective.

Emanuele Menegatti*

1. Gig-Economy vs. Collective Representation. 2. The decline of collective representation in UK and US. 3. The Italian framework supporting freedom and union activity. 4. Conclusions: Towards Union Freedom 2.0.

Abstract

The interposition of a digital platform between consumers and workers providing services, even of a very traditional nature, has led to the creation of a (relatively) new business model, where there is an attempt to deny providers access to rights and protections typical of labour law; among these, collective rights. My intervention aims to offer a comparison between the Italian legal system, on one hand, and the American and British ones on the other, demonstrating how the former, unlike the latter, thanks to the support provided by the workers' statute to freedom and union activity in workplaces, has managed to provide the necessary tools to effectively address the aforementioned challenges.

Keywords: Platform work; Union rights; Unfair labour practices; Collective bargaining; Right to strike.

1. Gig-Economy vs. Collective Representation.

The introduction of a digital platform between consumers and workers has given rise to what appears to be new business and work models. In these models, the relationship between the platform and service providers, who are formally considered as independent contractors, seeks to resemble a business-to-business relationship.[1]

* Professor of Labour Law, University of Bologna-Alma Mater Studiorum. This essay has been submitted to a double-blind peer review. This essay will be published in in the Proceedings of the Seminar "*Issues of EU Collective Labour Law. What role for the social partners in the light of the challenges posed by the Recovery Plan and the digitalisation of work*?", held in Bologna on 19 May 2023.

[1] The models of work created by the gig economy and the related issues have been extensively explored in labour law scholarship. Among the early contributions on this topic, *see:* De Stefano V., *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"*, in *Comparative Labor Law and Policy Journal*, 37, 2016, 471 ff..; Codagnone C., Abadie F., Biagi F., *The Future of Work in the 'Sharing Economy'.*

From the perspective of the workers involved, there is actually nothing genuinely new. Familiar, and sometimes unlawful, practices such as on-call work, piece-rate pay, labour intermediation, and interposition are evident. Similarly, the challenges are not entirely novel: workers operating through platforms are denied access to employment protections and collective rights and representation. This very aspect is the focus of the present paper. The business model fostered by these platforms is, chronologically speaking, the latest attempt to distance employing entities from unions, collective actions, and collective bargaining.

Various are the actions taken by the platforms that produce this distancing.[2] The one which emerged very clearly from the outset of the gig-economy, concerns the classification in terms of autonomy of the workers. A situation that can effectively hinder access to employment protections and a significant portion of social security rights. The collective rights, including the right to collective bargaining, have also often been excluded based on the same premise.[3] Significant are also the effects of the dispersion of workers in the context of virtual workplaces, where physical gathering spaces are limited and the sense of belonging to a community is hard to build. In such a situation, the sense of solidarity among workers, which has always been the foundation of collective action, is missing. In other words, there is a marked individualization of work relationships and a related trend towards self-representation. All of this is accompanied by hostile strategies towards collectivization carried out by platforms, which, as we will see, channel into well-established techniques to counteract collective representation.

For their part, trade unions are active in trying to counteract this push towards de-unionization in many countries, through collective actions, lobbying, and resorting to justice. Alongside them, various spontaneous movements have emerged, constituted by platform-based workers. As a recent study highlights,[4] ride-hailing drivers and riders organizations,

Market Efficiency and Equitable Opportunities or Unfair Precarisation?, in *JRC Science for Policy Report*, 2021, 1 ff., https://publications.jrc.ec.europa.eu/repository/handle/JRC101280 (last accessed 22 September 2022).

[2] Refer to the comprehensive analyses conducted in this regard by Prassl J., *Collective voice in the platform economy: challenges, opportunities, solutions*, Bruxelles, 2018, 1 ff.; Vandaele K., *Will trade unions survive in the platform economy?,* in *ETUI Working Papers*, Brussels, 2018, 1 ff.; Forsyth A., *The future of Unions and Worker Representation*, Hart Publishing, Oxford, 2022, 1 ff.

[3] Due to antitrust law, the establishment of mandatory minimum fees through collective agreements is considered an illegal restraint of competition, to the detriment of consumers. In the United States, this is governed by the Sherman Antitrust Act, which allows an exception, introduced by the subsequent Clayton Antitrust Act, for unions that enter into collective agreements aimed at supporting the legitimate interests of employees (the so-called labor exception). However, it was also clarified by the Supreme Court in the case of Columbia River Packers Assn., Inc. v. Hinton, 315 U.S. 143 (1942), that the exception cannot be extended to associations representing self-employed workers. The situation within the European Union is quite similar. Article 101 of the Treaty on the Functioning of the European Union prohibits such collective agreements. However, the European Court of Justice has provided a parallel exception similar to the American one in the Albany case (CJEU, 21 September 1999, C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*) where collective agreements aim to 'improve working and employment conditions' for employees. This does not apply, however, to cover collective agreements aimed at establishing minimum fees for self-employed workers, as clarified in the FNV Kunsten Informatie en Media case (CJEU, 4 December 14, C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*), even when the workers in question perform activities similar to those of an employee. Unless they are deemed false self-employed workers, identifiable based on the broad concept of 'worker' elaborated by the European Court of Justice. For further reference on this concept, please *see* Menegatti E., *Taking EU labour law beyond the employment contract: The role played by the European Court of Justice*, in *European Labour Law e-Journal*, 11, 2020, 26 ff.

[4] Vandaele K., nt. (2), 15 ff.

contrary to what the aforementioned marked individualization of work relationships would suggest, have instead shown that they possess a certain bargaining power against the platforms. This is mainly due to the visible and disruptive effects of their protest actions, capable of capturing the attention of public opinion.

The effectiveness of such actions in relation to the strategies of individualizing work relationships pursued by the platforms is, however, highly variable. Much depends on the legal framework for union protection and support present in the national legal system in question. In Italy, thanks to the strong constitutional and statutory recognition of trade union freedom, the right to collective bargaining, and the right to strike, resistance has so far proven to be quite effective. Furthermore, a recent analysis shows that Italy is the country in the European Union that has provided the most substantial response to the phenomenon of platform-based work;[5] not only at the legislative level, but also thanks to collective bargaining and the judiciary. In other legal systems, specifically those where the platform phenomenon has spread more quickly and extensively than in ours, such as the US and British systems, collective representation struggles more to establish itself, in a context certainly not favorable to unionization.

The aim of this contribution is precisely to compare the aforementioned legal systems with the Italian one, in order to draw, at a time when various legislative measures aimed at protecting working conditions in the so-called gig economy are taking shape, useful insights for this purpose.

The choice of these legal systems is motivated by the opposing backdrop of industrial relations. Both the United States and the United Kingdom have for many decades now shown a system of typically company-based collective bargaining, weak unions without a specific institutional role, strong employer opposition to the spread of unionization, heteronomous regulation of union relations, and in particular of collective bargaining and the right to strike. In contrast, Italy is characterized by strong sector-based collective bargaining, still significant union density, a strong institutional role of the union, low institutional interference in industrial relations, accompanied by strong recognition of freedom and significant rights connected to union activities in companies primarily guaranteed by the workers' statute. As one can easily imagine, this situation is not without tangible consequences: while the United States and the United Kingdom have long embarked on a trend of declining unionization and coverage of collective bargaining; the Italian system has managed to maintain consistent and effective support in favor of collective autonomy".

The choice of these legal systems leads to a non-trivial methodological implication. Great caution is needed when evaluating the experiences of other systems when trying to use them in a, so to speak, predictive manner, that is, from a *de iure condendo* perspective. Meaning, to discard certain solutions *a priori* that might replicate in a certain system problem already arisen elsewhere, or the adoption of virtuous foreign experiences. Even more so with reference to the topics discussed here. According to the famous teaching of Otto Kahn-Freund,[6] the transplantation of rules within the context of collective labor relations must consider the

[5] *See* Mandl I., *Initiatives to improve conditions for platform workers: Aims, methods, strengths and weaknesses*, Luxembourg, 2021.
[6] Khan Freund O., *On uses and misuses of comparative law*, in *Modern Law Review*, 37, 1, 1974, 12.

intertwined relationship with the economic system, the peculiarities of industrial relations systems, union traditions, and business culture. A situation that subjects the transplant to a high risk of rejection.

However, this is not the perspective we aim to adopt in this contribution. Our approach will be the less ambitious one of promoting, through comparison, a better mutual understanding of the legal systems, in their strengths and weaknesses, which can contribute to their reform process. In this sense, the Italian experience can serve as a useful example for the Anglo-Saxon systems that will be considered, given the resilience that the collective relations system is showing in the face of the new challenges of the gig economy. The same exercise can also be beneficial for our system to understand, in light of the findings that will emerge from the comparison, whether and which adjustments might be necessary to optimize the tools available to collective representations.

I will then highlight the factors, including institutional ones, that led to the collapse of collective representation in the United States and the United Kingdom. From here, the evident challenges that platform workers faced in these contexts when they attempted to build a collective defense of their interests (§ 2). I will then move on to the Italian situation, highlighting how the constitutional and statutory defense, especially of trade union freedom, allowed an almost immediate and effective response to the challenges posed by the platforms (§ 3). This will permit some comparative conclusions (§ 4).

2. The decline of collective representation in UK and US.

The United States arguably has the most cumbersome system for supporting collective representation among Western legal systems, which has inevitably also encompassed the new challenges of the platform economy.

The National Labor Relations Act (NLRA) of 1935 remains the regulatory framework for supporting trade unions and collective bargaining. The federal legislative intervention historically had the task of bringing democracy into workplaces after years of persistent oppression, better known as the Lochner era.[7] The original intent was to eradicate yellow unions, ensuring the authenticity of company trade union representatives, within a framework that supported exclusively company-level collective bargaining. To this end, there was an attempt to promote the establishment, through the so-called ballot system, of a trade

[7] This label refers to the period between 1905 and 1935 when, starting with the Lochner case, the U.S. Supreme Court invalidated more than 150 legislative provisions aimed at protecting working conditions and enabling worker unionization. These laws were deemed unconstitutional because they were seen as infringing on the principle of contractual freedom. For example, federal laws that prevented the dismissal of workers due to union membership and national laws prohibiting collective agreements with convenience unions were considered unconstitutional. For more information on this topic, *see* Secunda P., *Sources of Labor Law in the United States: Contract Supra Omnis*, in Gyulavari T., Menegatti E. (eds.), *The Sources of Labour Law*, Kluwer Law International, Alphen aan den Rijn, 2020, 389 ff.

union representation supported by the majority of workers in the bargaining unit (which roughly corresponds to our production unit).[8]

The requirement for a company vote, coupled with the absence of sector-wide collective bargaining, have emerged as the biggest hindrances to the spread of bargaining, which now covers an extremely low percentage, generally estimated at around 11% (below 10% when considering only the private sector). The need to call an election and obtain a majority of votes there has historically allowed employers to interfere with hostile strategies. The list of aggressive employer practices, aimed at preventing the ballot in the first place and discouraging union affiliation, is long. These range from better treatment for those who are not unionized or protest, the ability for employers to spread anti-union messages, to threats of company closure. Defending the union is very challenging. The system to prevent so-called unfair labor practices, while present in the NLRA framework, has in fact never really worked.[9] Thanks to a distinctly pro-employer interpretation by the National Labor Relations Board, the federal agency responsible for administering the NLRA, the widespread practice of employers organizing meetings with staff where anti-union messages are conveyed, without any form of counter-argument, has been legitimized. Unions, on the other hand, do not have access to meetings with workers during working hours. This has been justified on the basis of the constitutional recognition of freedom of speech (on the employer's part) and the protection of private property (specifically, the company), which is intended to prevail over union activity in the workplace.[10] Even where workers have managed to establish collective representation, employers have not failed to further effectively obstruct collective negotiations. Artfully raised disputes about the validity of the elections, negotiations conducted in bad faith solely to delay, and even outsourcing the work performed in the bargaining unit.[11]

As one can easily predict, the gig-economy, since workers are dispersed and communicate less easily with unions and among themselves, has made it even easier for platforms to hinder unionization. Right from the outset, by leveraging the legal angle of the formally non-subordinate nature of relationships, it was not hard to exclude the right to collective bargaining by referring to competition law. In fact, under the guidance of the Trump administration, the NLRB has expressly ruled out that Uber drivers can fall under the scope of the NRLA.[12]

However, this was not enough to stop the workers' claim for the right to representation and collective bargaining. Taking advantage of the pressure power that, as mentioned, comes from combat initiatives, spontaneous organizations of Uber drivers, with the support of the traditional union, managed to obtain from the City of Seattle an ordinance in 2015, which

[8] For a description of the representation system created by the National Labor Relations Act, please refer to Cox A., Bok D., Gorman R., Finkin M., *Labor Law*, Foundation Press, New York, 2011, 79 ff.
[9] *Ibidem*, 214 ff.
[10] Forsyth A., nt. (2), 20.
[11] Greenhouse S., *Beaten down. Worked up: The past, the present, and the future of American labor*, Alfred A. Knopf, New York, 2019, 137-139.
[12] Mishel L., McNicholas C., *Uber drivers are not entrepreneurs*, in *Economic Policy Institute*, 20 September 2019, https://www.epi.org/publication/uber-drivers-are-not-entrepreneurs-nlrb-general-counsel-ignores-the-realities-of-driving-for-uber/.

recognized their ability to establish collective representations and thus negotiate collectively with the platform, even if classified as self-employed workers. However, the ordinance was successfully challenged by the U.S. Chamber of Commerce in a federal court, which recognized the violation of competition law.[13]

Again, employers have shown a remarkable and immediate ability to respond. This response was facilitated by the weak protection granted to strikes by North American law. For example, the practice of replacing striking workers was easily enabled. So much so that platforms can disconnect workers involved in protest actions and simultaneously increase rates to attract workers who only occasionally work.[14]

The counter-strategies of the platforms also go through actions to disrupt autonomous movements, seeking support from the "softer" traditional unions. This happened in California where a union agreed to support Uber in proposing a bill that, on the one hand, recognized rights for drivers, but on the other accepted their status as independent workers; this angered a spontaneous organization (Rideshare Drivers United). Something similar happened in the state of New York, where a drivers' association (Independent Drivers Guild) had accepted a similar agreement, always implying the classification in terms of independent work, also raising many suspicions, given a funding received from Uber.[15]

Very similar events have occurred in the United Kingdom. By the early '70s, the era of so-called collective laissez-faire had ended[16] – when the legislature chose to delegate the regulation of labor relations to collective bargaining without interference. From 1971, in order to limit unionization and strikes following the social unrest of the late '60s, the decision was made to regulate the recognition of unions and collective bargaining with procedures similar to the American ballot.[17] Policies to contain union action were further strengthened under the conservative government led by Margaret Thatcher.[18] Even at the end of the two decades of conservative rule, with the electoral victory of Tony Blair's new labour, the situation changed little, despite the electoral promise of restoring rights to unions.[19]

Today, the British legal system still struggles to fully and effectively protect the freedom and activity of trade unions. A significant example is the discrimination based on individual workers' union activism who are not members of a union. The Trade Union and Labour Relations Act of 1992 (TULRCA) protects, under Article 137, union members who are denied employment for that reason.[20] A questionable ruling by the House of Lords proposed a literal interpretation of the text, excluding that the protection could also extend to the analogous employer refusal in the face of mere trade union activism demonstrated by

[13] Ninth Circuit Court of Appeals, 890 F3d 769 (9th Cir 2018), *Chamber of Commerce v City of Seattle*.
[14] Greenhouse S., nt. (11), 137-139.
[15] *Ibidem*, 83.
[16] Kahn-Freund O., *Labour Law*, in M. Ginsberg (*ed*), *Law and Opinion in England in the 20th Century*, Stevens and Sons, London, 1959, 224.
[17] *See* Doherty M., Mangan D., *The sources of labour law*, in Gyulavari T., Menegatti E. (*eds*), nt. (7), 374.
[18] *See* Davies P., Freedland M., *Towards a Flexible Labour Market*, Oxford University Press, Oxford, 2007, 2.
[19] Please *see* the critical analysis of the actions of the Blair government by Giddens A., *The Third Way: The Renewal of Social Democracy*, Polity Press, Cambridge, 1998, 163.
[20] *See* Adams Z., Barnard C., Deakin S., Fraser Butlin S., *Deaking and Morris' labour law*, Bloomsbury Publishing, London, 2021, 919 ff.

workers (regardless of their affiliation with a union).[21] It took a ruling by the European Court of Human Rights[22] and a couple of amendments to the 1992 law to achieve protection that still fails to provide full and effective defense against discrimination on trade union grounds.[23]

In the United Kingdom, as in the United States, there are procedures to suppress unfair labour practices related to ballots.[24] The protection, however, is limited only to direct practices, such as attempts to bribe workers or direct threats. Indirect practices, which are quite common, such as facilitating the establishment of a representation or simply a forum of workers "close" to the employer, setting up anti-union campaigns in the workplace, or artfully raising legal disputes about the validity of the ballots, are not considered. The TULRCA still provides for emergency remedies for further specified anti-union initiatives, such as in the case of dismissal for union reasons, for which there is also an order for the reinstatement of the unjustly dismissed worker. However, both the limited scope of the procedure (only the case of dismissal) and the fact that the judge's order can be disregarded by the employer until a regular decision has been made by the court, significantly limits its effectiveness.[25]

It is not surprising, therefore, that the decline in collective bargaining coverage has also been accompanied by a decline in recourse to the arbitration body that oversees anti-union practices.[26] This seems like a union's surrender in the face of overwhelming employer power. Added to this, the right to strike, just as in the United States, has limitations that make it practically unfeasible. Specifically, through a Conservative Government intervention in 1982, a vote by workers was required before legally proclaiming a strike, within a lengthy, costly, and challenging administration procedure.[27]

In terms of the gig-economy, despite the highlighted challenges, some results have been achieved by unions and spontaneous movements. An example is the case of Hermes, a courier company that uses a platform based on the gig-economy model, which was forced to start collective negotiations.

However, even here, there were employer counter-reactions, very similar to their counterparts overseas. Thus, the establishment of a collective representation for company negotiations was effectively obstructed by invoking the "independent" status of the involved workers. An independent union, Independent Workers Union of Great Britain (IWGB), widespread among the riders, tried to get the Deliveroo platform to recognize a company

[21] *Wilson v. Associated Newspaper Ltd*, (1995) 2 AC 454.
[22] ECHR, 2 July 2002, 552, *Wilson and Palmer v. United Kingdom*.
[23] The reference is to the provisions of the Employment Relations Act of 1999 and 2004. For a comprehensive examination of this issue, please refer to Collins H., Ewing K.D., McColgan A., *Labour Law*, Cambridge University Press, Cambridge, 2019, 491 ff.
[24] The procedure is described and analyzed in detail by Collins H., Ewing K.D., McColgan A., nt. (23), 587 ff.
[25] Regarding this matter, please refer to the commentary on the case of Employment Tribunals, 24 January 2011, Case no. 2358477/2010, *Thomas v. London Underground Ltd*., and Employment Tribunals, 22 November 2010, Case no. 2330511/2010, *Lynch v. London Underground Ltd*., by Collins H., Ewing K.D., McColgan A., nt. (23), 506.
[26] Forsyth A., nt. (2), 215.
[27] The regulation is now contained in the TULRCA 1992, in Section 219. For an analytical description of the procedure, please refer to Adams Z., Barnard C., Deakin S., Fraser Butlin S., nt. (20), 965 ff.

representation.[28] To this end, they relied on the broad concept of 'worker' present in the British legal system, roughly corresponding to quasi-subordinate workers.[29] For workers, a whole series of rights are in fact recognized, including, precisely, the right to collective bargaining.

However, the central arbitration committee denied such recognition, due to the substitution clauses present in their contracts.[30] A conclusion also shared by the subsequent ruling of the High Court, following the complaint brought by the IWGB,[31] despite in practice such clauses being nothing more than a fiction, since they are never used by the workers; therefore, a ruse designed to artfully deprive workers of their 'workers' status.[32] An interesting aspect of the situation is that, while waiting for the Supreme Court's ruling on the matter in the appeal proposed by the union against the High Court's decision, Deliveroo concluded a collective agreement with another union (GBM), aimed at recognizing some rights for the riders, but combined with the recognition of their status as self-employed workers. This was enough to paralyze the stipulation of the new agreement that IWGB was ready to negotiate with Deliveroo, if the Supreme Court had confirmed the 'workers' status of the couriers. Once again, this reflects an unfair attitude from the platform, which the British system failed to counteract.

From what has just been described, a picture emerges, both in the United States and in the United Kingdom, where laws that, in principle, intended to promote genuine union representation have instead been easily exploited by companies to undermine union action and collective bargaining. An apparent unintended consequence that, perhaps, is not so unintended after all, given that this was probably the desired effect by the governments that promoted such a legislative framework.

3. The Italian framework supporting freedom and union activity.

It is easy to see how Italy offers a much more encouraging framework for the development of unions and collective bargaining compared to what has just been described. The difference is clearly marked, starting from the constitutional recognition of trade union freedom, unhindered by any authorization (art. 39, paragraph 1) and the right to strike, with limits set by law (art. 40) and in fact not particularly invasive. This recognition is then brought

[28] Please refer to the complete account of the incident on the labor union organization's website at https://iwgb.org.uk/en/post/iwgb-takes-deliveroo-to-supreme-court/ (last accessed 4 October 2022).
[29] *See* Countouris N., *The Changing Law of the Employment Relationship. Comparative Analyses in the European Context*, Routledge, Farnham, 2007, 71 ff.
[30] Central Arbitration Committee (CAC), (2018) IRLR 84, *Independent Workers Union of Great Britain v RooFoods Ltd T/A Deliveroo*.
[31] EWHC, 5 December 2018, 3342, *Independent Workers Union of Great Britain (on the application of) v Central Arbitration Committee and RooFoods Ltd t/a Deliveroo*.
[32] *See* Atkinson J., Dhorajiwala H., *IWGB v RooFoods: Status, Rights and Substitution*, in *Industrial Law Journal*, 48, 2, 2019, 292.

into the company by the Workers' Statute,[33] through a set of rules that has proven effective, even over time.

The statutory framework has shown a good ability to adapt to changes in production systems and work, most recently the fragmentation and dematerialization brought about by platform-based work. This, even though it was conceived with reference to a completely opposite model: a productive context, the factory, which besides being a closed system, where the entire production cycle was completed, represented a physically tangible gathering space, where full-time and permanent workers were employed.

This capability of the Statute clearly emerges when compared to the other legal systems considered here. It has been highlighted above how the main obstacle in the United States and the United Kingdom that stood between unions and access to workplaces, especially fragmented ones, is the formalized ballot system. On the other hand, the same problem did not replicate in our system because of the broad and flexible recognition in favor of trade union freedom. This freedom is in fact guaranteed also to organizational forms that do not have an associative character. Both art. 39 of the Constitution and art. 14 of the Workers' Statute refer to the "organization" of a trade union nature without postulating either the presence of a particular organizational structure or the necessarily permanent nature of the workers' coalition; and without even giving importance to the qualification of relationships.[34]

It also finds recognition in the Italian legal system the right of workers to join trade unions at individual workplaces,[35] which is totally missing in the UK and US. And this freedom is protected against discriminations for reason of union affiliation, as per Article 15 of the Workers Statute. It is a broad-spectrum coverage that aims to preserve employees not only from the typical acts specifically indicated by the regulation, such as scenarios involving participation in a strike, refusal of employment, or dismissal due to union affiliation (or non-affiliation); but also against any form of unilateral or bilateral act, including omissive ones. All of this is complemented by the provisions of Article 16, which aims to prohibit employers from granting collective economic treatments of a discriminatory nature based on workers' 'union' behavior. Thus, preferential treatments granted to workers who have not engaged in strikes or participated in assemblies are prohibited. This situation, as we have seen, occurs with some regularity in the United States and has also reemerged during recent platform worker protests.

To tell the truth, due to functional limitations of the provisions in Articles 15 and 16 of the Labor Code, judicial applications of these provisions have been somewhat rare.[36]

[33] For the role of the Workers' Statute, please *see* the historical contributions by Ghezzi G., Mancini G.F., Montuschi L., Romagnoli U., *Commentario del Codice Civile. Statuto dei diritti dei lavoratori. Art. 14-18*, Zanichelli Società Editrice del Foro Italiano, Bologna, 1981; Grandi M., *L'attività sindacale nell'impresa*, Franco Angeli, Milano, 1976.

[34] Giugni G., *Diritto sindacale*, Cacucci, Bari, 2014, 263 ff.

[35] *See* Carinci F., De Luca Tamajo R., Tosi P., Treu T., *Diritto del lavoro. Volume 1. Il diritto sindacale*, Utet Giuridica, Turin, 2018, 157.

[36] For further insights on this matter, please also refer to Carinci F., De Luca Tamajo R., Tosi P., Treu T., nt. (35), 159, where they highlight that the primary reason for the lack of success can be attributed to the inadequacy of the traditional nullity penalty, which in practice is reduced to compensation. Moreover, this compensation is entirely ineffective when it comes to omissive discriminatory acts, such as selectively granting benefits. The nullity of the act that grants the benefit does not automatically extend to all workers. Finally, there is the issue

However, this does not mean there has been a lack of protection against anti-union practices. In fact, these practices have more frequently and effectively been countered through the instrument provided by Article 28 of the Workers' Statute.

In addition to the simple recognition of trade union freedom, which we can consider as the 'baseline' level of protection, specific legal situations are outlined in the Workers' Statute under its Title III. These provisions impose genuine cooperation obligations on the employer, often to the detriment of the organizational needs of the company, thereby sidestepping the issue of power dynamics within the company. This very circumstance constitutes a significant barrier to workers' representation and collective action in ultra-liberal systems.

Some selectivity, yet nothing comparable to the UK and US legal systems, involves the right of workers to establish company-level union representatives (Article 19). These representatives are empowered to convene assemblies (Article 20), even during working hours, with a corresponding obligation on the part of the employer to cooperate or at the very least refrain from interference, including the participation to the assembly. This is sufficient to outlaw practices in our system that are allowed in the United States, where employers are free to target workers with anti-union messages and restrict unions from organizing meetings during working hours.

The framework is further complemented by the employer's obligation to provide premises for workers' representative bodies (Article 27), the right to post notices (Article 25), the guarantee of conducting proselytizing and collections (Article 26), union leave and detachments (Articles 23 and 24), the ability to organize a referendum among workers (Article 21), and restrictions on the transfer of members of workers' representative bodies (Article 22).

However, what appears to be the greatest strength of the Italian legal system, when compared to the American and British frameworks, is the mentioned safeguard regarding union activities within the company, guaranteed by the provisions related to the repression of anti-union conduct outlined in Article 28 of the Workers' Statute. It is not by chance that this provision is commonly referred to as the 'linchpin' and 'closing' norm of the statutory framework, capable of giving practical effectiveness to the rights recognized therein.[37] The tool placed in the hands of the union by the statutory legislator has proven, thanks to its well-designed structure, which is inherently open and teleologically determined, to cover the entire range of legal interests related to the union (freedom and union activity, the right to strike). It has demonstrated a remarkable ability to encompass all the forms that anti-union employer actions can take.

A clear and recent example comes from a legal case related to digital labour platforms. The reference is to the dispute that arose following the signing of a collective agreement between UGL and Assodelivery under the Legislative Decree of September 3, 2019, No. 101 (converted into Law No. 128 on November 2, 2019). Through this agreement, the platforms

of the individual nature attributed to the action, making it unsuitable for addressing typically collective situations like discrimination.

[37] For the significance of the tool provided by Article 28 within the statutory framework of freedom and trade union activity, please *see* Treu T., *Condotta antisindacale e atti discriminatori*, Franco Angeli, Milan, 1974.

attempted to defuse the effects of the regulations concerning riders, particularly those related to the classification of employment relationships and, above all, the workers' compensation system.[38] Although with different lines of argument, both the Bologna court, in a decree dated June 30, 2021,[39] and the Florence court, in a judgment dated November 24, 2011, No. 781[40] (in opposition to the judgment issued by the same court on February 9, 2021),[41] recognized the anti-union nature of Deliveroo's conduct in applying the aforementioned collective agreement to riders and ordered the platform to cease its application.

In a nutshell, the Italian legal system has proven capable of countering all those situations that in the United States and the United Kingdom have led to the almost complete annulment of unionization, even in platform work. Just think of the mentioned practices of direct communication between employers and employees aimed at bypassing or openly discrediting union intermediation. Or even the more direct threats of retaliation against those who vote in favor of unions in ballots, or the outsourcing of company activities, replacing striking workers, and raising rates on protest days.

4. Conclusions: Towards Union Freedom 2.0.

The message that the comparative analysis conveys is that, in the face of the challenges to collective representation posed by the platform economy model, national legal systems must appropriately move towards a widespread and effective recognition of trade union freedom and the right to collective bargaining. These rights can only receive genuine protection if they are safeguarded by an effective procedural tool for repressing both direct and indirect anti-union conduct.

This recognition should take into account the necessary adaptations regarding the transformations affecting collective representation in virtual and dispersed work environments, as well as the new opportunities provided by digitalization in terms of both union activities and hostile employer conduct. Even in cases where, as in Italy, adequate union rights are already recognized, they still presuppose the presence of physical spaces.[42]

[38] For a comprehensive overview of the situation involving the national collective labor agreement for riders, please refer to the authoritative comments by Carinci F., *Il CCNL rider del 15 settembre 2020 alla luce della Nota dell'Ufficio legislativo del Ministero del lavoro spedita a Assodelivery e UGL, firmatari del contratto*, in *Lavoro Diritti Europa*, 2021, 1; Tiraboschi M., *Il CCNL Assodelivery-UGL Rider: le ragioni della contesa politico-sindacale e le (distinte) problematiche giuridiche che questo accordo solleva*, in *Bollettino Adapt*, 35, 28 September 2020, https://www.bollettinoadapt.it/il-ccnl-assodelivery-ugl-rider-le-ragioni-della-contesa-politico-sindacale-e-le-distinte-problematiche-giuridiche-che-questo-accordo-solleva/ (last accessed 22 September 2023).

[39] https://www.wikilabour.it/wp-content/uploads/2021/07/20210630_Trib-Bologna.pdf (last accessed 22 September 2023). *See* also the comments to the judgmenet by: Fava G., *Tribunale di Bologna e CCNL Riders: un'analisi al di là di apodittiche prese di posizione*, in *Lavoro Diritti Europa*, 3, 2021; Puccetti E., *CCNL Rider: Dalla carenza di "valido potere negoziale" all'antisindacalità della sua applicazione*, in *Lavoro Diritti Europa*, 3, 2021.

[40] https://www.dirittoantidiscriminatorio.it/app/uploads/2021/11/Trib.-Firenze-sent.-7812021.pdf (last accessed 22 September 2023).

[41] https://www.wikilabour.it/wp-content/uploads/2021/02/20210209_Trib-Firenze.pdf (last accessed 22 September 2023) and the comment by Pellacani G., *Il Tribunale di Firenze, la Cgil, i riders e altre vicende. L'ordinamento "intersindacale" è arrivato al capolinea?*, in *Working Paper Adapt*, 14, 2021.

[42] *See* Magnani M., *Nuove tecnologie e diritti sindacali*, in *Labour & Law Issues*, 5, 2, 2019, 6.

Just think of the right to assembly, premises for workers' representative bodies, and the right to post notices. Even an evolving interpretation of the Workers' Statute could lead to the legitimization of new forms of exercising these rights. For example, through virtual communication tools between unions and workers, such as email messages, virtual meeting rooms, and so on.[43] In fact, there are already practical experiences where these rights have been recognized in digital form.[44]

What is emerging from practical experience shows that the issue is not so much adapting traditional union rights to new technologies but the fact that the right to assembly and, more generally, other traditional communication tools between unions and employees are now outdated compared to digital communication tools. In all the legal systems considered, it has been observed that the dispersion of workers is already being countered, even by those who do not have access to traditional union rights, using the same technological means employed by the platform. Thus, with a fair degree of success, spontaneous movements of platform workers have self-organized, especially through social media, for the purpose of undertaking collective actions.[45]

This situation is not surprising. As is well-known, forms of unionism are an adaptation to the surrounding economic environment. Hence, the inevitable transformation. Indeed, if it is true that traditional unions are a product of the economic model of the 20th century, it is easy to foresee that collective representation in the gig economy will largely rely on new forms of organization.[46] This strongly suggests the need for an adaptation of current legislation, even in countries that already support collective action without reservations. An adaptation aimed not only at recognizing, as mentioned earlier, the virtual exercise of union rights but, more importantly, at expanding, where appropriate, the scope of their use. More specifically, beyond wage employment and, in our case, even beyond the scope of workers' representative bodies.[47] Only in this way can their obsolescence be prevented, at least with regard to the new jobs created by platforms.

In this sense, the recent proposal for a directive on platform work also seems to be moving forward.[48] Article 15 of the proposal expressly requires Member States to ensure that

[43] *See* Donini A., *Il luogo per l'esercizio dei diritti sindacali: l'unità produttiva nell'impresa frammentata*, in *Labour & Law Issues*, 5, 2, 2019, 98 ff.; Di Meo R., *I diritti sindacali nell'era del caporalato digitale*, in *Labour & Law Issues*, 5, 2, 2019, 71 ff.

[44] One example is the recent supplementary company agreement between Takeaway.com Express Italy and Filt, Fit and Uil Trasporti, and in particular its Article 22. For a commentary on the union rights provisions of the agreement *see* Di Meo R., *I diritti sindacali (art. 22)*, in *Labour & Law Issues*, 7, 1, 2021, 205 ff.

[45] Magnani M., nt. (42), 5.

[46] Tullini P., *L'economia digitale alla prova dell'interesse collettivo*, in *Labour & Law Issues*, 4, 1, 2018, 1 ff.; Recchia G.A., *Alone in the crowd? La rappresentanza e l'azione collettiva ai tempi della sharing economy*, in *Rivista Giuridica del Lavoro*, I, 2018, 144 ff.; Lassandari A., *Problemi di rappresentanza e tutela collettiva dei lavoratori che utilizzano le tecnologie digitali*, in *Quaderni della Rivista Giuridica del Lavoro*, 2017, 59 ff.; Imberti L., *La nuova "cassetta degli attrezzi" del sindacato tra spazi fisici e luoghi digitali: l'esperienza di Toolbox Cgil di Bergamo*, in *Labour & Law Issues*, 5, 2, 2019, 115 ff.; Bini S., *Appunti sulla rappresentanza sindacale dei contingent workers*, in Alessi C., Barbera M., Guaglianone L. (*eds*), *Impresa, lavoro e non lavoro nell'economia digitale*, Cacucci, Bari, 2019, 575 ff.

[47] *See* Martelloni F., *Quali diritti sindacali per le Unions dei riders*?, in *Labour & Law Issues*, 7, 1, 2021, 211 ff. and the punctual solutions offered by Donini A., nt. (43), 106 ff.

[48] For a comment to the Directive proposal *see* De Stefano V., *The EU Commission's proposal for a Directive on Platform Work: an overview*, in *Italian Labour Law e-Journal*, 15, 1, 2022, 1; Alaimo A., *Il pacchetto di misure sul lavoro nelle piattaforme: dalla proposta di Direttiva al progetto di Risoluzione del Parlamento europeo. Verso un incremento delle*

digital labor platforms enable individuals working through digital platforms, regardless of the classification of their relationship, 'to contact and communicate with each other and to be contacted by representatives of individuals working through digital labor platforms through the digital infrastructure of digital labor platforms or through equally effective means.' The recognition of this right is accompanied by the corresponding obligation for platforms to refrain from accessing or monitoring such communications.

In any case, as highlighted, the primary limitation to collective interest defense in the United States and the United Kingdom is not so much the recognition of union rights as outlined in Title III of the Workers' Statute. Instead, it is the protection of union freedom in its most basic form. What is missing, in contrast to the Italian legal system, is the support for union association in various forms it can take in the workplace, the recognition of the right to undertake collective actions without formalities that make it excessively difficult, even preventing its use. In short, the conditions for the widespread adoption of genuine collective bargaining are not present. Just consider how in Italy, unlike in Anglo-Saxon countries, the right to collective bargaining, despite being controversial in light of EU competition law,[49] does not appear to have been seriously questioned so far, also considering the strong constitutional support.[50] Moreover, it is the legislator itself that, as mentioned above regarding the collective agreement signed by UGL, has explicitly recognized it in favor of riders in Legislative Decree No. 101/2019 (converted into Law No. 128/2019).

A right that can also be found in other European countries. For example, in France, where the law dedicated to platform workers recognizes the right to collective bargaining for workers who are considered independent. However, this right is primarily supported by international law. The jurisprudence of the European Court of Human Rights is significant in this regard. Starting with the reversal of its stance in the Demir and Baykara v. Turkey judgment,[51] the European Court of Human Rights has placed trade union freedom, the right to collective bargaining, and the right to strike within Article 11 of the European Convention on Human Rights (ECHR), considering them instrumental rights for the protection and guarantee of human rights in a context of weak contractual labor. In the same direction, a well-known opinion of the European Committee of Social Rights has also leaned.[52]

The European Union is also taking significant steps in this direction. Through an initiative parallel to the proposal for a directive on platform work, it aims to provide guidelines on the

tutele?, in *Labour & Law Issues*, 8, 1, 2022, 1; Barbieri M., *Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni di lavoro nel lavoro con piattaforma*, in *Labour & Law Issues*, 7, 2, 2021, 1. Tullini P., *La Direttiva Piattaforme e i diritti del lavoro digitale*, in *Labour & Law Issues*, 8, 1, 2022, 43.

[49] *See* the well-known judgements CJEU, 13 January 2004, C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional e Secretary of State for Education and Employment*, and CJEU, 4 December 2014, C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*. On the latter the comment by Ichino P., *Sulla questione del lavoro non subordinato ma sostanzialmente dipendente nel diritto europeo e in quello degli stati membri*, in *Rivista Italiana di Diritto del Lavoro*, 2, 2015, 566 ff.

[50] Loi P., *Il lavoro autonomo tra diritto del lavoro e diritto della concorrenza*, in *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 4, 2018, 843 ff.; Tomassetti P., *Il lavoro autonomo tra legge e contrattazione collettiva*, in *Variazioni in Tema di Diritto del Lavoro*, 3, 2018, 737; Perulli A., *Il lungo viaggio del lavoro autonomo dal diritto dei contratti al diritto del lavoro, e ritorno*, in *Lavoro e Diritto*, 2, 2017, 251 ff.

[51] HCHR, 12 November 2008, n. 34503/97, *Demiter e Baykara c. Turchia*.

[52] ECSR, Complaint No. 123/2016, *Irish Congress of Trade Unions (ICTU) v. Ireland*.

application of EU competition law to collective agreements determining working conditions for self-employed workers who provide personal services.[53]

Bibliography

Adams Z., Barnard C., Deakin S., Fraser Butlin S., *Deaking and Morris' labour law*, Bloomsbury Publishing, London, 2021;
Alaimo A., *Il pacchetto di misure sul lavoro nelle piattaforme: dalla proposta di Direttiva al progetto di Risoluzione del Parlamento europeo. Verso un incremento delle tutele?*, in *Labour & Law Issues*, 8, 1, 2022;
Atkinson J., Dhorajiwala H., *IWGB v RooFoods: Status, Rights and Substitution*, in *Industrial Law Journal*, 48, 2, 2019;
Barbieri M., *Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni di lavoro nel lavoro con piattaforma*, in *Labour & Law Issues*, 7, 2, 2021;
Bini S., *Appunti sulla rappresentanza sindacale dei contingent workers*, in Alessi C., Barbera M., Guaglianone L. (*eds*), *Impresa, lavoro e non lavoro nell'economia digitale*, Cacucci, Bari, 2019;
Carinci F., De Luca Tamajo R., Tosi P., Treu T., *Diritto del lavoro. Volume 1. Il diritto sindacale*, Utet Giuridica, Torino, 2018;
Carinci F., *Il CCNL rider del 15 settembre 2020 alla luce della Nota dell'Ufficio legislativo del Ministero del lavoro spedita a Assodelivery e UGL, firmatari del contratto*, in *Lavoro Diritti Europa*, 2021;
Codagnone C., Abadie F., Biagi F., *The Future of Work in the 'Sharing Economy'. Market Efficiency and Equitable Opportunities or Unfair Precarisation?*, in *JRC Science for Policy Report*, 2021;
Collins H., Ewing K.D., McColgan A., *Labour Law*, Cambridge University Press, Cambridge, 2019;
Countouris N., *The Changing Law of the Employment Relationship. Comparative Analyses in the European Context*, Routledge, Farnham, 2007;
Cox A., Bok D., Gorman R., Finkin M., *Labor Law*, Foundation Press, New York, 2011;
Davies P., Freedland M., *Towards a Flexible Labour Market*, Oxford University Press, Oxford, 2007;
De Stefano V., *The EU Commission's proposal for a Directive on Platform Work: an overview*, in *Italian Labour Law e-Journal*, 15, 1, 2022;
De Stefano V., *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"*, in *Comparative Labor Law and Policy Journal*, 37, 2016;
Di Meo R., *I diritti sindacali (art. 22)*, in *Labour & Law Issues*, 7, 1, 2021;
Di Meo R., *I diritti sindacali nell'era del caporalato digitale*, in *Labour & Law Issues*, 5, 2, 2019;
Doherty M., Mangan D., *The sources of labour law*, in Gyulavari T., Menegatti E. (*eds*), *The Sources of Labour Law*, Kluwer Law International, Alphen aan den Rijn, 2020;
Donini A., *Il luogo per l'esercizio dei diritti sindacali: l'unità produttiva nell'impresa frammentata*, in *Labour & Law Issues*, 5, 2, 2019;

[53] European Commission, *Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons*, 29 September 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5796 (last accessed 22 September 2023).

European Commission, *Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons*, 29 September 2022;
Fava G., *Tribunale di Bologna e CCNL Riders: un'analisi al di là di apodittiche prese di posizione*, in *Lavoro Diritti Europa*, 3, 2021;
Forsyth A., *The future of Unions and Worker Representation*, Hart Publishing, Oxford, 2022;
Ghezzi G., Mancini G.F., Montuschi L., Romagnoli U., *Commentario del Codice Civile. Statuto dei diritti dei lavoratori. Art. 14-18*, Zanichelli e Roma Società Editrice del Foro Italiano, Bologna, 1981;
Giddens A., *The Third Way: The Renewal of Social Democracy*, Polity Press, Cambridge, 1998;
Giugni G., *Diritto sindacale*, Cacucci, Bari, 2014;
Grandi M., *L'attività sindacale nell'impresa*, Franco Angeli, Milano, 1976;
Greenhouse S., *Beaten down. Worked up: The past, the present, and the future of American labor*, Alfred A. Knopf, New York, 2019;
Ichino P., *Sulla questione del lavoro non subordinato ma sostanzialmente dipendente nel diritto europeo e in quello degli stati membri*, in *Rivista Italiana di Diritto del Lavoro*, 2, 2015;
Imberti L., *La nuova "cassetta degli attrezzi" del sindacato tra spazi fisici e luoghi digitali: l'esperienza di Toolbox Cgil di Bergamo*, in *Labour & Law Issues*, 5, 2, 2019;
Kahn-Freund O., *Labour Law*, in M. Ginsberg (ed.), *Law and Opinion in England in the 20th Century*, Stevens and Sons, London, 1959;
Khan Freund O., *On uses and misuses of comparative law*, in *Modern Law Review*, 37, 1, 1974;
Lassandari A., *Problemi di rappresentanza e tutela collettiva dei lavoratori che utilizzano le tecnologie digitali*, in *Quaderni della Rivista Giuridica del Lavoro*, 2017;
Loi P., *Il lavoro autonomo tra diritto del lavoro e diritto della concorrenza*, in *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 4, 2018;
Magnani M., *Nuove tecnologie e diritti sindacali*, in *Labour & Law Issues*, 5, 2, 2019;
Mandl I., *Initiatives to improve conditions for platform workers: Aims, methods, strengths and weaknesses*, Luxembourg, 2021;
Menegatti E., *Taking EU labour law beyond the employment contract: The role played by the European Court of Justice*, in *European Labour Law e-Journal*, 11, 2020;
Mishel L., McNicholas C., *Uber drivers are not entrepreneurs*, in *Economic Policy Institute*, 20 September 2019;
Pellacani G., *Il Tribunale di Firenze, la Cgil, i riders e altre vicende. L'ordinamento "intersindacale" è arrivato al capolinea?*, in *Working Paper Adapt*, 14, 2021;
Perulli A., *Il lungo viaggio del lavoro autonomo dal diritto dei contratti al diritto del lavoro, e ritorno*, in *Lavoro e Diritto*, 2, 2017;
Prassl J., *Collective voice in the platform economy: challenges, opportunities, solutions*, Bruxelles, 2018;
Puccetti E., *CCNL Rider: Dalla carenza di "valido potere negoziale" all'antisindacalità della sua applicazione*, in *Lavoro Diritti Europa*, 3, 2021;
Recchia G.A., *Alone in the crowd? La rappresentanza e l'azione collettiva ai tempi della sharing economy*, in *Rivista Giuridica del Lavoro*, I, 2018;
Secunda P., *Sources of Labor Law in the United States: Contract Supra Omnis*, in Gyulavari T., Menegatti E. (*eds*), *The Sources of Labour Law*, Kluwer Law International, Alphen aan den Rijn, 2020;

Tiraboschi M., *Il CCNL Assodelivery-UGL Rider: le ragioni della contesa politico-sindacale e le (distinte) problematiche giuridiche che questo accordo solleva*, in *Bollettino Adapt*, 35, 28 September 2020;
Tomassetti P., *Il lavoro autonomo tra legge e contrattazione collettiva*, in *Variazioni in Tema di Diritto del Lavoro*, 3, 2018;
Treu T., *Condotta antisindacale e atti discriminatori*, Franco Angeli, Milano, 1974;
Tullini P., *L'economia digitale alla prova dell'interesse collettivo*, in *Labour & Law Issues*, 4, 1, 2018;
Tullini P., *La Direttiva Piattaforme e i diritti del lavoro digitale*, in *Labour & Law Issues*, 8, 1, 2022;
Vandaele K., *Will trade unions survive in the platform economy?,* in *ETUI Working Papers*, Brussels, 2018.