

## Collective action for self-employed workers: a necessary response to increasing income inequality\*

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## I. Introduction.

According to European reports, the number of working poor<sup>1</sup> has increased substantially in the self-employment sector. European collected data reveal that the in-work poverty risk rate for self-employed workers (with and especially without employees) is now much higher than that for ordinary employees.<sup>2</sup>

Being self-employed or working as a professional (lawyer, architect, engineer) is no longer a status symbol of wealth, independence, and power as it was in the past. In Italy, lawyers — who cannot be classified as ordinary employees but independent contractors — declare an average annual income of 38,620 Euros with sensible disparities between men (€51,827) and women (€23,357), north (€55,775) and south (€23,205).<sup>3</sup> A report about the publishing sector points out that freelancers declare less than 15,000 Euros per year;<sup>4</sup> the median annual earning for male architects and engineers does not exceed 35,500 Euros, while it is slightly over 18,000 Euros for females.<sup>5</sup> From a broader perspective, a 2017 analysis shows that the number of Italian freelancers and other unregulated self-employed workers amounted to 370.000 with a growth of 67% from 2008–2017. In the same period, as a response to increased competition amongst workers, the median annual income decreased by 24.5%, reaching 16,200 Euros in 2017.<sup>6</sup>

In 2015, the Consulta dei Professionisti (CGIL) presented a report outlining the increasing need for unionization perceived by several independent professionals (including lawyers, artisans, architects, engineers, psychologists, journalists, editors, photo-reporters, actors, consultants, and so on) who were in a position of vulnerability and disparity. Of these professionals, 31.7% claimed protection against the risk of sickness, 34.5% against the risk of unemployment, 24.7% complained about the inadequacy of pension schemes, 68.5% declared they had no bargaining power about wages or time, and 76% declared they had no union experience.<sup>7</sup>

It is worth noting that many professionals (especially lawyers) are generally hostile towards unions because they are too focused on employment and thus, are unable to understand or interpret self-employed interests and needs. As a result, they favor new forms of collective organization.<sup>8</sup> Similarly, in the U.K. and in the U.S., following the successful experience of Freelancers Union, self-employed Instagram influencers are trying to form new unions – AIC, TCU, IG Meme Union – to fight discrimination, achieve proper protections and transparent working conditions,

<sup>1</sup> See the EUROPEAN SOCIAL POLICY NETWORK (ESPN), *POVERTY IN EUROPE: A STUDY OF NATIONAL POLICIES* (2019); EUROFOUND REPORT, *IN-WORK POVERTY IN THE WORKING POOR* (EUROPEAN UNION, 2017).

<sup>2</sup> Source: Eurofound Report, *supra* note 1.

<sup>3</sup> See the Censis Report 2019, *L'avvocato nel quadro dell'innovazione della professione forense*. The data refer to the annual income declaration of 2017.

<sup>4</sup> See the investigation report published by the Association ACTA available at <https://www.actainrete.it/2019/12/03/redacta-libera-tutti/>.

<sup>5</sup> See the Italian 2019 Report available at [https://www.casaportale.com/public/uploads/73491-Rapporto2019\\_VersioneDEFINITIVA\\_R4.pdf](https://www.casaportale.com/public/uploads/73491-Rapporto2019_VersioneDEFINITIVA_R4.pdf).

<sup>6</sup> See Giorgio Pogliotti, *La ricerca: liberi professionisti aumentano di numero ma i loro redditi si riducono di un quarto in nove anni*, *Il Sole24ore*, November 13, 2019.

<sup>7</sup> Report “Vita da professionisti” presented by the Consulta dei Professionisti on April 14, 2015. See also Enzo Mingione et al., *Le organizzazioni sociali e i giovani professionisti nell'area milanese*, *Quaderni di rassegna sindacale* (2014) 123 ff.

<sup>8</sup> Enzo Mingione et al., *supra* note 7, 130.

eliminate exploitative practices by brands.<sup>9</sup>

The median annual earning of the so-called “false” self-employed workers or quasi-employees is even lower. These are workers who cannot be regarded as “genuine self-employed” since, in practice, they are placed into a condition of subordination comparable to that of ordinary employees. Examples include gig-workers, Uber drivers, food delivery riders, etc.<sup>10</sup> Generally, their monthly income is slightly above 600 Euros.

In Italy, food delivery riders are formally classified as quasi-employees (lavoratori parasubordinati), falling into the self-employment category. Thus, they lie outside of the scope of employment protection. In past years, they have experienced unionization to achieve the following objectives: fair wages, legal classification as employees rather than self-employed, and health and safety protection.<sup>11</sup> The latter has become particularly important during the coronavirus pandemic. Several riders filed lawsuits asking to be provided with personal protective equipment such as face masks and sanitization products.<sup>12</sup> It is worth noting that the riders, in this case, chose to act individually, through legal claims, rather than collectively by striking or collective bargaining (*see infra* § V). Even the fight against misclassification was pursued through individual claims, rather than as a collective. The most recent decision by the Italian Supreme Court (Corte di Cassazione) has now classified them as “collaborations organized by the principal,” a new legal category introduced during Renzi’s government (Article 2, Legislative Decree 81/2015), whereby self-employed workers whose working activities are organized by one principal are entitled to all employment protections (including minimum wage and health and safety protection).<sup>13</sup> In a judgement of November 24, 2020, the Tribunale di Palermo goes even further recognizing for the

<sup>9</sup> See <https://www.theatlantic.com/technology/archive/2019/04/instagram-memers-are-unionizing/587308/>.

<sup>10</sup> Food delivery riders and Uber drivers can be hardly classified as “genuine” self-employed workers since they are placed under the power of organization and direction of the principal. In addition, their freedom to choose if and when to work appears to be merely fictional. This conclusion has been achieved by a number of European Courts that have finally classified the riders and Uber drivers as ordinary employees. In Spain, see Yolanda Sanchez-Uran Azana, *Economía de plataformas digitales y servicio compuestos*, *La Ley – Union Europea*, 57 (2018); Tribunal Superior de Justicia di Madrid, Sala de lo Social, 27 November 2019, ECLI: ES:TSJM:2019:11243 (on the Glovo case). As to Uber, in France, see Cour d’appel de Paris, 10 January 2019; Cassation social, 4 March 2020, no. 374; on *Take it easy*, see Cass. soc., 18 November 2018, n. 1737. In Germany, the Federal Labor Court, 1<sup>o</sup> December 2020, has recently recognized the existence of an ordinary employment relationship in a case of crowdworking. In the USA, see the recent *State of California’s complaint against Uber for injunctive relief, restitution and penalties against Uber*, May 5, 2020. For a general overview on the debate, see Valerio De Stefano, *The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy*, *Comp. Lab. L. & Pol’y J.*, 37 (2016) 471 ff.; Myriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, *Ibid.*, 37 (2016) 577; Myriam A. Cherry, Antonio Aloisi, *Dependent Contractors in the Gig Economy: A Comparative Approach*, *Am. Un. L. Rev.*, 66 (2017) 635; Tiziano Treu, *Rimedi, tutele e fattispecie: riflessioni a partire dai lavori della “Gig economy”*, *Lavoro e diritto*, (2017) 367 ff.; PATRIZIA TULLINI (Ed.), *WEB E LAVORO. PROFILI EVOLUTIVI DI TUTELA* (2017); ADALBERTO PERULLI (Ed.), *LAVORO AUTONOMO E CAPITALISMO DELLE PIATTAFORME* (2018); JEREMIAS PRASSL, *HUMANS AS A SERVICE. THE PROMISE AND PERILS OF WORK IN THE GIG ECONOMY* (2018); ANNAMARIA DONINI, *IL LAVORO ATTRAVERSO LE PIATTAFORME DIGITALI*, (2019); COLIN CROUCH, *SE IL LAVORO SI FA GIG* (2019).

<sup>11</sup> See Arianna Tassinari, Vincenzo Maccarrone, *La mobilitazione dei fattorini della gig economy in Italia: forme organizzative e implicazioni per la rappresentanza*, *Quaderni di Rassegna sindacale* (2018) 75 ff.; Andrea Lassandari, *La tutela collettiva del lavoro nelle piattaforme digitali: gli inizi di un percorso difficile*, *Labor and Law Issues*, 4(2018) 1.

<sup>12</sup> See *infra* § V

<sup>13</sup> See Corte di cassazione, January 24, 2020, n. 1663; for a description, in English language, of the Italian reforms, see Myriam A. Cherry, Antonio Aloisi, “*Dependent Contractors*” in *The Gig Economy: A Comparative Approach*, *Am. Un. L. R.*, 66 (2017) 3, 635 ff.; Maurizio Del Conte, Elena Gramano, *Looking to the other Side of the Bench: the New Legal Status of Independent Contractors Under the Italian Legal System*, *Comp. L. L. & Pol’y J.*, 39 (2018) 579 ff.; Elena Gramano, Giovanni Gaudio, “*New trade union strategies for new forms of employment*”: *Focus on Italy*, *Eur. L.L.J.* (2019), 10, 240 ff.

first time that food delivery riders of Foodinho (Glovo) should be classified as ordinary employees. Notwithstanding, strikes have occasionally been used by riders as a tool of social and political pressure.<sup>14</sup>

The riders are generally skeptical about traditional unions and they prefer to create new collective organizations such as the Riders Union and Rider X I diritti.

Different economic and social factors have contributed to weakening the self-employed workers' market and bargaining power. Broadly speaking, an increased concentration in the labor market, generally labeled as monopsony, was observed. The market and economic power have progressively concentrated on big multinationals, global law firms, and web giants with negative effects on income and equality, underlined by several scholars.<sup>15</sup>

On the other hand, workers' power has weakened.<sup>16</sup> Workers (employees and self-employed) have become less and less able to counteract the "right to property" because of a number of factors: globalization and the loss of control over national labor markets, on one hand; increasing competition, social dumping and race to the bottom among workers, which undermine class consciousness, on the other. Antitrust policies, tax and fiscal policies,<sup>17</sup> State's interventionism<sup>18</sup> are not enough to offset the growth of capital power.

In the 20<sup>th</sup> century, the labor movement played a fundamental role in counteracting such power, thereby reducing income and social inequalities.<sup>19</sup> In the 21<sup>st</sup> century, as self-employed workers' income and social inequality have spread, the question of whether the scope of the labor movement should be extended to self-employment and other forms of precarious, atypical work is a crucial one.

When do workers realize the need for unionization? When does unionization become so important that it is in the public's interest to legally recognize and protect it? These are some of the questions that need to be addressed from a self-employment perspective.

Selig Perlman famously summarized the factors at the origin of the American labor movement in the employees' lack of class consciousness and the liberalistic approach towards the market.<sup>20</sup> The rise of unionism was due to the shift from a liberalistic and anti-monopolistic market approach (typical of producers) towards a monopolistic and a protectionist one which, in turn, was linked to so-called "scarcity consciousness."<sup>21</sup> In other words, workers soon became aware of job

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<sup>14</sup> In June 2020, the Italian Riders' Network "Rider X I diritti" called a strike for the lack of PPE (Personal Protective Equipment). The strike basically consisted in the riders' refusal to deliver the food on the floor, asking the clients to come to the ground floor. The Foodora's riders also called strikes in 2016 and 2017 protesting against the low wage and the precarious working conditions.

<sup>15</sup> From an economic and legal point of view, see JEAN-PHILIPPE ROBÉ, *LE TEMPE DU MONDE DE L'ENTREPRISE* (2015); JEAN-PHILIPPE ROBÉ, ANTOINE LYON-CAEN, STÉPHAN VERNAC, *MULTINATIONALS AND THE CONSTITUTIONALIZATION OF THE WORLD POWER SYSTEM* (2016).

<sup>16</sup> See J. Bivens, L. Mishel, J. Schmitt, *It's not just monopoly or monopsony*, 2018, in Epi.org.

<sup>17</sup> See the famous theory of THOMAS PIKETTY, *IL CAPITALE NEL XXI SECOLO* (2018) 771 and recently J. E. STIGLITZ, *POPOLO, POTERE E PROFITTI. UN CAPITALISMO PROGRESSISTA IN UN'EPOCA DI MALCONTENTO (OR. PEOPLE, POWER AND PROFITS, 2019)*, 2020.

<sup>18</sup> In Italy, this economic line of thought is particularly stressed by MARIANA MAZZUCATO, *LO STATO INNOVATORE* (2013); MARIANA MAZZUCATO, MICHAEL JACOBS (EDS.), *RIPENSARE IL CAPITALISMO* (2016).

<sup>19</sup> See JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* (2014) 68 ff.

<sup>20</sup> SELIG PERLMAN, *A THEORY OF THE LABOR MOVEMENT* (1928).

<sup>21</sup> *Ibid.*, 159 ff. See also KARL POLANYI, *LA GRANDE TRASFORMAZIONE. LE ORIGINI ECONOMICHE E POLITICHE DELLA NOSTRA EPOCA (OR. THE GREAT TRANSFORMATION, 1944)*, 2000, 256 ff. where the A. links the advent of labor but also monetary and trade protectionism to scarcity consciousness.

scarcity and they regarded the acquisition of the control of the market as the tool to counteract the right to property and its rampant power.

The same can be said for self-employed workers (notably, unregulated self-employed workers) who operate individually in segmented markets (e.g., freelance editors, journalists, graphic designers, consultants, artisans) with a lack of class consciousness and a traditional liberal approach towards competition and access to the market.

The situation suddenly changes when workers start to develop a scarcity consciousness. Notably, they realize that, because of increasing competition amongst workers and the concentration of the labor market (monopsony), they can be easily replaced with someone else and that they are progressively losing their bargaining power on time, wages, and other contractual conditions. Their economic condition no longer corresponds to their social and existential needs. This is the basis for exploitation and for income, social and economic inequality.

This paper argues that social and economic inequality makes it in the public and constitutional interest to legally recognize and protect the need for unionization and new forms of collective action. After a brief description of the organizing patterns of new self-employed workers movements (§ II), it is suggested that self-employed collective action takes at least three different forms that need to be protected and recognized: political and legislative, through lobbying and other institutional activities (§ III), economic, through the use of coercive measures such as strike action and collective bargaining (§ IV), and judiciary, through legal claims filed by unions or by individual workers supported by unions (§ V).<sup>22</sup>

## II. The Organizing Patterns of Self-Employed Workers Movements: Craft and Service Unionism.

Before analyzing the different forms of collective action, the distinguishing traits of self-employed workers' unionism will be considered. Traditional Italian unions, unlike British or American unions, have largely developed at the sector or industrial level.

During the 1950s, political disputes led to the creation of three trade union confederations with close ties to political parties: the Confederazione Generale Italiana del Lavoro (CGIL), associated with both the Communist and the Socialist party, the Confederazione Italiana Sindacati Lavoratori (CISL), associated with the Christian Democrats, and the Unione Italiana del Lavoro (UIL) with various allegiances to Socialists, Republicans, Reformists, and Social Democrats.<sup>23</sup> In turn, each confederation was divided into several federations, one for each industrial sector. For example, the FIOM represents workers in the metal sector for the CGIL, the FIM for the CISL, and the UILM for the UIL. The FILT represents workers in the transportation and logistics sector for the CGIL, the FIT-CISL for the CISL, and the Ultrasporti for the UIL. Numerous smaller autonomous unions play an increasing role in the Italian industrial relations system. Some of these are specialized craft unions such as ANIEF for education and ORSA for the transportation sector. Others have a

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<sup>22</sup> See Selig Perlman, *supra* note 20, at 159 who underlined that labor movement is an organized campaign against the right to property that can take three different forms: political and legislative, economic and cooperative.

<sup>23</sup> For a description, in English language, see CHARLES F. SABEL, *WORKS AND POLITICS. THE DIVISION OF LABOR IN INDUSTRY* (1982) 145 ff.; Lucio Baccaro, Mimmo Carrieri, Cesare Damiano, *Resurgence of the Italian Confederal Unions: Will It Last?*, in *Europ. J. of Ind. Rel.*, 9 (2009) 1, 43 ff.

more transversal structure such as *Comitati di Base* (COBAS) and *Unione Sindacale di Base* (USB).

While the traditional Italian union pattern is industrial, the emerging self-employed workers union pattern is craft or occupational. According to scholars, this is one of the reasons why they are difficult to develop in Italy, compared to the U.S. In the U.S., the strong craft-union tradition has facilitated the rise of self-employed unions, such as the *Freelancers Union*.<sup>24</sup>

The trend for craft unions shows that self-employed workers tend to identify themselves as members of a profession rather than an industrial sector.<sup>25</sup> *Riders Union Bologna* and *Deliverance Milano* are clear examples of occupational unions. Food delivery riders do not feel represented by traditional unions, such as the *FILT CGIL* (logistics and transportation sector) and they prefer to create new unions characterized by a strong occupational consciousness and job-related identity.<sup>26</sup> On the contrary, a closer relationship and partnership has been established between the *Riders Union* and the autonomous union *Si-Cobas*.<sup>27</sup> These are interesting examples of new social alliances and coalitions between cities and unions.

Many self-employed unions maintain a confederation and transversal structure. *Coordinamento Libere Associazioni Professionali* (Colap), created in 1999, represents more than 200 professional associations with roughly 300,000 members. *Confprofessioni* (Confederazione Italiana Libere Professioni), established in 1966, represents liberal professions, such as lawyers, doctors, notaries, dentists, psychologists, artists, consultants, and auditors. Its structure strongly recalls that of traditional unions with collective bargaining, political representation, and lobbying as its main goals.

The *Associazione Consulenti del Terziario Avanzato* (Acta) is the most peculiar. It has been defined as a quasi-union<sup>28</sup> as it is not oriented towards collective bargaining and strike action; rather, it builds up its collective identity on political action and other social initiatives, such as flash-mobs, sit-ins, and fax bombing. Acta aims to represent freelancers and highly-skilled self-employed workers who do not have clear legal recognition or a clear identity. However, in the last year, Acta has evolved its strategy by channeling its collective representation into specific internal markets, such as the publishing sector. *RedActa* represents the interests of editors, graphic designers, and journalists working as freelancers in the publishing sector.<sup>29</sup>

CGIL and CISL have tried to expand trade union representation to the self-employed. In 2005, CGIL created the *Consulta delle Professioni* with predominant political advocacy; CISL created *Vivace*, which was more oriented towards service unionism, by offering several individual services to its members (labor and business consultants, legal services, fiscal and sanitary assistance, etc.).

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<sup>24</sup> See Sergio Bologna, *Fine del lavoro come la fine della storia?*, Asterios Editore Volantini (2020).

<sup>25</sup> See Janice R. Fine, *Community Unions and the Revival of American Labor Movement*, *Politics & Society*, 2005, 153 ss.; Dorothy S. Cobble, *Historical Perspectives on Representing Non-Standard Workers*, in *NONSTANDARD WORK. THE NATURE AND CHALLENGES OF CHANGING EMPLOYMENT ARRANGEMENTS*, 291 (2000); Sara Horowitz, *New Thinking on Worker Groups role in a Flexible Economy*, *ibid*, p. 393 ff.

<sup>26</sup> In their Facebook accounts, *Riders Union* and *Deliverance* describe themselves as “a group of riders” rather than as an association representing the class of workers, broadly conceived.

<sup>27</sup> See Vincenzo Maccarone, Arianna Tassinari, *Le mobilitazioni dei fattorini della gig economy in Italia: forme organizzative e implicazioni per la rappresentanza*, in *Quaderni di rassegna sindacale*, 2018, 75 here at 80.

<sup>28</sup> See RENATA SEMENZA, ANNA MORI, *LAVORO APOLIDE. FREELANCE IN CERCA DI RICONOSCIMENTO* (2020) 111.

<sup>29</sup> *Ibid*.

The Nuove Identità del Lavoro (Nidil) - CGIL, founded in 1998 and the Federazione Lavoratori Somministrati Autonomi Atipici (Felsa) - CISL, founded in 2009, are also interesting examples as they attempted to raise membership among atypical rather than genuinely self-employed workers. Collective representation mostly covers temporary agency workers (*parasubordinati*) and false-self-employed workers. So far, they have not been very successful.

As the previous paragraph suggests, the self-employed are generally hostile towards traditional unions. On the one hand, employees' interests represented by unions can frequently conflict with self-employed interests; on the other hand, traditional union responses to emerging self-employed needs remain strongly influenced by the employment culture.<sup>30</sup>

Finally, service unionism seems to be a distinguishing trait of new self-employed workers' unions. To attract new members and collect union fees, unions offer several individual services (legal services, business and labor consultants, fiscal and contractual assistance, and so on) and special conventions with insurance groups or banks. This is the case for Vivace-CISL. Even Confprofessioni (which is also strongly focused on collective bargaining), Consulta delle professioni, and Colap offer their members educational opportunities and several individual services. One exception is Acta, which remains predominantly focused on political advocacy rather than on collective bargaining and individual services; this is because Acta, compared to other unions, is less structured and relies less on economic resources. However, an important service provided by all unions consists in helping self-employed workers to negotiate proper and adequate individual contractual terms and conditions.

A service unionism pattern is not extraneous to the Italian tradition. In past years, traditional employees' unions have also developed an approach strongly based on services as a tool to fight declining union membership and crises.<sup>31</sup>

### III. Forms of Collective Action: Political Action, and Coalitions with Local Administrations.

Political action and political participation are dominant traits of Italian unionism (and also Spanish and French). Since the 1990s, the Italian government has involved CGIL, CISL, and UIL in its policymaking. Social tripartism (*concertazione sociale*) is used to compensate the government when it is relatively weak, to strengthen its social legitimacy as necessary to adopt drastic economic reforms.<sup>32</sup> Even during the coronavirus pandemic, the relatively weak government has involved unions in the policymaking process to address drastic reforms and mitigate their social impact.

As observed in the long-run, excessive concentration on political action and the role played by

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<sup>30</sup> For example, in June 2016, when the Statute of Self-Employed Workers was being drafted, there has been a huge debate about maternity protection for female self-employed workers. Notably, self-employed workers associations insisted for the introduction of minimum maternity social benefits but criticized the idea of defining a length of time a woman (self-employed worker) should abstain from work. The abstention should have remained merely optional and not mandatory, leaving the final choice to the woman. However, the CGIL and part of Democratic Party were strongly against this solution which is in antithesis with the idea that the worker does not enjoy genuine contractual freedom, a true milestone of employment law. Notwithstanding, it was finally decided to follow the advice of self-employed workers associations, such as Acta, and to define the woman's abstention from work during pregnancy in genuine self-employment as optional and not mandatory.

<sup>31</sup> See MIMMO CARRIERI, PAOLO FELTRIN, AL BIVIO. LAVORO, SINDACATO E RAPPRESENTANZA NELL'ITALIA DI OGGI (2016).

<sup>32</sup> See Lucio Baccaro, Mimmo Carrieri, Cesare Damiano, *supra* note 23, at 12.

the State in bolstering central unions might weaken union bargaining power as they become less interested in organizing the unorganized and more interested in raising membership.<sup>33</sup> To put it in another way, the more unions are involved in policymaking, the less they will attempt to revitalize their role through organizing.

Political action usually refers to union strategies designed “to influence the State’s policymaking [and legislative] process and union involvement at many different levels.”<sup>34</sup> In Italy, political action has been largely employed by both traditional unions and the new self-employed workers’ unions such as Acta, Colap, and CGIL. Self-employed workers’ unions’ interests in political action depend on a variety of reasons.

First, accounts of unions often stress difficulties encountered in organizing and raising membership. A service union strategy, based on individual services, may not be enough to raise subscriptions and increase bargaining power. Thus, political action and participation are viewed as a means of union revitalization.<sup>35</sup>

Second, market-oriented unionism predominantly focuses on collective bargaining, which is an enormous challenge in the fragmentation of union counterparts in the self-employment market. Who is the social counterpart of artists? Consultants? Architects? Engineers? Freelancers? A counterpart might be identified in specific markets characterized by monopsonic or oligopolistic conditions. This might be the case for the food delivery sector, where few big firms can be identified, the publishing sector or even the Instagram influencer market.

Political action can take different forms.

For example, Colap has recently been invited to take part in the States-General (Stati Generali), organized by Premier Giuseppe Conte to address the coronavirus crisis and its challenges. On June 19, 2020, Colap declared that this was the occasion for promoting its main objectives: fair remuneration, welfare protection reforms, education, bureaucratic simplification, and subsidiarity.<sup>36</sup> Acta has always used political action, participation, and lobbying as fundamental tools to achieve its objectives, such as fair remuneration and more contractual and welfare protection for self-employed workers. In 2015–2016, they had considerable influence in drafting the *Statute of Self-Employment* (Self-Employment Jobs Act), Law no. 81/2017.<sup>37</sup> Also CGIL, to a significant extent, promotes its members’ interests through lobbying and legislative proposals presented by deputies and senators who are closely tied to it.

In contrast, the experience of the Riders Union and Deliverance Milano is different as food delivery riders are much more similar to ordinary employees than to self-employed workers and they operate in a market where social counterparts are identifiable (e.g. Foodora, Glovo, Deliveroo).

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<sup>33</sup> See Edmund Heery, Lee Adler, *Organizing the Unorganized*, in CAROLA M. FREGE, JOHN KELLY (EDS.), *VARIETIES OF UNIONISM. STRATEGIES FOR UNION REVITALIZATION IN A GLOBALIZING ECONOMY* (2004), 54-55.

<sup>34</sup> See Kerstin Hamann, John Kelly, *Unions and Political Actors: A recipe for Revitalization?*, in C.M. Frege, J. Kelly (eds.), *supra* note 33, at 91.

<sup>35</sup> See Lucio Baccaro, Kerstin Hamann, Lowell Turner, *The Politics of Labor Movement Revitalization: The Need for a Revitalized Perspective*, in *Europ. J. of Ind. Rel.*, 9 (2003) 119 ff.

<sup>36</sup> See the website [http://www.colap.eu/schede-2213-il\\_colap\\_agli\\_stati\\_generali](http://www.colap.eu/schede-2213-il_colap_agli_stati_generali).

<sup>37</sup> See <https://www.actainrete.it/2018/06/14/jobs-act-autonomi-cosa-prevede-e-a-chi-si-applica/>.

As a result, economic action based on strike action and collective bargaining can be carried out successfully.

More recently, a new trend has been observed. Notably, unions have become more oriented toward social coalitions with local administrations.<sup>38</sup> This strategy is not new. In the USA, the Fight for 15 Dollars movement based its strategy on union coalition with local administration, such as the New York Communities for Change.<sup>39</sup> The fight was conducted at political rather than economic level to promote legislative and social change. In eight years, the outcome is surprising. In 2019, the U.S. House of Representatives passed the Raise the Wage Act, “which would make \$15 an hour a reality for nearly all American workers by 2025, up from the current national minimum wage of \$7.25 an hour.”<sup>40</sup> The Bill has been sent to the Senate. However, in eight years, many American states and even tiny towns have adopted a \$15 minimum wage.<sup>41</sup>

Local administration fights side-by-side with unions against web-based and other business giants to make their territories fair spaces that are capable of attracting skilled workers and professionals, rather than “showrooms for growing social inequality”.<sup>42</sup> This is also one of the main objectives of the Decent Work Cities Movement, which aims to “call on the responsibility of all cities to jointly combat the global phenomenon of social inequality, placing the importance of fair and decent working conditions at the center of the analysis, as a crucial area of action for sustainable urban policy.”<sup>43</sup>

In this scenario, it is not surprising that the State of California (May 5, 2020) sued Uber and Lyft, complaining about their policies of constant misclassification of their drivers. This was seen as evading “workplace standards and requirements that implement California’s strong public policy in favor of protecting workers and promoting fundamental fairness for all Californians. This longstanding policy framework includes a comprehensive set of safeguards and benefits established by the State of California (“State”), cities, and counties, such as minimum wages, overtime premium pay, reimbursement for business expenses, workers’ compensation coverage for on-the-job injuries, paid sick leave, and wage replacement programs like disability insurance and paid family leave.” A Californian bill was then about to make app-based companies to treat their workers as ordinary employees when, in November 2020, Uber and Lyft spent \$ 200 million (the most expensive initiative in the State’s history) to convince voters to pass a Ballot measure, Proposition 22, which will exempt them from the application of labor and employment protections to delivery drivers, classified as independent contractors. This shows as globalization has increased market and political power of companies; a power that cannot be counteracted without a strong alliance between workers, unions, local authorities and, may be, other non-governmental organizations devoted to the cause of human rights and equality (e.g. Amnesty International) and provided with significant skills and financial resources. By all means, the increasing interest of NGOs, such as

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<sup>38</sup> In general, See Carola Frege, Edmund Heery, Lowell Turner, *The New Solidarity? Trade Union Coalition-Building in Five Countries*, in C.M. Frege, J. Kelly (eds.), *supra* note 33, at 137 ff.

<sup>39</sup> See Lisa Dorigatti, *Sindacati e alleanze sociali. Riflessioni a partire dalla campagna «Fight for \$ 15»*, in *Quad. rassegna sindacale* (2015) 125 here at 129.

<sup>40</sup> See Lydia De Pillis, *A \$15 minimum wage started as a slogan. Now it's passed the House*, available at <https://edition.cnn.com/2019/07/15/economy/15-dollar-minimum-wage-house-vote/index.html>.

<sup>41</sup> See L. De Pillis, *supra* note 40.

<sup>42</sup> <https://www.fes-connect.org/trending/transforming-cities-for-decent-work/>.

<sup>43</sup> *Ibid.*

Amnesty, in the protection of employees and workers rights goes side by side with the increasing global and transnational dimensions of companies. One example: during the Black Friday, Amnesty International has released a new briefing against Amazon, “*Let workers unionize*”, documenting the Company’s hostility towards workers’ attempt to unionize in France, Poland, the UK and USA.

A fundamental political and social change has occurred: local administration does not strive only to attract national and foreign capitals by offering suitable economic, fiscal, and legislative conditions; they are more inclined to rely on a coalition with unions, NGOs, or broader social and community movements to fight social dumping and to attract workers and professionals by ensuring the respect of fundamental human and labor rights and fair labor standards.

A coalition of self-employed unions, NGOs and local administration may successfully achieve a wide range of objectives. It can support and strengthen a union's power in its relationship with the State or with other economic and social actors; it can contribute to legitimizing union activities; it can promote a social and political change and attract new members; it can allow unions to collect more financial resources.<sup>44</sup>

In the US an interesting example is provided by the so-called Community benefits agreements (CBAs); project-based contracts between developers and community coalitions (local administrations, unions, NGOs, social organizations) in which the developer agrees to provide certain economic, social and environmental benefits to the community hosting a project (e.g. the Staple Center, a multipurpose arena in Downtown Los Angeles) such as hiring workers from the neighborhood, providing living wage jobs and public spaces, supporting low-income or other disadvantaged groups.<sup>45</sup>

In Italy, an example of a coalition is represented by Bologna’s Charter of Fundamental Rights of Digital Work in the Urban Context (*Carta dei diritti fondamentali del lavoro digitale nel contesto urbano*), signed in 2018 by the municipality of Bologna, CGIL, Riders Union, Sgnam, and MyMen (two Italian food delivery platforms). Foodora, Glovo, and Deliveroo refused to sign but their refusal had a negative social, political, and economic impact on their brand and image. Bologna municipality acted as an intermediary and tried to persuade the platforms to sign the Charter, whereby they voluntarily agreed to apply fair labor standards to food delivery riders, such as fair and decent wages, health and safety protections, and transparent and fair working conditions. The city of Bologna is also testing other interesting tools of urban policy. For example, restaurants and bars are allowed to use urban spaces (the *dehors*) if they accept social labor standards; more precisely, if they apply fair wages and fair working conditions, limit the recourse to atypical work, and avoid unfair practices, such as workers’ misclassification. The Bologna Charter has also played a considerable role in drafting the new minimum legal protections for platform workers adopted by the Italian Parliament (Law no. 128/2019) during Giuseppe Conte’s government.

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<sup>44</sup> See C. Frege, E. Heery, L. Turner, *supra* note 38, at 138.

<sup>45</sup> See N. Sheikh, Community

Benefits Agreements: Can Private Contracts Replace Public Responsibility?, in 18 *Corn. J. L. & Pub. Pol’y*, 223(2008).

#### IV. Collective Bargaining and Right to Strike.

As previously mentioned, market-oriented unionism focuses mainly on collective bargaining and strike action, which are not distinguishing traits of self-employed workers unions. One reason is that, so far, competition law has prevented self-employed workers from being covered by collective agreements. A collective agreement is inherently inconsistent with many assumptions of antitrust and free-market policy<sup>46</sup> and an antitrust labor exemption is thought to be limited only to employees' unions.

A second reason is the fragmentation of the social and economic counterpart and the disappearance of the workplace level where collective action historically found a fertile ground.<sup>47</sup> As suggested in the previous paragraph, the question of the legal recognition of the right to collective bargaining and the right to strike for self-employed workers becomes central only in specific markets and sectors characterized by monopolistic or oligopolistic conditions (e.g., the publishing and food delivery sector).

One example is the call-center outbound collective agreement, signed in Italy on June 2016, by the Out-Bound Italian Association (representing firms performing outbound call-center activities), Felsa-CISL, Nidil-CGIL. The agreement recognizes the call-center workers' right to minimum wage, maternity, health and safety protection, paid holiday days, and some protection against unfair dismissal.

In the food delivery sector, the coalition between the Riders Union and the municipality of Bologna has led to a few firms voluntarily applying the right to minimum wage, the right to transparent working conditions, and health and safety protection. Finally, Italian Law 128/2019 has expressly conferred to food delivery riders, though legally classified as self-employed workers, the right to a minimum wage set forth by national collective agreements and concluded by the most representative unions for the logistics sector; a legal provision that has raised serious doubts of compatibility with competition law.<sup>48</sup>

The main question is whether and under what conditions should the right to strike and the right to collective bargaining be conferred to self-employed workers. Should the boundaries of antitrust labor exemption be reconsidered as to permit self-employed collective agreements to be immune from competition law?

In arriving at an answer, one preliminary factor must be taken into consideration. The history of the right to strike and the right of collective bargaining reveals that they were recognized as fundamental aspects in many societies. These rights are not linked to a specific type of contract (namely, the employment contract) but, rather, to existing social and economic conditions of disparity.<sup>49</sup> Neither the personal scope of Articles 39 and 40 of the Italian Constitution (the right to

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<sup>46</sup> See ARCHIBALD COX, DEREK C. BOK, ROBERT A. GORMAN, MATTHEW. W. FINKIN, LABOR LAW. CASES AND MATERIALS, 14<sup>TH</sup> ED. (2006) 966.

<sup>47</sup> See Sergio Bologna, Dieci tesi per la definizione di uno statuto del lavoro autonomo, in SERGIO BOLOGNA, ANDREA FUMAGALLI (EDS.), IL LAVORO AUTONOMO DI SECONDA GENERAZIONE. SCENARI DI POSTFORDISMO IN ITALIA (1997), 40.

<sup>48</sup> See Adalberto Perulli, Il diritto del lavoro "oltre la subordinazione": le collaborazioni etero-organizzate e le tutele minime per i riders autonomi, Working Paper CSLDE "Massimo D'Antona" – IT (2020) 410, at 32.

<sup>49</sup> See GINO GIUGNI, DIRITTO SINDACALE (2002), 220.

collective organization and right to strike, respectively) nor that of Article 28 of the European Union Charter of fundamental Rights, EUCFR (on the right of workers and their representatives to take collective actions), appear to be limited to employees placed into a condition of contractual juridical subordination vis-à-vis an employer.<sup>50</sup>

In Italy, in the Acts of the Constituent Assembly (Assemblea Costituente), the choice to provide both the right to collective organization and strike action with a constitutional basis (Articles 39 and 40) promotes human dignity, liberty, autonomy, substantial equality, and democracy. Workers are entitled to rely on collective organization and economic coercion to offset the inequality of bargaining powers to achieve free and decent working conditions necessary for the maintenance of themselves and their families (see Article 3, 36, 35, 41).<sup>51</sup> Collective bargaining and right to strike are regarded as “social equality rights”<sup>52</sup> necessary to restore condition of substantial equality and democracy in the market. In turn, economic democracy is thought to be a preliminary condition of political democracy.<sup>53</sup>

Similarly, in a judgment in 1937, the American Supreme Court ruled in favor of the right to a collective organization because “a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment.”<sup>54</sup> The Supreme Court’s assertion has been quoted by the Supreme Court of Canada, in a judgment in 2007. It was significantly added that the right to collective bargaining gives workers a degree of control and influence sufficient to “offset inherent inequalities of bargaining power in the employment relationship<sup>55</sup>.” Furthermore, “human dignity, equality, liberty, respect for the autonomy of the person, and the enhancement of democracy are among the values that underly collective bargaining and strike, which is a collective bargaining essential accessory.”<sup>56</sup>

Even the amended Clayton Act, Section 17, exempts collective bargaining from antitrust laws, not for reasons related to the type of contract (the employment contract) but rather because “the labor of a human being is not a commodity or article of commerce.”<sup>57</sup> This represents an

<sup>50</sup> See, recently, Ioannis Lianos, Nicola Countouris, Valerio De Stefano, *Re-Thinking the Competition Law/Labour Law Interaction: Promoting a Fairer Labour Market*, in *Europ. Lab. L. J.*, 10 (2019) 325 ff.; Eva Grosheide, Mark Barenberg, *Minimum fees for the self-employed: a European response to the “Uber-ized” economy?*, in *Colum. J. Eur. L.* 22 (2016)193 ff.

<sup>51</sup> ANTONIO BALDASSARRE, DIRITTI DELLA PERSONA E VALORI COSTITUZIONALI (1997) 123 ff.

<sup>52</sup> This definition is provided by VALENTE SIMI, IL DIRITTO DI SCIOPERO (1956), 90.

<sup>53</sup> See PIERO CALAMANDREI, COSTRUIRE LA DEMOCRAZIA. PREMESSE ALLA COSTITUENTE (1946).

<sup>54</sup> See *N.L.R.B. vs. Jones & Laughlin Steel Corp.*, 301 US 1, 33, 1937.

<sup>55</sup> See *Health Services and Support – Facilities subsector Bargaining Assn vs. British Columbia* [2007] 2 SCR 391, § 81 ff. See J.G. Pope, *The Right to Strike under the United States Constitution: Theory, Practice and Possible Implications for Canada*, in *Canad. Lab. & Empl. L. J.*, 15 (2009) 209 ss.

<sup>56</sup> In *Health Services*, *supra* note 55, § 81-84.

<sup>57</sup> See the Clayton Act of 2014, Section 17. Section 17 of the Clayton Act of 2014 that provides: “Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws”. Originally, the Section 6 of the Clayton Act, providing that labor of a human being is not a commodity, was enacted by the Congress in 1914 in order to end the

important change in the American perspective used to consider “the sale of one’s labor” as “indistinguishable from the sale of any other commodity.”<sup>58</sup> Contrary to what might be expected at first glance, the ultimate goal of antitrust laws is the “enhancement of consumer welfare” and the “economic enrichment of society.”<sup>59</sup>

To conclude, there is a general convergence towards the idea that it is not the legal classification of the work relation as an employment contract, but an existing condition of social and economic disparity that justifies collective rights.

The competition labor exemption for collective bargaining was established by the Court of Justice of the European Union (CJEU) in the landmark *Albany* and *FNV Kunsten* judgments.<sup>60</sup> The conditions whereby workers can or cannot be covered by collective agreements are now open to widespread and growing debate. There are two conditions<sup>61</sup>: 1) Labor exemption applies to workers and not to undertakings; by worker, the CJEU means an ordinary employee or a “false” self-employed working under the direction of someone else, whilst the “genuine” self-employed are aligned with undertakings; 2) The restriction (collective agreement) must pursue social policy objectives.

#### A. A self-employed worker is not an undertaking: The obligation of personal service as the line drawn between a worker and an undertaking.

It seems reasonable to assume that only labor agreements, and not agreements between undertakings, should be exempted by competition law for “labor is not a commodity or an article of commerce.” However, it remains unclear why the self-employed should be regarded as undertakings and their agreements should not be immune from competition law.<sup>62</sup>

In Italy, this assumption is unacceptable. A self-employed worker is different from an undertaking. The Italian Civil Code provides a clear distinction between an employee (Article 2094), a self-employed worker (Article 2222), and an entrepreneur (Article 2082). The micro-entrepreneur

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judicial practice to use the Sherman Act, to a large extent, for contesting labor strikes. However, Section 6 proved to be a weak instrument and, in 1932, the Congress “passed the Norris-La Guardia Act, which deprives the federal courts of jurisdiction to issue injunctions in labor disputes, unless independently unlawful acts are threatened or committed” (See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY. THE LAW OF COMPETITION AND ITS PRACTICE, 5<sup>TH</sup> ED., WEST ACADEMIC PUBLISHING (2005) 965-966).

<sup>58</sup> See Matthew W. Finkin, *Menschenbild: The Conception of the Employee as a Person in Western Law*, 23 *Comp. Lab. L. & Pol’y J.* 577 (2002) 579.

<sup>59</sup> See Daniel J. Gifford, *Redefining the Antitrust Labor Exemption*, in *Minn. L. Rev.*, 72(1988) 6, at 1382 ff. Broadly speaking, the statutory exemption applies if a labor union acts “in its self-interest” and does not “combine with non-labor groups” (e.g. non-union subcontractors). However, the non-statutory exemption has applied broadly by American Courts as to immunize an agreement among employers to set the maximum pay they would pay to a certain class of employees (See H. Hovenkamp, *supra* nota 54, at 968; A. Cox, D. C. Bok, R. A. Gorman, M. W. Finkin, *supra* note 46, at 985 ff.).

<sup>60</sup> See CJEU, 21 September 1999, C-67/96, *Albany*, ECLI:EU:C:1999:430 and CJEU, 4 December 2014, C-413/13, *FNV Kunsten*, ECLI:EU:C:2014:241.

<sup>61</sup> See, among others, I. Lianos, N. Countouris, V. De Stefano, *supra* note 50; Dagmar Schiek, Andrea Gideon, *Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier?* European Legal Studies online papers, 7 (2018) 1 ff.; B. Rombouts, *Commentary*, in *Int. Labour Rights Case Law Journal*, 5 (2019) 17 ff.; Victoria Daskalova, *Regulating the New Self-Employed in the Uber Economy: What Role for EU Competition Law?*, German L. J., 19 (2018) 461 ff.; NICOLA COUNTOURIS, VALERIO DE STEFANO, NEW TRADE UNIONS STRATEGIES FOR NEW FORMS OF EMPLOYMENT (ETUC, Brussels, 2019).

<sup>62</sup> See V. Daskalova, *supra* note 61, at 462 who finds it surprising that the concept of undertakings applies to individuals; See also I. Lianos, N. Countouris, V. De Stefano, *supra* note 50.

(Article 2083) is located in the self-employment category. The obligation of predominantly personal service is the line drawn between a self-employed worker and an undertaking, between labor law and commercial law.<sup>63</sup> More precisely, insofar as the debtor performs the contract by predominantly relying on his working activity, rather than on an impersonal business economic organization, it might be concluded that the contract for service involves a human being, rather than an undertaking, and therefore it should be classified as a self-employment contract (Article 2222).<sup>64</sup>

At the beginning of the 20<sup>th</sup> century, Ludovico Barassi<sup>65</sup> defined the *contratto di lavoro* as a general category including either the contract of service or the contract for service, as they are both characterized by the execution of a personal service rather than by a market exchange of goods.<sup>66</sup> The human being is inherently linked to the *contratto di lavoro*,<sup>67</sup> which makes it impossible to rely on contract law and competition law categories that are mainly based on the paradigm of trade and sales contracts, involving a market exchange of goods. An analogous movement takes place in France and Spain where “employees are perceived as persons who bear inalienable rights;”<sup>68</sup> an assumption that justifies the dogmatic construction of employment and labor law as different and even antagonistic to general contract law.

Significantly, a group of scholars has recently questioned the principles of European contract law. Insofar as these principles are based on the paradigm of sales, they cannot capture and regulate the social and human dimension embedded in labor, tenancy, and consumer-credit long-term contractual relations, the so-called “lifetime contracts.”<sup>69</sup>

The distinction between employment and a self-employment contract is essential. Barassi investigated the boundaries between the contract of service (*locatio operarum*) and the contract for service (*locatio operis*).<sup>70</sup> The conclusion is that the principle requirement of the contract of service is the power of the employer to control and direct the employee’s work, which is absent in a contract for service. The element of power justifies allocating the risks inherent in entrepreneurial and working activities (the risk of economic loss; risk of damages caused by the employee to third

<sup>63</sup> See, for the British debate, Paul Davies and Mark Freedland, *Employees, Workers, and the Autonomy of Labour Law*, in HUGH COLLINS, PAUL DAVIES, ROGER RIDEOUT (Eds.), *LEGAL REGULATION OF THE EMPLOYMENT RELATION* (2000) 267-285.

<sup>64</sup> Italian Courts generally consider that a self-employment contract exists insofar as the debtor performs the contractual activity by predominantly relying on his personal labor. This is compatible with the existence of an economic organization that must be minimal, meaning that the contractual outcome has to be the result (at least predominantly) of the personal working activity of the debtor. See Corte di cassazione, 29 December 2008, n. 30407; Corte di cassazione, 4 April 2017, n. 8700; Corte di cassazione, 21 May 2010, n. 12519; Corte di cassazione, 29 May 2001, n. 7307. For a general overview of the Italian debate on the distinction between self-employed workers, small entrepreneurs and medium/large firms, see ORSOLA RAZZOLINI, *PICCOLO IMPRENDITORE E LAVORO PREVALENTEMENTE PERSONALE* (2012).

<sup>65</sup> LUDOVICO BARASSI, *IL CONTRATTO DI LAVORO NEL DIRITTO POSITIVO ITALIANO* (FIRST EDITION 1901; SECOND EDITION, 1915).

<sup>66</sup> *Ibidem*, 453 and 602 ff. This is the heritage of the 1789 French Revolution and of Philip Lotmar’s *Arbeitsvertrag*.

<sup>67</sup> PHILIP LOTMAR, *DER ARBEITSVERTRAG NACH DEM PRIVATRECHT DER DEUTSCHEN REICHES* (BERLIN: LEIPZIG, DUNCKER UND HUMBLOT, 1902) I, who underlines as the employment contract is a matter of ‘human being’.

<sup>68</sup> See Matthew W. Finkin, *supra* note 56, at 577.

<sup>69</sup> This is the idea underlying the construction of the category of the “life time contracts” suggested by LUCA NOGLER, UDO REIFNER (Eds.), *LIFE TIME CONTRACTS* (2014); LUCA RATTI (Ed.), *EMBEDDING THE PRINCIPLES OF LIFE TIME CONTRACTS* (2018); Hugh Collins, David Hiez, *Life Time Contracts: Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law*, in *Giornale di diritto del lavoro e delle relazioni industriali* (2014) 591 ff.

<sup>70</sup> Ludovico Barassi, *supra* note 65, 453 ff. and 602 ff.

parties; risk of employee's injuries at work and illness, and so on) to the employer. However, the binary divide between employees and the self-employed do not alter the fact that both contracts involve a human being and, therefore, deserve to be treated differently from a contract involving an exchange of commodities and impersonal business organizations.<sup>71</sup>

Since the CJEU and EU law predominantly focuses on the creation of a single market, it is not surprising that they have not been able to conceptualize the difference between self-employed workers and undertakings. The EU concept of undertaking does not take into account how economic activity is performed — relying on personal working activity or an impersonal business organization —; it rather focuses on the allocation of financial risk.<sup>72</sup> In this respect, a worker coincides with an employee, which is to say a worker who performs the activity under the direction of someone else<sup>73</sup> and for the duration of their relationship, “[is] incorporated into the undertakings concerned and thus, forms an economic unit.”<sup>74</sup> On the contrary, a self-employed is aligned with undertakings, bearing all financial risks.

A similar approach is applied in the Netherlands where there is a binary distinction between employees, working under the direction of an employer, and self-employed, equated to entrepreneurs and working for multiple clients at their own risk.<sup>75</sup> The *FNV Kunsten* case concerns the application of labor exemption to collective labor agreements laying down minimum fees, not only for orchestra substitutes hired under an employment contract but also for self-employed workers.<sup>76</sup> The CJEU holds that “it must be recalled that, according to settled case-law, on the one hand, a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking.”<sup>77</sup>

Not surprisingly, in *FNV Kunsten*, the CJEU admits that the “non-genuine” self-employed can be regarded as worker and not as undertaking, for the scope of competition labor exemption. By “non-genuine” self-employed, the Court means “a person who has been hired as a self-employed person under national law, for tax, administrative or organizational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place, and content of his work, does not share in the employer's commercial risks, and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking.”<sup>78</sup> To put it another way, the employer's misclassification does not prevent a worker, formally classified as self-employed, to be regarded as an employee for the scope of antitrust labor exemption. The risk and power distribution plays a decisive

<sup>71</sup> As to the British debate, a similar reasoning has been developed by MARK FREEDLAND, *THE PERSONAL EMPLOYMENT CONTRACT* (OXFORD: OXFORD UNIVERSITY PRESS, 2003); Mark Freedland, Nicola Countouris, *Towards a Comparative Theory of the Contractual Construction of Personal Work in Europe*, in *Ind. L. J.*, 37 (2007), 49 ff.

<sup>72</sup> See I. Lianos, N. Countouris, V. De Stefano, *supra* note 50, at 298.

<sup>73</sup> See CJEU, 16 September 1999, C-22/98, *Becu*, ECLI:EU:C:1999:419, § 26 ff.

<sup>74</sup> *Ibid.*

<sup>75</sup> See Pierluigi Di Gennaro, *Subordination or Subjection? A study about the dividing line between subordinate work and self-employment in six European legal systems*, *Lab. & Law Issues* 6(2020)1, 16 ff.

<sup>76</sup> CJEU, *FNV Kunsten*, *supra* note 60.

<sup>77</sup> CJEU, *FNV Kunsten*, *supra* note 60, § 33.

<sup>78</sup> CJEU, *FNV Kunsten*, *supra* note 60, § 36.

role in understanding whether the workers have been misclassified by the employer.

These elements are significant in understanding whether the agreements pursue social policy objectives, namely, counteracting the inequality of market and bargaining powers. In contrast, they should be held irrelevant in the face of the distinction between worker and undertaking. Here, the main question should be whether the individual carries out an economic activity that is predominantly based on his personal labor rather than on an impersonal business organization. If the answer is yes, he should be classified as a worker and not as an undertaking.

**B. Self-employed collective bargaining should be immune to antitrust law if it pursues social policy objectives: Namely, if it counteracts the inequality of bargaining powers.**

The second stage of the analysis investigates whether collective agreements in restraint of trade pursue social policy objectives. In the landmark *Albany* judgment, the CJEU exempted a collective agreement that established a pension fund from the scope of competition law as it promoted social policy objectives that, in the absence of such exemption, would be seriously undermined.<sup>79</sup> Improving working conditions, namely remuneration, is regarded as a social policy objective.<sup>80</sup>

Advocate General (AG) Nils Wahl, in the opinion delivered in the *FNV Kunsten* case, specified that even the fight against social dumping might be considered a social policy objective.<sup>81</sup> The AG also suggested that the distinction between employees and self-employed is blurred.<sup>82</sup>

However, none of the decisions clarified the meaning of social policy objectives. Broadly speaking, a social policy objective can be thought to exist when a collective agreement is used to offset the inequality of market and bargaining power.

As suggested before, this conclusion is rooted in the history of collective rights and was recently achieved by the European Committee of Social Rights (ECSR) in *ICTU vs. Ireland*, ruling against the compatibility of the Irish Competition Act of 2017 with Article 6.2 of the Revised European Social Charter (1996).<sup>83</sup> In the footsteps of *FNV Kunsten*, the Irish Competition Act of 2017 restricts the right to collective bargaining for employees and the “false” self-employed. However, in its decision, the ECSR found that the scope of Irish law was too restrictive and “will deprive many self-employed workers of the right to bargain collectively.”<sup>84</sup> The rationale of collective mechanisms is the weak position of an individual supplier of labor, while the distinction between employees and the self-employed is irrelevant.<sup>85</sup> The decisive criterion is the imbalance of power between providers and engagers of labor. As a result, the right to bargain collectively must be accorded to

<sup>79</sup> See CJEU, *Albany*, *supra* note 60, § 59.

<sup>80</sup> *Ibid.*, § 63.

<sup>81</sup> Opinion AG Wahl, 11 September 2014, ECLI:EU:C:2014:2215, § 79 ff. See also Piera Loi, *Il lavoro autonomo tra diritto del lavoro e diritto della concorrenza*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2018, 843 ff.

<sup>82</sup> “I admit that, in today’s economy, the distinction between the traditional categories of worker and self-employed person is at times some what blurred. The Court, in fact, has already had to examine a number of cases in which the working relationship between two persons (or one person and one entity) did not — because of its peculiar features — fall neatly into one or other category, displaying features characteristic of both” (Opinion AG Wahl, *supra* note 80, § 51).

<sup>83</sup> ECSR, *Irish Congress of Trade Unions v. Ireland*, Complaint No.123/2016, Merits, 12 December 2018.

<sup>84</sup> ECSR, *ICTU vs. Ireland*, *supra* note 83, § 109.

<sup>85</sup> *Ibid.*, § 38.

all self-employed workers “who have no substantial influence on the content of the contractual conditions.”<sup>86</sup>

This perspective seems to be very helpful. It persuasively suggests that the *Albany* exception should apply whenever (1) the agreement is a labor agreement, covering employees or the self-employed and (2) the employees or self-employed do not have any substantial bargaining or market power on wage, time, and other contractual conditions. In contrast, the distinction between employment and self-employment, based on the allocation of the contractual power of direction, should not play any role.

What factors should be taken into account in understanding whether there is an imbalance of powers?

The CJEU provides further insight in the *Elite Taxi* judgment; notably, it asserts that Uber “exercises decisive influence over the conditions under which that service is provided by those drivers.”<sup>87</sup> In this economic scenario, insofar as the collective agreement is used by drivers to offset the inequality of bargaining power as “to create a fairer market place for all,” it becomes socially and legally justifiable.<sup>88</sup> Workers coalition, economic coercion, and the restriction of trade are in the “public interest” since they are necessary tools that restore conditions of substantial equality in the market.

A similar approach has been employed in Australia where the competition statute only provides an exemption for employees’ collective bargaining. However, the Consumer Act 2010 allows the competition regulator to authorize collective bargaining proposed by self-employed workers when it is in the “public benefit”, namely when “the proposed conduct outweigh the anti-competitive detriment”.<sup>89</sup>

The competition exemption should be authorized also in Europe, on a case by case basis, whenever self-employed workers unions show that collective bargaining, in the light of conditions of economic and social disparity existing in a specific market or sector, is in the public interest. Unions could be asked by courts or by the competition authority (at national and/or EU level) to allege factual elements, such as the poor level of remuneration generally granted to freelancers and other self-employed workers in a specific sector, the existence of few engagers of labor that substantially control entry into the market and are capable of imposing the price, and other contractual conditions (monopolies or oligopolies). The poor levels of pay existing in certain economic sectors should be regarded as a relevant index of the imbalance of bargaining powers.

The European Commission has been recently moving towards this direction. On June 30, 2020 the EC has launched a process for addressing the issue of collective bargaining for the self-employed recognizing that the boundary between employees and self-employed is blurring and that

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<sup>86</sup> *Ibid.*, § 111.

<sup>87</sup> See CJEU, 20 December 2017, C-434/15, *Elite Taxi*, ECLI:EU:C:2017:981, § 39.

<sup>88</sup> See D. Schiek, A. Gideon, *supra* note 61, at 14.

<sup>89</sup> See Shae McCrystal, *Collective Bargaining Beyond the Boundaries of Employment; A comparative Analysis*, in *Melb. U. L. R.* 37 (2014), 662 ff.

the equation self-employed-undertaking is no longer satisfying.

C. The self-employed workers should be entitled to the right to strike when the purpose is to counteract substantial inequality.

The self-employed workers' right to strike should be justified using the same considerations that support the right to collective bargaining.<sup>90</sup> As previously suggested, in Italy, Canada, Spain, and France the constitutionalization of both the right to collective bargaining and the right to strike promotes fundamental constitutional values such as human dignity, autonomy, democracy, and substantial equality. Furthermore, the right to strike is considered a constitutional and human right, although it combines both a collective and individual dimension.<sup>91</sup> However, in countries such as Germany, the UK, and the US, the right to strike is regarded as an economic and collective right, rather than as a human and individual right, and it does not have a clear constitutional foundation.<sup>92</sup>

Within this framework, the Italian Constitutional Court has concluded that employees and the self-employed should be entitled to the right to strike<sup>93</sup> whenever their activity is characterized by indicia of “non-independence that reveal a condition of economic weakness.”<sup>94</sup>

This approach is very similar to the one applied to support collective bargaining. Workers (employees or self-employed) should be entitled to strike whenever a substantial imbalance of economic powers is found to exist. In this case, the strike turns out to be a social and economic tool of coercion to restore substantial equality in the market.

In this respect, many years ago, the right to strike had been conferred to sharecroppers in the agricultural sector in light of the existing economic disparity between sharecropper tenants and

<sup>90</sup> See J. G. Pope, *supra* note 55, at 219; See also LARRY SAVAGE, CHARLES W. SMITH, UNIONS IN COURTS. ORGANIZED LABOR AND THE CHARTER OF RIGHTS AND FREEDOMS, chap. 1 (2017).

<sup>91</sup> It is worth noting that in Italy the strike was used as a form of civil revolt and organized rebellion aimed at overthrowing Fascist dictatorship (see the big general strikes organized in March 1943 and in March 1944). This explains why the Italian Constitution of 1947 understands the right to strike as a human and a necessary social tool to restore conditions of economic and also political democracy. See FONDAZIONE GIUSEPPE DI VITTORIO, LA RINASCITA DEL SINDACATO. DAGLI SCIOPERI DEL MARZO 1943 E 1944 AL PATTO DI ROMA E AL 1° MAGGIO DEL 1945 (2005).

<sup>92</sup> For a comparative overview on the right to strike see BOB HEPPLE, ROCHELLE LE ROUX, SILVANA SCIARRA (EDS.), LAWS AGAINST STRIKES - THE SOUTH AFRICAN EXPERIENCE IN AN INTERNATIONAL AND COMPARATIVE PERSPECTIVE (2015); BERND WAAS, THE RIGHT TO STRIKE. A COMPARATIVE VIEW (2014); ARABELLA STEWART AND MARK BELL, THE RIGHT TO STRIKE: A COMPARATIVE PERSPECTIVE, THE INSTITUTE OF EMPLOYMENT RIGHTS (2008). For the right to strike as a human right see V. De Stefano, Non-standard workers and freedom of association: a critical analysis of restrictions to collective rights from a human rights perspective WP CSDL “Massimo D’Antona”.INT – 123/2015. As to the common-law and, particularly, the British approach to the right to strike, which gives rise to immunities, see LORD WEDDERBURN, THE WORKER AND THE LAW (1986), 573 ff.

<sup>93</sup> See Corte Costituzionale, 17 July 1975, no. 222.

<sup>94</sup> See Corte Costituzionale, 27 May 1996, no. 171. For an overview of the Italian debate, see ROBERTO VOZA, INTERESSI COLLETTIVI, DIRITTO SINDACALE E DIPENDENZA ECONOMICA (2004) 73 ff.; ANDREA PILATI, I DIRITTI DI SCIOPERO (2004); Marta Mondelli, *Libertà sindacale e diritto di sciopero oltre i confini della subordinazione, Diritto delle relazioni industriali* (2010) 674 ff.; Bruno Caruso, Gabriella Nicosia, *Il conflitto collettivo postmoderno: lo “sciopero” dei lavoratori autonomi*, in W.P. “Massimo D’Antona”, n. 43/2006; Gabriella Nicosia, *La sostenibile leggerezza del confine fra sciopero e astensione collettiva dei lavoratori autonomi*, in *Rivista italiana di diritto del lavoro* (2004) I, 121 ff; Adriana Topo, *Tutela e rappresentanza degli interessi collettivi nel lavoro autonomo*, in *Lavoro e diritto* (1997) 203 ff.

owners.<sup>95</sup> Bill no. 3049 on May 27, 1961, was proposed by the Hon. Romagnoli *et al.* and concerned collective rights and freedoms in the agricultural sector. It declared that sharecroppers and other agricultural workers “are placed, as to collective rights, into a condition of disparity that needs to be overcome.”<sup>96</sup>

Similarly, nobody doubts that the food delivery riders’ protests and refusals to work should be legally classified as strikes and should be protected under the umbrella of Article 40 of the Italian Constitution. Both requirements are met in this case: (1) a human being who is performing a personal working activity and (2) a condition of social and economic disparity in the market.

This approach cannot be applied to protests undertaken by professionals or small-scale entrepreneurs who are not placed into a condition of economic and bargaining disparity vis-à-vis their principals and clients (certain categories of lawyers, business consultants, notaries, gas station proprietors). In Italy, their refusal to perform a contractual activity is legally classified as a freedom and not a right, falling under the umbrella of Article 18 (Freedom of association) and not Article 40 (Right to strike) of the Italian Constitution. As a result, they are immune to criminal liability but not to civil and contractual liability.<sup>97</sup>

Finally, in the self-employment market, it may be difficult to identify self-employed workers’ social and economic counterparts. Additionally, work stoppage carried out by the self-employed does not always have a significant impact on firms or citizens. More precisely, if a lawyers’ stoppage of work can have negative effects on courts, citizens, and society, a freelance strike might have no impact on principals or citizens. More precisely, principals remain free to replace self-employed workers on strike as the prohibition of replacement applies only to employers; as the American experience shows, a permanent replacement rule can contribute to “a drastic decline in strike activities.”<sup>98</sup>

This explains why self-employed workers’ unions have moved toward political action rather than collective bargaining and strike action. In the meantime, they have developed new and interesting tools of economic and social coercion, such as reputational tools. For example, the practice of “name and shame” has been employed by unions against business undertakings that apply poor levels of pay and unfair working conditions, while other forms of protest, such as flash-mobs, sit-ins, fax bombing, and parades, are organized to elicit sympathy from citizens to support the

<sup>95</sup> See Roberto Voza, *supra* note 94, 93; GIUSEPPE PERA, SCRITTI. DIRITTO SINDACALE, II (2007), 1060 ff. For an historical overview see PAOLO PASSANITI, MEZZADRIA. PERSISTENZA E TRAMONTO DI UN ARCHETIPO CONTRATTUALE (2017); VITTORIO MEONI, GLI SCIOPERI DEL 1902 IN VALDICHIANA. LE LOTTE CONTADINE DI CHIANCIANO, CHIUSI E SARTEANO (2002).

<sup>96</sup> “Norme per l’esercizio delle libertà sindacali per i mezzadri, coloni, compartecipanti e affittuari coltivatori diretti”: see Pera, *supra* note 94, 1060.

<sup>97</sup> Furthermore, such collective actions (usually turned against the Government or the Parliament rather than the clients) might have negative effects on the fundamental rights of citizens who cannot fill up their cars or be defended by lawyers in Courts. Here, there is the need to strike a balance between freedom of association (which includes freedom to organize collective protests) and other constitutional rights such as right to free movement and right to defense. This is the rational underpinning the Italian choice to include these forms of “collective abstentions”, carried out by small entrepreneurs and professionals, within the scope of the Law regulating strike in the essential services (Article 2, Law 146/1990 as amended by the Law 81/2000). See Gabriella Nicosia, *supra* note 94 and especially Andrea Pilati, *I diritti di sciopero*, *supra* note 94.

<sup>98</sup> See J.G. Pope, *supra* note 55, at 209 ff.; Jake Rosenfeld, *supra* note 19.

interests and goals of the self-employed.<sup>99</sup>

## V. Unions and Courts: Legal Activism and Strategic Litigation

The Italian labor movement is historically hostile to judicial intervention as the result of the *collective laissez-faire* approach<sup>100</sup> enshrined after the fall of Fascism. The UK and Canada<sup>101</sup> adopt a similar approach, but it differs slightly in France and Spain, where the State plays a fundamental role in the economy and regulates every aspect of the industrial relations system.<sup>102</sup> In these countries, there is a long-standing tradition of unions acting in courts to protect their interests as well as those of their members.<sup>103</sup>

In Italy, an exception is represented by Article 28 of the Statute of Workers (1970) that enables unions to bring unfair labor practice claims against employers to obtain injunctions to stop or prohibit the employer's unfair practices and measures, eliminating the continuing negative effects. In the last few years, unfair labor practices have frequently been invoked by unions and, particularly, by CGIL. According to some scholars, the unions' recourse to courts as a means of settling disputes shows that they are losing their capacity to solve industrial conflicts through collective bargaining and strike action.<sup>104</sup>

This occurred in *Fiom (Cgil) vs. Fiat-Chrysler*, where Fiom (CGIL) secured its collective rights in court, scoring several important victories,<sup>105</sup> while its economic and bargaining power revealed

<sup>99</sup> On Christmas 2017, the food delivery riders represented by Riders Union decided to hang their bikes on the Bologna's Christmas tree, in Piazza Maggiore, as a sign of protest. This action was so impressing that the Mayor, Virginio Merola, and the municipality of Bologna as a whole started to seriously work on the issue, ending in the approval of the Bologna Charter of Digital Work. In 2009, a group of freelancers and independent contractors represented by Acta peacefully occupied the Triennale of Milan, a symbol of art and creativity, with flash mobs and artistic initiatives turned to express their resentment against fiscal and pension policies. See Dario Banfi, <https://www.dariobanfi.it/occupazione-della-triennale/>.

<sup>100</sup> A pivotal work in this respect is the monograph of GINO GIUGNI, *INTRODUZIONE ALLO STUDIO DELL'AUTONOMIA COLLETTIVA* (1966).

<sup>101</sup> See Larry Savage, Charles W. Smith, *supra* note 90.

<sup>102</sup> For a comparative overview see recently ORSOLA RAZZOLINI, *AZIONE SINDACALE E TUTELA GIURISDIZIONALE. STUDIO PRELIMINARE A PARTIRE DA UN'ANALISI COMPARATA* (2018).

<sup>103</sup> In Spain a *proceso de conflicto colectivo* has been introduced by the Decree 2354/1962 that retraces, to some extent, some of the ideas of the Italian corporatist law of 1926. After Franco's death, the law was significantly amended by the Real Decreto Ley 17/1977 and, more recently, by the Ley Reguladora de la Jurisdicción Social (LRJS). The law enables unions (but also employers associations) to bring claims in courts for many reasons: collective agreement interpretation, breach of contract, defense of rights and interests that should be referred to "un grupo genérico de trabajadores o [...] un colectivo genérico susceptible de determinación individual". See, among others, Aurelio Desdentado Bonete, *Las transformaciones del proceso de conflicto colectivo*, in WILFREDO SANGUINETI RAYMOND, ENRIQUE CABERO MORÁN (EDS.), *SINDICALISMO Y DEMOCRACIA* (2017) 551; Miguel R. Alarcón Caracuel, *De proceso de conflictos colectivos*, in JOSÉ A. FOLGUERA CRESPO ET AL. (EDS.), *COMENTARIOS A LA LEY REGULADORA DE LA JURISDICCIÓN SOCIAL*, 2<sup>o</sup> ED. (2011). In France, a famous judgment of the Cour de Cassation, Chambres réunies, April 5, 1913 developed the concept of "*intérêt collectif de la profession*" and established unions right to defend such collective interests in courts (the case was about the action exercised by unions against a wine counterfeiter in prejudice of the *profession*, the category represented by the union). According to the French Code du Travail, unions might act in substitution of the workers in certain specific matters (*action en substitution*), such as discriminations (Art. L. 1134-2 Cd. Tr.). Article L. 2132-3 Code du Travail codifies a general collective action (a compensatory mechanism) in the interest of the profession. « Les syndicats professionnels ont le droit d'agir en justice. Ils peuvent, devant toutes les juridictions, exercer tous les droits réservés à la partie civile concernant les faits portant un préjudice direct ou indirect à l'intérêt collectif de la profession qu'ils représentent ». See PIERRE DURAND, ROBERT JAUSSAUD, *TRAITE DE DROIT DU TRAVAIL*, T. I (1947) ; JEAN PELISSIER, GILLES AUZERO, EMMANUEL DOCKES, *DROIT DU TRAVAIL*, 27<sup>e</sup> ED. (2013).

<sup>104</sup> See Andrea Lassandari, *L'azione giudiziale come forma di autotutela collettiva*, in *Lavoro e diritto*, (2014) 309.

<sup>105</sup> The most important victory is the one scored at the Constitutional court, judg. 231/2013. For a general overview see Luigi Mariucci, *Il caso Fiat: una crisi di sistema? Back to the future: il caso Fiat tra anticipazioni e ritorno al passato*, *Lavoro e diritto* (2011) 239;

its weakness in the industrial relations system. Similar to Canadian unions,<sup>106</sup> CGIL has recently adopted a Constitution-based strategy to secure collective rights (in the Fiat case) but also to contest political decisions, such as the Jobs Act of 2015, which amended unfair dismissal laws by canceling the remedy of reinstatement in the majority of cases.<sup>107</sup>

Three other legal innovations have recently strengthened the relationship between unions and courts. First, the codification of collective discrimination (Law 215-216/2003, Article 5), which transposes Articles 7.2 and 9.2 of Anti-Discrimination Directives 2000/43 and 2000/78 whereby, “Member States shall ensure that associations, organizations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.” This has led to a strategic shift towards “rights-based legal activism.” Unions act in court to protect the fundamental rights of non-discrimination of several workers or of a single worker who has been discriminated by an employer on the grounds of personal beliefs, race and ethnic origin or sexual orientation.<sup>108</sup>

Second, Law no. 31 on April 12, 2019, Provisions on Class Action (*Disposizioni in materia di azione di classe*) is expected to enter into force in May 2021. This law enlarges the boundaries of the field of application of consumer class actions to enable generic organizations and private associations to bring compensatory and injunctive redress for the protection of both collective interest and homogeneous individual rights. The action can be brought by collective organizations and not by individuals, as class representatives (like in the U.S.).<sup>109</sup> Many commentators argue that this legal provision can be applied to unions or other workers' associations.<sup>110</sup> As a result, unions and other workers' associations, enrolled on a specific list from the Minister of Justice, will be allowed to bring compensatory redress to protect workers' general individual homogeneous rights or injunctive redress to protect workers' collective interests. In the former case, the

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Vincenzo Bavaro, *Rassegna giuridico-sindacale sulla vertenza Fiat e le relazioni industriali in Italia*, *Giornale di diritto del lavoro e delle relazioni industriali* (2011) 313; Franco Liso, *Appunti sui profili giuridici della recente vicenda Fiat*, *Ibid.* (2011) 331; see also the comments of Giuseppe Berta, Gian Primo Cella, Claudio Trigilia in *Giornale di diritto del lavoro e delle relazioni industriali* (2011) 95 ff.

<sup>106</sup> See Larry Savage, Charles W. Smith, *supra* note 90.

<sup>107</sup> See the Constitutional court judgments 231/2013 and 194/2018 (that declared the Jobs Act partially incompatible with the Italian Constitution. It is worth noting that, in Italy, unions or private organizations are not allowed to direct access to the Constitutional court; a judicial mediation and intervention is always necessary. In this case, the plaintiff was a female employee acting against the employer for unfair dismissal; however, the union actively supported the claim and also asked to intervene in front of the Constitutional court.

<sup>108</sup> As to the discrimination carried out by Fip-Fiat, that refused to rehire a number of workers who were members of the CGIL, see Tribunale di Roma, 21 June 2012, Corte d'appello di Roma, 9 October 2012 and Corte di cassazione, 11 March 2014, n. 5581. As to the discrimination carried out by Ryan-Air, see Tribunale di Bergamo, 30 March 2018 and Corte d'appello di Brescia, 24 July 2019. See Marzia Barbera, Venera Protopapa, *Il caso Fiat: come la tutela antidiscriminatoria riformula il conflitto sindacale*, *Riv. Giur. Lav.* (2014) II, 177; Giulia Proseccchi, *Antisindacalità e discriminazione? La condotta di Ryan-Air e l'“imbarazzo” della scelta sull'azione giudiziale*, *Riv. Giur. Lav.* (2020) 158. As to the discrimination of a lesbian teacher carried out by a private school in Trento, see Corte d'appello di Trento, 7 March, 2017.

<sup>109</sup> As to the American class action and collective action, see William C. Jhaveri-Weeks, Austin Webbert, *Class Actions under Rule 23 and Collective Actions under the Fair Labor Standard Act: Preventing the Conflation of Two Distinct Tools to Enforce the Wage Laws*, *Georgetown J. on Poverty L. & Pol'y*, 23 (2016) 233 ff.

<sup>110</sup> See ORSOLA RAZZOLINI, SIMONE VARVA, MICAELA VITALETTI (EDS), *SINDACATO E PROCESSO (A CINQUANT'ANNI DALLO STATUTO DEI LAVORATORI)*. GIUSTIZIA CIVILE.COM (2020).

individual workers will have to expressly opt-in (rather than opt-out) if they want to be awarded compensatory damages; in the latter, the judge will issue an injunction that obliges firms or other entities to stop the illicit conduct and to adopt all necessary measures to eliminate the effects of the infringement.

Finally, on January 8, 2020, the Constitutional court adopted a deliberation that restricts the boundaries of the rights of third parties to participate in the Constitutional trial through the intervention of rights. However, this is a right that, in decades of experience, the Court only exceptionally awarded to unions or other private associations<sup>111</sup>. Meanwhile, for the first time, non-profit organizations (including political parties and unions) are entitled to participate as *amicus curiae* by delivering a written opinion of a maximum of 25,000 characters. As a result, unions or other workers' associations can potentially stand trial, not as the "party" (through the intervention of right) but as "amicus."

The introduction of the *amicus curiae* in the Italian Constitutional court has been welcomed by some scholars and highly criticized by others. The risk, it has been said, is that the court will open the doors to conflicts of political, social, and economic interests and will shift from purely jurisdictional to a mostly political function.<sup>112</sup> In Lowman's words, "No longer a mere friend of the court, the amicus has become a lobbyist, an advocate, and, most recently, the vindicator of the politically powerless";<sup>113</sup> this is a risk some scholars are afraid of. The benefit, in the Constitutional court's words, is that it "opens up to hear the voice of civil society",<sup>114</sup> in accordance with a pluralistic view of the legal system and its sources.

Except for unfair labor practices, self-employed workers unions can rely on all the abovementioned judicial tools. Representative actions and strategic litigation can strengthen the power of unions and, in the meantime, contribute to effective judicial protection of self-employed workers who, frequently, do not have enough economic resources to burden the costs of individual litigations. For example, the question of late payments, an Italian plague,<sup>115</sup> or a firm's practice to apply unfair terms and conditions could be successfully addressed collectively rather than individually.

As mentioned above, during the coronavirus lockdown, food delivery riders have continued to work without adequate personal protective equipment (face masks and hands sanitization

<sup>111</sup> ROBERTO ROMBOLI, IL GIUDIZIO COSTITUZIONALE INCIDENTALE COME PROCESSO SENZA PARTI (1985); MARILISA D'AMICO, PARTI E PROCESSO NELLA GIUSTIZIA COSTITUZIONALE (1991); Paolo Bianchi, *Dal «processo senza parti» alla «rappresentazione processuale degli interessi»*, *Giur. cost.* (1994); Felice Giuffrè, *La "forma" del contraddittorio dal giudizio di legittimità al sindacato di ammissibilità: la Corte apre ai «comitati del no» ma solo in quanto «amici»*, *Giur. cost.* (2000) 2995 ff. In general, see GUSTAVO ZAGREBELSKY, VALERIA MARCENÒ, GIUSTIZIA COSTITUZIONALE. II. OGGETTI, PROCEDIMENTI, DECISIONI (2007) 146.

<sup>112</sup> See Massimo Luciani, *L'incognita delle nuove norme integrative*, *Riv.AIC*, 2 (2020) 402 ff. As to the nature of the Constitutional court's judgment and trial see CARLO MEZZANOTTE, CORTE COSTITUZIONALE E LEGITTIMAZIONE POLITICA, EDITORIALE SCIENTIFICA (1984, rist. 2014).

<sup>113</sup> See Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin after the Friends Leave?*, *The American University Law Review*, 41(1992) 1243 ff.; and, critically, Benedetta Barbisan, *Amicus curiae: un istituto, nessuna definizione, centomila usi*, *Rivista AIC*, 4 (2019).

<sup>114</sup> See the Press release of the Constitutional court, 8 January 2020, available at [https://www.cortecostituzionale.it/documenti/comunicatistampa/CC\\_CS\\_20200111093807.pdf](https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20200111093807.pdf).

<sup>115</sup> See Sergio Bologna, *supra* note 47, 25 ff. who underlines that the problem of late payments in Italy is a problem of "denied citizenship".

products).<sup>116</sup> They brought individual claims in front of different tribunals to obtain an injunction. However, this issue could have been successfully addressed collectively through an injunctive redress brought by a representative union. In this respect, the entry into force of the Italian class action will offer new strategic opportunities and challenges to both employees and self-employed workers unions.

Finally, it is worth noting that, in recent years, an increasing cooperation and/or competition between unions and NGOs can be observed. Human rights issues – such as non-discrimination rights, right to decent working conditions etc. – are concerns of both unions and NGOs. Unions' reluctance towards Courts might be very soon counterbalanced by NGOs judicial activism and strategic human rights litigations.<sup>117</sup> As has been underlined, a cooperation between the two of them might turn out to be fundamental especially in informal and non-unionized sectors where unions need to enter into social alliances with NGOs.<sup>118</sup> Further, this cooperation might encourage unions to go beyond the national boundaries and to address international human rights concerns such as the protection of workers' fundamental rights in global supply chains.<sup>119</sup>

## VI. Conclusion.

The emergence of self-employed workers' income inequality, and poverty has started a huge debate about the need to expand the scope of the labor movement to the multifaceted universe of self-employment. In Italy, traditional unions and new unions are striving to provide adequate responses to increasing social and economic disparities by considering the different needs of protection and unionization of the genuinely self-employed (such as professionals, freelancers) and the false self-employed (such as food delivery riders, Uber drivers, call center workers).

This paper argues that self-employed collective action can take three different forms: political and legislative, through lobbying, social alliances, and other institutional activities; economic, through the use of coercive measures such as strikes and collective bargaining; judiciary, through legal claims filed by the unions or by individual workers supported by the unions.

Self-employed workers' unions rely mostly on political action and new forms of coalition with local administration. A social coalition can support and strengthen a union's power in its relationship with the State; it can contribute to legitimize union activities; it can promote a social and political change and attract new members; it can allow unions to collect more financial resources. An interesting example is represented by the Bologna Charter of Fundamental Rights of Digital Work in the Urban Context.

In contrast, collective bargaining and strike action faces significant legal and economic difficulties; namely, the assumed incompatibility between competition law and collective rights and the elusiveness of the socio-economic counterpart in the self-employment market. In this respect, there is a need to reconcile competition law and collective rights and to reconsider the boundaries of the so-called antitrust labor exemption whenever collective bargaining and strike action is

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<sup>116</sup> See Tribunale di Bologna, 14 April 2020; Tribunale di Firenze, 1° April 2020; Tribunale di Firenze, 5 May 2020.

<sup>117</sup> See HELEN DUFFY, STRATEGIC HUMAN RIGHTS LITIGATION. UNDERSTANDING AND MAXIMIZING IMPACT (2018).

<sup>118</sup> See Dave Spooner, *Trade Unions and NGOs: The Need for Cooperation, Development in Practice* (2003), 19 ff.

<sup>119</sup> An analysis of the European debate on the protection of human rights in global supply chains through new national and EU legal tools (such as the French *devoir de vigilance*, Loi 2017-399) is in *Giornale di diritto del lavoro e delle relazioni industriali* (2020), issues no. 2,3,4.

necessary to promote fundamental constitutional values such as human dignity, liberty, autonomy, substantial equality, and democracy. Newly evolving forms of protest are also taken into account (flash-mobs, sit-in, parades).

Finally, legal activism and strategic litigation might play an important role in strengthening the power of self-employed workers' unions and in guaranteeing self-employed workers the right to effective judicial protection. In this respect, several recent legal innovations can be taken into account: collective discrimination (2003), a general representative action for the protection of homogeneous individual rights and collective interests (2019–2020), and the *amicus curiae* (2020). However, in the judicial field, unions face increasing competition from NGOs that have common human rights concerns, such as non-discrimination rights and rights to decent working conditions and wages, and have been involved in strategic litigation for years, developing experience, skills and financial resources. A cooperation between the two of them might be encouraged since it could support unions' action, especially in non-unionized, informal and transnational contexts.