

## The Ryanair case in the Italian and European framework: who decides the rules of the game?\*

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## 1. Introduction.

It is well known that Ryanair is the most important and successful European airline. Founded in 1985 with a share capital of just GBP 1, and a staff of 25 people, the company organised initially only daily flights on a 15-seater Bandeirante aircraft, operating from Waterford, in the southeast of Ireland, to London Gatwick Airport. After a first period of growth at the end of the Eighties, during the beginning of the Nineties Ryanair faced a crisis due both to the competition of other airlines and to the Gulf War. The company, however, reacted adopting the 'low fares business model', copied from the American Southwest Airline, and becoming, therefore, the first low-cost airline in Europe, under the guidance of Michael O'Leary, its actual CEO. Following this new business model, today Ryanair carries over 130 million passengers a year, on more than 2,000 daily flights from 86 bases, connecting 215 destinations in 37 countries on a fleet of 430 Boeing 737 aircraft<sup>345</sup>.

However, the success of Ryanair hides negative sides. Indeed, during the last years, pilots and cabin crews have organised several collective actions against the low-cost airline, revealing the real working conditions imposed by the company. Ryanair creates some legal ambiguities, exploiting especially the transnational nature of its performances, from which it takes advantage to cut down on labour costs. In a report commissioned by the European Transport Workers' Federation, Ryanair was defined 'a "short haul fundamentalist" that leads the industry in terms of driving down costs and developing new ancillary sources of revenue'<sup>346</sup>.

The present article aims at analysing the Ryanair case in the Italian and European framework from a twofold point of view: labour law and industrial relations.

Firstly, the working conditions in the airline company are described. It is well known that Ryanair requires an absolute secrecy about this. However, the employment dimensions reached by the company and the increasing union conflict have brought out recently documentation and evidences which let us to have a clear view of the current labour relationships in Ryanair. The intention here is therefore to provide an overview of the Ryanair's working conditions, verifying if the airline company adopts a strategy of limitation of employment protections directed to reduce costs and increase productivity. In the light of this, it is necessary to understand if EU transnational labour law has sufficient instruments to face law and forum shopping or if, on the contrary, the so-called 'EU social deficit'<sup>347</sup> has affected also this sector, giving life to gaps exploited by companies to subjugate labour relationships to the most advantageous legislation and competent jurisdiction for themselves.

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<sup>345</sup> For these information and the complete Ryanair's history see <https://corporate.ryanair.com/about-us/history-of-ryanair/> (accessed 19 Oct. 2018).

<sup>346</sup> G. Harvey and P. Turnbull, *The Development of the Low Cost Model in the European Civil Aviation Industry. Final Report for the European Transport Workers' Federation (ETF)* (2012).

<sup>347</sup> See, *inter alia*, S. Giubboni, *Diritti e solidarietà in Europa. I modelli sociali nazionali nello spazio giuridico europeo*, il Mulino 47 (2008).

Taking into account all of this, secondly, an overview of transnational issues (mainly concerning employment contract law, social security law and competent jurisdiction) is provided, considering also the solutions offered by the EU Institutions, so far.

Thirdly, the Ryanair approach to industrial relations is addressed, in order to understand the position of the Irish company in respect of Trade Unions. Even here, the transnational nature of labour relationships in Ryanair produces important implications both making more difficult building a collective interest among workers<sup>348</sup> and facilitating the escape from any kind of confrontation with Trade Unions and the rejection of the collective phenomenon itself in its multifaced dimensions by the company.

Finally, some conclusions are drawn, with the aim of pointing out the importance of the Ryanair case in the European and Italian legal and industrial relations framework.

## 2. The working conditions in Ryanair.

As every other airline, Ryanair workers are structured in ground crew and flight crew. Both are fundamental for the functioning of Ryanair business model, based on '25 minutes turnarounds', namely to prepare the aircraft in this time to do as many flights as possible and thus to keep the prices low<sup>349</sup>. Specifically, the flight crew is composed of cabin crew and pilots.

Cabin crew are in their turn articulated in a hierarchical manner. At the top there is the 'Base Supervisor', followed by the 'Deputy Base Supervisor' and by the 'Cabin Service Supervisor'. The lowest positions for cabin crews are 'Junior' and 'ad hoc Junior'.

Not all of these workers are directly hired by Ryanair. Indeed, 'Junior' are employed by two Irish employment agencies controlled by Ryanair itself, Workforce and Crewlink, providing workers to the airline. Thus, Ryanair insists on applying Irish labour, social security and tax law to these relationships, saving the related costs due to the advantages given by the flexibility of Irish law, as well as avoiding the employer's accountability<sup>350</sup>.

Cabin crew have to attend a training course (approximately of six months) to work in Ryanair, which is provided by the agencies mentioned and costs between EUR 2,400 and 3,000, at the expense of workers<sup>351</sup>.

Also pilots are organised hierarchically. Their highest positions are 'Base Chief Pilot' and 'Captain', followed by the lower 'Senior First Officer' and 'First Officer'.

In the majority of cases, however, pilots are not hire as employees but work for Ryanair, formally, under the legal status of self-employed, so that they are not entitled to sick pay and paid leave.

The airline company has set a specific strategy with the aim of circumvent tax law. Indeed, pilots have been obliged to found (and often to become directors of) several limited service companies

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<sup>348</sup> See A. Loffredo, *Democrazia aziendale, imprese transnazionali e dumping sociale*, Editoriale Scientifica 42-43 (2018), speaking of transnational road transports.

<sup>349</sup> Crewlink, *The Rough Guide to Working for Crewlink. Operating on Ryanair Aircraft*, 5-6.

<sup>350</sup> S. Borelli, *Parlando di welfare e barbarie, oggi*, 42 *Ragion pratica* 99, 103 (2014).

<sup>351</sup> Ryanair, *Ryanair Cabin Crew Pay and Conditions*, paras 7 and 9, <https://www.parliament.uk/documents/commons-committees/work-and-pensions/Correspondence/Letter-from-Ryanair-21-12-17.pdf> (accessed 13 Oct. 2018).

guided by accountants chosen by Ryanair itself and registered in countries, such as Ireland, Slovakia, Cyprus, Malta and Isle of Man, where the tax regime is particularly favourable. Those service companies have contracts with agencies, such as Brookfield Aviation and McGinley Aviation, which then supply pilots to Ryanair. Thus, on the one side, the mentioned contract contains a clause according to which the pilot agrees not to be a Ryanair's or agency's employee and the agency is actually neither an agent of Ryanair nor has any power to bind Ryanair in any matter, without obligations for the airline company to hire pilots from the agency. On the other side, the responsibility of all pilots' performances' tax and social security payments falls on services companies, i.e. on pilots themselves. Moreover, the contract between the agency and Ryanair provides that if the pilot publishes derogatory statements in writing or on the internet (in private or public chatrooms) about the agency or Ryanair, the relationship will be terminated<sup>352</sup>.

Even pilots are required to attend a training course to work for Ryanair, partially at their expenses. But if they resign after the recruitment, pilots have to refund the airline company all the training costs<sup>353</sup>. These contract terms are indeed accepted by pilots for a specific reason, namely the fact that Ryanair hires also pilots without any flight experience, while the other airlines generally require at least 1,500 hours to fly<sup>354</sup>. In other words, pilots use the Irish airline company as a sort of 'flying school'<sup>355</sup>.

The contractual and working conditions of Ryanair employees and temporary agency workers are similar. As Ryanair's aircrafts are registered in Ireland, the airline claims that employment is based in Ireland, although contractual home base is in another State<sup>356</sup>, and the Irish law and jurisdiction shall be applied<sup>357</sup>. For the same reason the airline company does not fulfil its administrative obligations, such as to communicate to the Public Administration the changes in the labour relationships (e.g. recruitments or dismissals) or to deliver to workers mandatory documents (e.g. the employment contract) and argues that the only applicable sanctions in case of breach of administrative law are the Irish<sup>358</sup>.

<sup>352</sup> For these reasons many Ryanair's pilots have been under investigation of the UK's HM Revenue & Customs during the last years (See <https://www.theguardian.com/business/2017/oct/03/ryanair-pilots-hmrc-investigation-airlines-uk>; see also <https://www.irishtimes.com/business/transport-and-tourism/hiring-of-ryanair-pilots-not-a-straightforward-arrangement-1.1541382> (both accessed 20 Oct. 2018).

<sup>353</sup> See <https://www.irishtimes.com/business/transport-and-tourism/judge-refuses-to-award-ryanair-damages-against-pilot-1.3460768> (accessed 20 Oct. 2018).

<sup>354</sup> Indeed, according to FCL.510.A (B), Commission Regulation (EU) No. 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew, 'Applicants for an ATPL(A) shall have completed a minimum of 1 500 hours of flight time in aeroplanes', where ATPL is the Airline Transport Pilot Licence.

<sup>355</sup> This explains why a large majority of ANPAC (the Italian National Professional Association of Civil Aviation) pilots have subscribed a dubious agreement signed by ANPAC itself in August 2018 (see Chapter 4, *infra*).

<sup>356</sup> Ryanair Junior Customer Service Supervisor contract s. 5.1; Crewlink Customer Services Agent contract s. 6.

<sup>357</sup> Ryanair Junior Customer Service Supervisor contract s. 34; Crewlink Customer Services Agent contract s. 37.

<sup>358</sup> Cf. Tribunale di Pisa 8 October 2018, No. 380, on which see S. Borelli, *La guerra al Ryanair Business Model. Le battaglie di Boscoduale, Busto Arsizio I, Bergamo e Pisa*, forthcoming in *Rivista Giuridica del Lavoro e della Previdenza Sociale*; Tribunale di Bologna 24 September 2015, No. 17149.

Basic gross salaries<sup>359</sup> include a premium for every hour associated with flight duty, as well as for Sunday and bank holiday working<sup>360</sup>. Furthermore, salaries are reviewed every year depending on the workers performances<sup>361</sup> and can be increased through bonus awards on in-flight sales<sup>362</sup>. In this sense, Ryanair monitors continuously cabin crew performances and, when they fall below the standard set or on board sales are not satisfying, the worker can be subjected to a disciplinary procedure and eventually dismissed<sup>363</sup>. This system facilitates a strong competition among workers and pushes them to report each other<sup>364</sup>.

Moreover, Ryanair exercises a strong surveillance power on workers, using the so-called 'mystery passengers', cabin crews dressed-up like passengers who check the colleagues' performances<sup>365</sup>. The company reserves also the right to conduct a personal search of cabin crew and their belongings<sup>366</sup> and to control communications made through the company devices by workers<sup>367</sup>.

There is not a formal working time as Ryanair can ask the cabin crew to perform their functions/provide their service in every moment discretionally, also on Saturdays, Sundays and public holidays, without additional remuneration<sup>368</sup>. Although paid holidays can be requested and granted, they depend on the passengers' demand, thus, especially in the peak season, the company can cancel or rearrange holidays<sup>369</sup>. Moreover, according to some former Ryanair's workers, the Irish employer does not tolerate sick leaves. Generally, workers, after having informed the company of their symptoms and diseases, have to fill in on the same day a self-certificate and fax it to some offices in Dublin, without knowing who will read their personal data. If then the worker gets sick 3 times in 6 months she/he will have to face a meeting in Dublin, although the illness has been certified by a doctor. For this reason, according to some former Ryanair's cabin crew, frequently many workers go to work sick to avoid problems<sup>370</sup>.

Workers have to provide meals at their expenses<sup>371</sup>, keeping the uniforms cleaned<sup>372</sup>, as well as paying the airport identity card and the staff car parking costs<sup>373</sup>. When Ryanair pays, these costs are deducted from the workers' salaries<sup>374</sup>.

<sup>359</sup> Which for temporary workers are calculated on scheduled block hour basis (see Crewlink Customer Services Agent contract s. 7).

<sup>360</sup> Junior Customer Service Supervisor contract s. 6; Crewlink Customer Services Agent contract s. 7.

<sup>361</sup> Junior Customer Service Supervisor contract s. 6; Crewlink Customer Services Agent contract s. 8.

<sup>362</sup> Junior Customer Service Supervisor contract s. 7.

<sup>363</sup> Crewlink, *supra* n. 5, 9 and 27.

<sup>364</sup> See [http://www.cislcatania.it/Media/Files/Lettera-Ryanair-\\_inglese\\_](http://www.cislcatania.it/Media/Files/Lettera-Ryanair-_inglese_) (accessed 13 Oct. 2018).

<sup>365</sup> *Ibidem*.

<sup>366</sup> Junior Customer Service Supervisor contract s. 28; Crewlink Customer Services Agent contract s. 27.

<sup>367</sup> Crewlink, *supra* n. 5, 49.

<sup>368</sup> Junior Customer Service Supervisor contract s. 9; Crewlink Customer Services Agent contract s. 9.

<sup>369</sup> Junior Customer Service Supervisor contract s. 10; Crewlink Customer Services Agent contract s. 10.

<sup>370</sup> See [http://www.cislcatania.it/Media/Files/Lettera-Ryanair-\\_inglese\\_](http://www.cislcatania.it/Media/Files/Lettera-Ryanair-_inglese_) (accessed 13 Oct. 2018).

<sup>371</sup> According to Junior Customer Service Supervisor contract s. 8, only filtered water is free of charge on board for cabin crew.

<sup>372</sup> Junior Customer Service Supervisor contract s. 17; Crewlink Customer Services Agent contract s. 18.

<sup>373</sup> Junior Customer Service Supervisor contract ss 13-14; Crewlink Customer Services Agent contract ss 15-16.

<sup>374</sup> Junior Customer Service Supervisor contract s. 29; Crewlink Customer Services Agent contract s. 28.

If for some reasons (for example seasonal) the company has excess capacity, it can give workers compulsory unpaid leaves, discretionally<sup>375</sup>.

Ryanair workers cannot spread 'confidential information' about the company during and after the labour relationship. Breaking this rule is considered as a gross misconduct leading to an instant summary dismissal. However, here 'confidentiality' is a very broad concept, including 'staff' information and 'any other information of a kind that would usually be regarded as secret or confidential'<sup>376</sup>. In the light of this, contacting Trade Unions is forbidden in practice<sup>377</sup>.

Moreover, in some cases Ryanair has gone further. Indeed, the airline company has concluded with their cabin crews specific contracts named 'Cabin Crew Agreement for Crew Operation' containing a termination clause ('termination/review of agreement') which provides that the contract will be terminated if the worker participates to work stoppages or collective actions. Furthermore, in case of Trade Unions recognition or of any kind of collective action, all wage increases, allowances or shift changes granted by the company itself will be withdrawn and the whole employment contract will be considered null and void<sup>378</sup>.

### 3. Law and forum shopping in Ryanair: exploiting transnationality.

The competitiveness of Ryanair, on which its commercial success is based, results from the possibility to compensate the reduction of consumers' fees with a considerable saving of above all (but not only) labour costs. These savings are obtained, as seen above, compressing employment protections at most, thanks to the law shopping practice, which the EU legislation has not been able to eradicate from the internal market, yet. Taking advantage of the peculiarity of the flight crews' activities, the company has positioned itself in the grey areas of the European discipline on the applicable law (contract law and social security law) and on the competent jurisdiction indistinctly concerning transnational relationships in general.

However, more targeted reforms and recent decisions of the EU Court of Justice are eroding the foundations on which the Ryanair system was built.

First, Regulation 465/2012 added paragraph 5 to Article 11 Regulation 883/2004 on the coordination of social security systems. The general criterion that the 2004 Regulation (substantially in continuity with the repealed Regulation 1408/1971) choose to identify the applicable national law in the field of social security was the *lex loci laboris*, namely the law of the place where the activity is performed<sup>379</sup>. This general principle is then specified and, in some ways, strengthened<sup>380</sup> by the introduction of the notion of 'substantial part of his activity' in relation to the situation of who habitually exercises an activity in two or more Member States. In this case, the legislation of the Member State of residence is applied if a 'substantial part' of the activity is performed

<sup>375</sup> Junior Customer Service Supervisor contract s. 23; Crewlink Customer Services Agent contract ss 21-22.

<sup>376</sup> Junior Customer Service Supervisor contract s. 21; Crewlink Customer Services Agent contract s. 20.

<sup>377</sup> See [http://www.cislc Catania.it/Media/Files/Lettera-Ryanair-\\_inglese\\_](http://www.cislc Catania.it/Media/Files/Lettera-Ryanair-_inglese_) (accessed 13 Oct. 2018).

<sup>378</sup> Tribunale di Bergamo 30 March 2018, No. 1586.

<sup>379</sup> Regulation 883/2004 Art. 11(3)(A).

<sup>380</sup> S. Giubboni, *La sicurezza sociale dei lavoratori che si spostano all'interno dell'Unione europea*, 598 (S. Sciarra & B. Caruso eds., Giappichelli 2008).

there<sup>381</sup>, and this expression must be understood – as specified in the implementing Regulation 987/2009 – as ‘a quantitatively substantial part of all activities of the employed ... person ..., without this being the major part of those activities’<sup>382</sup>. If, instead, a ‘substantial part’ of the activity is not exercised in the State of residence, the worker is subject to the legislation of the Member States where the employer is established.

Until 2012, therefore, the identification of the social security regime applicable to Ryanair flight crews was conducted on the basis of these criteria set by EU legislation for the generality of transnational performances. The critical point of this system relating to the civil aviation sector was constituted by the fact that, given the peculiarities of the flight crews’ performances, a ‘substantial part’ of the activity was not always easily identifiable. As a consequence, according to the mechanism described above, the subsidiary criterion of the place of registration of the employer’s office should have been applied. In the case of Ryanair, the result wished by the company was reached, namely the application of the Irish law on social security.

Aware of the possible abuses in respect of flight crews stemming from the legal system built in 2004, the EU legislator, with the aforementioned Regulation 465/2012, added to Article 11 Regulation 883/2004 a provision specifically addressed to this sector. According to the ‘home base’ criterion, introduced in that occasion<sup>383</sup>, the social security system of the State in which the crew member usually begins and ends a period of service or a series of periods of service and in which, under normal conditions, the employer company is not responsible for providing the accommodation to the worker must be applied to flight crews<sup>384</sup>.

The amendment, by anchoring the identification of the social security legislation applicable to the place where the worker starts/ends the performance, enhances the principle of effectiveness and thus seems to be effective in order to combat the law shopping<sup>385</sup>. However, given that - for civil aviation security purposes - airlines are required to identify the home base for each crew member, the national legislation on social security can be determined simply by verifying the place formally qualified as such by the company at the time of hiring or later<sup>386</sup>.

Another issue in the Ryanair system is - as mentioned - the result of the interpretation accepted by the EU Court of Justice regarding the criterion to identify the law applicable to flight crews’ employment contracts and the jurisdiction over the disputes in this respect.

<sup>381</sup> Regulation 883/2004 Art. 13(1)(A).

<sup>382</sup> According to Regulation 987/2009 Art. 14(8) ‘an indicator that a substantial part of the activities is not being pursued in the relevant Member State’ means that, globally, in that same country the service has not been performed for a quota corresponding to at least 25% of the working hours and/or salaries.

<sup>383</sup> Regulation 883/2004 Art. 11(5).

<sup>384</sup> This definition of ‘home base’ is contained in Annex III, Chapter Q of Regulation 3922/1991, recalled by the new Regulation 883/2004 Art. 11(5).

<sup>385</sup> S. Borelli, *supra* n. 6, 105; S. Sciarra, *Un confronto a distanza: il diritto di sciopero nell’ordinamento globale*, 2-3 *Politica del Diritto* 221-222 (2012).

<sup>386</sup> G. Frosecchi, *La legge previdenziale applicabile ai lavoratori di compagnie aeree internazionali. I casi Ryanair*, 1 *Rivista Giuridica del Lavoro e della Previdenza Sociale* 117 (2016). For some courts (*see* Tribunale di Bologna 24 September 2015, No. 17149), the reference to the home base may only concern disputes arising after the date of the enforcement of Regulation 465/2012 (28 June 2012). The same could be said for the criterion of the ‘substantial part’ of the activity pursuant to Regulation 883/2004 Art. 13 and Regulation 987/2009 Art. 14 (become fully operational only from 1 May 2010). However, *see infra* in this chapter.

Ryanair's position has always been to support the applicability of Irish law and the jurisdiction of that country's judge on flight crews' relationships. This by virtue of various elements: in the employment contracts there is a clause for the election of the forum and another that designates Irish law as the applicable law; the execution of the service takes place on aircrafts registered in Ireland<sup>387</sup>; the employment contract is concluded when Ryanair signs it at its registered office in Ireland, after the worker has signed it (wherever occurred).

However, for the EU legislation, the main criterion to identify the applicable law and the competent jurisdiction is *lex loci laboris* (respectively, Article 8 Regulation 593/2008<sup>388</sup> and Article 21 Regulation 1215/2012<sup>389</sup>). Instead, the criterion of the place of the country where the place of business through which the employee was engaged is situated is applicable when it is not possible to identify the place where or from which<sup>390</sup> the employee habitually carries out the performance<sup>391</sup>.

This system is inspired by the principle of *favor laboris*<sup>392</sup>, which circumscribes the role of the parties' contractual autonomy. In fact, these may choose to submit the contractual relationship to the law or jurisdiction of a Member State other than that determined according to the aforementioned criteria only in compliance with the mandatory rules of the latter's legal system<sup>393</sup> and under specific conditions<sup>394</sup>.

As easily understandable, the element of uncertainty here is represented by the concept of 'place in which (or from which) the employee habitually carries out his work'. It is precisely on this point that the case law of the Court of Justice provides its most significant contribution in this area. In fact, the judge of Luxembourg - first with reference to the law applicable to the employment

<sup>387</sup> See para. 2, *supra*. More specifically, as Article 17 of Chicago Convention (Convention on International Civil Aviation) provides that 'Aircraft have the nationality of the State in which they are registered', Ryanair and Crewlink claim that the performance would be habitually carried out on the Irish territory, namely on Irish aircraft, because workers spend more time on flight than on the ground (see Opinion of Advocate General H. Saugmandsgaard Øe delivered on 26 April 2017, point 121). This latter view has been adopted by Tribunale di Bologna 24 September 2015, No. 17149, which on this basis has excluded that Ryanair must comply with Italian employer's administrative obligations, because the only applicable legislation is the Irish.

<sup>388</sup> Which replaces the Rome Convention of 19 June 1980, still applied to the judgments established until 17 December 2009.

<sup>389</sup> Which replaces Regulation 44/2001, still applied to disputes rooted before 10 January 2015.

<sup>390</sup> The clarification - very important for flight crews - that *locus laboris* is also that from which the work activity is usually carried out is contained in Regulation 593/2008 and in Regulation 1215/2012, following an extensive interpretation in this sense of the Court of Justice (ECJ 13 July 1993, C-125/92, *Mulox IBC*, paras 24 et seq.).

<sup>391</sup> Only for the determination of the law applicable to the employment contract it is instead provided that 'where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that ... [in which or from which the employee habitually carries out his work or where the place of business through which the employee was engaged is situated], the law of that other country shall apply' (Regulation 593/2008 Art. 8(4), in continuity with the Rome Convention of 1980). However, in order to avoid that this criterion overemphasizes the discretion of the judge (and ultimately makes the prediction of the other two irrelevant), a strict and restrictive interpretation is now desired in order to make the latter criterion residual with respect to others (see G. Orlandini, *Il rapporto di lavoro con elementi di internazionalità*, 137 W.P. C.S.D.L.E. "Massimo D'Antona".IT 20-21 (2012).

<sup>392</sup> See the whereas 23 Regulation 593/2008 and 18 Regulation 1215/2012. It has been claimed (see A. Lyon-Caen & S. Sciarra, *La Convenzione di Roma e i principi del diritto del lavoro*, 20 Quaderni di Diritto del Lavoro e delle Relazioni Industriali 22 (1998) and G. Orlandini, *supra* n. 42, 10) that the law referred to seems actually to be more properly inspired by the principle of 'proximity'. This because it does not aim at allowing the worker the application of the most favorable national discipline among those possible, but only to identify in the one (presumably) closest to him the applicable law (and the competent jurisdiction).

<sup>393</sup> Regulation 593/2008 Art. 8(1).

<sup>394</sup> Regulation 1215/2012 Art. 23.



relationship<sup>395</sup> and, more recently, also in terms of competent jurisdiction<sup>396</sup> - has ruled that this criterion must be interpreted in a broad sense. When an effective centre of the worker's activity cannot be easily identified, emphasis should be placed on the 'place where, or from which, the employee in fact performs the essential part of his duties vis-à-vis his employer'. In order to identify the latter, the national court has to consider a series of indicators, such as the place of departure and return of the transport missions, the one in which the worker receives instructions on the missions and organises her/his work, as well as the one where work tools are<sup>397</sup>. The nationality of the aircraft is, instead, absolutely irrelevant<sup>398</sup>. The Court thus rejects a solution focused on formal data, such as the content of the contractual clauses or the State of the aircraft's registration, to privilege the concrete attitude of the relationship. Within this 'empirical' method a 'significant role' must be recognised - according to the Court of Justice - to the notion of 'home base'<sup>399</sup>. In fact, even if the place of start and end of the flight crew's performance cannot be made to coincide with the notion of 'place in which (or from which) the employee habitually carries out his work', it can undoubtedly constitute an 'extremely important' indicator<sup>400</sup> for the identification of the latter, enough to be considered a 'rebuttable presumption'<sup>401</sup>. Some doubts, however, remain when there is a plurality of 'home bases', as, for example, in case of temporary agency work and generally of atypical work. Here, if a 'place in which (or from which) the employee habitually carries out his work' could not be identified, there would be nothing left but apply the law (and the jurisdiction) 'of the country where the place of business through which the employee was engaged is situated', according to Article 8, para. 3, Regulation 593/2008 (and Article 21(1)(B)(ii) Regulation 1215/2012)<sup>402</sup>.

<sup>395</sup> ECJ 15 March 2011, C-29/10, *Koelzsch*, para. 43 and ECJ 15 December 2011, C-384/10, *Voogsgeerd*, para. 35.

<sup>396</sup> ECJ 14 September 2017, C-168/16 and C-169/16, *Nogueira*, para. 57, where it was also stated that, for the interpretation of EU legislation on jurisdiction in cases concerning employment, it must be taken into account of the corresponding provisions of the law on the legislation applicable to contractual obligations (para. 55).

<sup>397</sup> *Nogueira*, cit., para. 63, ECJ *Koelzsch*, cit., para. 49 and *Voogsgeerd*, cit., para. 38.

<sup>398</sup> Indeed, as noted by the Advocate General H. Saugmandsgaard Øe, in his Opinion on *Nogueira* case (points 123-127), 'In the first place, no provision of Regulation No 44/2001 contains any reference to the Chicago Convention or to the nationality of the aircraft on board which the workers carry out their work ... In the second place, no provision of the Chicago Convention provides that the work carried out on board an aircraft must be regarded as being carried out on the territory of the State whose nationality the aircraft has ... In the third place, the concept of "nationality of an aircraft", provided for in Article 17 of the Chicago Convention, has neither the object nor the effect of assimilating the space inside an aircraft to the territory of the State whose nationality that aircraft has. That concept of nationality of aircraft is used (i) to define the scope of a number of provisions of that convention which apply only to aircraft having the nationality of one of the Contracting States (48) and (ii) to prohibit certain distinctions on the basis of that nationality ... Since no provision of the Chicago Convention has the effect of assimilating the space within an aircraft to the territory of the State whose nationality that aircraft has, I see no good reason why work on board an Irish aircraft should be regarded as being carried out on Irish territory for the purposes of the application of Article 19(2)(a) of Regulation No 44/2001 ... I infer from the foregoing that the nationality of an aircraft within the meaning of Article 17 of the Chicago Convention is irrelevant and cannot be taken into account by the national court for the purposes of determining the place where the cabin crew habitually carry out their work within the meaning of Article 19(2)(a) of Regulation No 44/2001'.

<sup>399</sup> *Nogueira*, cit., para. 66 et seq.

<sup>400</sup> D. Diverio, *Dalla Corte di Giustizia un'importante precisazione sulla giurisdizione nelle controversie di lavoro relative al personale di cabina*, 4 *Rivista Italiana di Diritto del Lavoro* 877 (2017).

<sup>401</sup> M. Murgo, *Personale di volo e competenza giurisdizionale nel caso Ryanair*, 3 *Diritto delle Relazioni Industriali* 972 (2018). Conversely, the Advocate General H. Saugmandsgaard Øe, in his Opinion on *Nogueira* case, has claimed that the 'home base' would have an indirect relevance, as it should be taken into account only in so far as it supports the other indicators.

<sup>402</sup> N. Vascello, *Giurisdizione e legge applicabile al rapporto di lavoro del personale impiegato a bordo di aeromobili tra nazionalità dell'aeromobile e base di servizio*, 2 *Diritto delle Relazioni Industriali* 637 (2018).

In addition to the issues discussed above, the domestic judges in Italy have faced also the problem of the legislation applicable when the employer does not comply with administrative obligations such as the communication to public offices of the changes in the labour relationships or the delivery to workers of mandatory documents. In particular, judges have proposed a solution which combines the criteria used to identify the social security applicable law and the 'empirical method' carried out by the ECJ concerning the law applicable to the employment relationship and the competent jurisdiction. On the one hand, as the administrative rules concerned have the same rationale of social security law, because both should be coordinated in order to protect as broad as possible workers and are directed to combat informal work, the social security criteria should be applied<sup>403</sup>. On the other hand - taking into account that the cases in question regarded facts occurred before the adoption of Regulation 465/2012 and before the full implementation of Regulation 883/2004<sup>404</sup> -, the concept of 'place where a worker is employed principally', used by Article 14(1)(B)(ii) Regulation 1408/1971 to identify the social security applicable law<sup>405</sup>, has been reconstructed following the reasoning of the *Nogueira* case, namely combining the notion of 'place in which (or from which) the employee habitually carries out his work', as defined by the ECJ, and that of 'home base'. In other words, even when the research of the applicable administrative law with its related sanctions is at stake, the criterion of the legislation chosen by the parties (*rectius* by Ryanair) has to give the way to that of *lex loci laboris*<sup>406</sup>.

Among the attempts of Ryanair to avoid the use of the 'proximity' criterion in order to identify the national applicable law, it is worth mentioning the exploitation of the different EU legislations across time. This is particularly true speaking of social security and employment administrative laws. Indeed, the airline company, supported by some national decisions, claims that for cases arisen before the adoption of Regulation 465/2012, the concept of 'home base' would not be usable, otherwise Article 11(5) of the Regulation 883/2004 would be retroactively applied<sup>407</sup>. This last interpretation, however, can be easily discredited using the 'empirical method' elaborated by ECJ in *Nogueira*. Indeed, when a case is subjected to the application of Regulation 1408/1971, because originated before 2012, the meaning of 'place where a worker is employed principally', referred to in Article 14(1)(B)(ii), can be searched in the light of the 'home base' concept as defined in Annex III, Chapter Q of Regulation 3922/1991, namely on the basis of a legislation made

<sup>403</sup> Tribunale di Bologna 24 September 2015, No. 17149; Tribunale di Pisa 8 October 2010, No. 380.

<sup>404</sup> Namely on 1 May 2010, *see supra* n. 42.

<sup>405</sup> More specifically, this disposition stated that '... a worker employed in international transport in the territory of two or more Member States as a member of travelling or flying personnel and who is working for an undertaking which, for hire or reward or on own account, operates transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a Member State, shall be subject to the legislation of the latter State, with the following restrictions: ... (ii) where a worker is employed principally in the territory of the Member State in which he resides, he shall be subject to the legislation of that State, even if the undertaking which employs him has no registered office or place of business or branch or permanent representation in that territory'.

<sup>406</sup> *See* Tribunale di Pisa 8 October 2010, No. 380.

<sup>407</sup> This position has been accepted by Tribunale di Bologna 24 September 2015, No. 17149.

before 2012<sup>408</sup>. Therefore, the place of start and end of the flight crew's performance is a fundamental indicator also to seek the social security and employment administrative legislations applicable before 2012.

#### 4. Ryanair's anti-union practices and Trade Union responses.

Since the beginning of its business activity, Ryanair has constantly managed to avoid and suppress Trade Unions. Essentially, Ryanair's main goal is to negotiate the contractual terms directly with the individual worker to take advantage of her/his socio-economic weakness and smoothly implement the *Ryanair business model*. The evidences of Ryanair anti-union behaviour in Ireland are widespread<sup>409</sup>. Therefore, it is not surprising that also beyond its home country the airline company has been blamed for having a negative attitude towards workers' organisations. Indeed, in a number of European States, controversies between Trade Unions and the low-cost airline have taken place, at various levels<sup>410</sup>. More recently, in a number of countries, the persistent pressure exercised by Trade Unions, also by means of collective actions, such as strikes, have succeeded in forcing the company at the negotiating table. So far, most of the collective agreements concluded concern employed pilots, while, apparently, the negotiation for cabin crew present more obstacles, which may be due to the weakest position of the cabin crew members, compared to pilots, in the labour relationship with the airline company<sup>411</sup>.

In Italy, both confederated and grass-root Trade Unions have engaged against the company<sup>412</sup> on several grounds: because of the failure to pay social security benefits in Italy, because of the working conditions and because of the anti-union practices, that is a persistent hindrance of

<sup>408</sup> See Tribunale di Pisa 8 October 2010, No. 380.

<sup>409</sup> M. O' Sullivan & P. Gunnigle, 'Bearing All the Hallmarks of Oppression'. *Union Avoidance in Europe's Largest Low-cost Airline*, 2 *Labor Studies Journal* 252-270 (2009); N. Cullinane & A. Dobbins, *Considering the Impact of the 'Right to Bargain' Legislation in Ireland: A Review*, 1 *Industrial Law Journal* 52-83 (2014).

<sup>410</sup> See M. O' Sullivan & P. Gunnigle, *supra* n. 65, 262, who refers to shop floor disputes in Belgium that have involved also French, Spanish and Italian Trade Unions; on the anti-union policy in France, see Vandewattyne J. (2016), *Ryanair ou le refus du dialogue social institutionnalis *, 8 *La nouvelle revue du travail* [En ligne], <https://journals.openedition.org/nrt/2609> (2016) (accessed 15 October 2018). A dispute between Ryanair and the Danish Trade Unions is addressed in A. Decker, *Ryanair and the Danish Model (Case Study Contribution to Textbook)* (C. Mulhearn & H. Vane eds., Palgrave Macmillan 2016).

<sup>411</sup> In August 2018, the Irish pilots' Trade Union F rsa came to an agreement, confirmed by the ballot held in September, see <https://www.bbc.com/news/world-europe-45280416> and <https://www.shropshirestar.com/news/uk-news/2018/09/05/ryanair-pilots-vote-to-accept-agreement-after-summer-strikes/> (accessed 6 Nov. 2018). It is again with a pilot's union (SEPLA) the agreement signed for employer pilots based in Spain, in October 2018, see [https://www.ilmessaggero.it/economia/news/ryanair\\_sindacati-4061232.html](https://www.ilmessaggero.it/economia/news/ryanair_sindacati-4061232.html) (accessed 6 Nov. 2018). Earlier this year, BALPA (UK) has been officially recognised, see <https://www.balpa.org/Media-Centre/Press-Releases/BALPA-signs-union-recognition-agreement-with-Ryana> [accessed 6 Nov. 2018] and, again, in October 2018, Ryanair has announced it has signed an agreement for directly employed pilots with BALPA (UK) and SPAC (Portugal), see <https://markets.ft.com/data/announce/detail?dockey=1323-13835340-2D51E038ES7VQ7CQT6RSD34H97> (accessed 6 Nov. 2018). Less common are the agreements applicable to employed cabin crew, as the one signed by LBC-NVK (Belgium) on 25 October 2018, applicable to all Cabin Crew based in Belgium, as promptly announced by the company: <https://vaaju.com/ireland/ryanair-has-reached-an-agreement-with-belgian-unions/> (accessed 6 Nov. 2018).

<sup>412</sup> Evidence of the wide interest in the Ryanair's workers is provided by the meeting requested to the Italian Minister of Transport, see <http://www.filtgii.it/documenti/ta6ott17-1.pdf> (accessed 15 Oct. 2018).

Trade Unions' activities, expressed in various ways. Over the years, the organisations have called for several strikes, of few hours, which have intensified in the latest months<sup>413</sup>.

Among Trade Unions' attempts to build a social dialogue with the company, the FILT-CGIL case is emblematic. Only in 2017, the Federation has repeatedly, and officially, asked to meet the company, to discuss working conditions and negotiate a framework agreement on the flow of information, without receiving any response<sup>414</sup>.

In a couple of cases, FILT has opted for the judicial strategy, as well. The two judgments delivered by the Courts of Busto Arsizio and Bergamo, both won by the claimants, provide concrete evidence of the extent of the Ryanair's anti-union attitude<sup>415</sup>.

The Busto Arsizio Labour Court, after having declared its jurisdiction mainly on the grounds of Article 7(2) Regulation 1215/2012<sup>416</sup>, has recognised the anti-union practice of the low-cost airline and the violation of Article 28 Law 300/1970, which protects Trade Unions whenever 'the employer indulges in behaviours designed to deny or to limit the exercise of trade union freedom and union activity, as well as the right to strike'. Indeed, the plaintiff had given enough evidence of the refusal of the company to negotiate, to provide information and to cooperate with the workers' representatives - also in the implementation of the norms on health and safety - as well as of the violation of Trade Unions' rights for agency workers. Eventually, in application of Article 28, the judge has ordered Ryanair to cease from the anti-union behaviours and cancel its effects<sup>417</sup>.

Notwithstanding the uncontroversial conclusion of the Busto Arsizio Labour Court, FILT-CGIL, FIT-CISL and UILTRASPORTI had to resort again to calling a strike in Ryanair, on 10 February 2018, because of the failure of the company to engage in collective negotiations<sup>418</sup>. On the other hand, Ryanair has appealed the ruling and the trial before the *Corte d'Appello* is still to be decided. On 28 September 2018, the same Italian Trade Unions have joined a coordinated one-day strike against the low-cost airline. On that day, pilots and cabin crew went on strike in Italy, Spain, Portugal, Belgium, the Netherlands and Germany, which obliged Ryanair to cancel 250 flights. The claim, at least, for the Italian Trade Unions, remains the request to the company to start a collective negotiation with them in order to conclude a collective agreement of Italian law, to guarantee both pilots and cabin crew<sup>419</sup> (as discussed below, FILT-CISL, the third most representative Trade Union, has rather opted for a conciliatory approach).

<sup>413</sup> The latest on 8 May 2018, which has triggered a prompt reaction from Ryanair that has created an ad hoc pop-up, to invite the costumers to sign a petition against strikes in airline companies, see <http://www.ilsole24ore.com/art/notizie/2018-05-08/uomini-radar-sciopero-oggi-voli-rischio-tutta-italia-113410.shtml?uud=AEExepkE> (accessed 6 Nov. 2018).

<sup>414</sup> See <http://www.filtcgil.it/index.php/aria/trasporto-aereo/diario-trasporto-aereo/> (accessed 6 Nov. 2018).

<sup>415</sup> For an assessment, see S. Borelli, *supra* n. 14.

<sup>416</sup> The jurisdiction of the Italian judge has been determined according to the criterion (set in Law No. 300/1970 Art. 28) of the place where the employer's anti-union behaviour, which is a tort, has occurred.

<sup>417</sup> Tribunale Busto Arsizio 5 February 2018, No. 448.

<sup>418</sup> See [http://www.rainews.it/dl/rainews/articoli/scioperi-disagi-chi-vola-agitazioni-serie-d6c3073c-ad97-4595-8422-37d80e1a31fc.html?refresh\\_ce](http://www.rainews.it/dl/rainews/articoli/scioperi-disagi-chi-vola-agitazioni-serie-d6c3073c-ad97-4595-8422-37d80e1a31fc.html?refresh_ce) (accessed 6 Nov. 2018).

<sup>419</sup> See <https://www.independent.co.uk/travel/news-and-advice/ryanair-strike-2018-latest-friday-september-live-cabin-crew-pilots-news-a8555561.html> [accessed 6 Nov. 2018].

On 30 March 2018, a further judgment has condemned Ryanair. FILT-CGIL had applied before the Bergamo Labour Court, claiming the discriminatory character of an employment contract clause that inhibits in absolute terms the Trade Union membership and collective actions. The clause (*clausola risolutiva espressa*) provides for the termination of the contract in case the worker takes part in Trade Union activities, including work stoppages, or communicates with the company via Trade Union representatives. The same clause adds that if the company is forced to recognise a cabin crew Trade Union or a collective action takes place, the employment contract is to be considered null and void<sup>420</sup>. In the case at stake, the Court founded its competence upon both Article 7(2) Regulation 1215/2012 and Article 28 Legislative Decree 150/2011, which aims at facilitating the judicial protection whether a discrimination takes place.

Eventually, the judge declared the discriminatory character of the contested clause, on the grounds of personal beliefs of a Trade Union nature, by contextualizing it in the general anti-union approach that Ryanair had revealed in several occasions. Both the clause and the general context have a 'demoralizing and deterrent effect' as concerns the job application at Ryanair for those who are Trade Union members. Therefore, the direct discrimination occurs in the phase of access to employment, thus infringing upon Article 3(1)(A) Legislative Decree 216/2003. The Court, in view of the persistency of the company's anti-union behaviour deemed necessary to impose both the proper diffusion of the Judgment and the payment of EUR 50,000 to FILT CGIL, as punitive damages to promote deterrence<sup>421</sup>.

While the Italian labour courts were in the process of deciding the two cases, Ryanair was opening to the social dialogue with ANPAC (National Professional Association of Civil Aviation)<sup>422</sup>, a pilot's organisation, which led to the official recognition of the association as company's social partner, with an agreement signed on 7 March 2018<sup>423</sup>. A recognition which is nothing but ambiguous and trivial, inasmuch as it only concerns a less representative Trade Union, both in quantitative and qualitative – only the pilots are concerned – terms. To the agreement that have recognised the pilot's association, another has followed on pilot's labour conditions, concluded in August 2018.

ANPAC has newly engaged in a collective negotiation with Ryanair, together with other two Trade Unions: ANPAV and FIT-CISL, for cabin crew. The three organisations came to an agreement with the company on 17 October 2018, the same agreement has been signed on 28 October 2018, by Crewlink and Workforce<sup>424</sup>.

Ryanair, with this agreement, commits to apply to 'all existing directly employed cabin crew' Italian employment law and Italian social insurance within 1 October 2019. This clause suggests that Ryanair, and apparently the signatory Trade Unions, deem necessary a private clause to achieve what the supranational legal system already provides for: the application of employment and

<sup>420</sup> See Chapter 1, *supra*.

<sup>421</sup> Tribunale di Bergamo 30 March 2018, No. 1586.

<sup>422</sup> The first meeting took place in early January, see the official note from ANPAC, available at: <https://www.anpac.it/attachments/article/819/180108-CS-RYR-incontro%20del%209%20gennaio.pdf> (accessed 18 Oct. 2018).

<sup>423</sup> See, *inter alia*, [http://www.repubblica.it/economia/2018/03/08/news/ryanair\\_firma\\_il\\_primo\\_accordo\\_coi\\_piloti\\_italiani-190763621/](http://www.repubblica.it/economia/2018/03/08/news/ryanair_firma_il_primo_accordo_coi_piloti_italiani-190763621/) (accessed 18 Oct. 2018).

<sup>424</sup> FIT-CISL announces the agreement's conclusion on its website, see [http://www.fitcisl.org/41?documento\\_fit=5233](http://www.fitcisl.org/41?documento_fit=5233) (last access 6 Nov. 2018).

social security law of the place where the work is effectively carried out<sup>425</sup>. The company also commits to, progressively, employ directly some agency workers. A number of ambiguous aspects characterize the agreement, as the fact that it is signed by the Irish headquarter, while Ryanair has an Italian branch since 2013<sup>426</sup>, or the fact that the agreement – especially the pay structure – is subject to individual acceptance of every worker, even the signatory Trade Unions' members<sup>427</sup>. Obviously, this clause shifts the responsibility from the organisations to the individual workers. In addition, the agreement includes a detailed dispute resolution procedure and an industrial peace obligation for the time of validity of the agreement (1 November 2018 – 31 December 2021), which prevents the signatory Trade Unions from organising any 'unilateral industrial action' that may undermine the agreement, 'regardless of any dispute that may arise'<sup>428</sup>. Furthermore, the three organisations commit not to pursue any pay claim beyond what set in the agreement, nor any claim '(cost increase or otherwise) for any difference between Irish and Italian benefits, tax or social insurance as a consequence of moving to Italian employment law'<sup>429</sup>.

FILT-CGIL and UILTRASPORTI strongly oppose the company agreement signed by ANPAC, ANPAV and FIT-CISL, which they define an '*accordo al ribasso*', that is an *in pejus* agreement which favours social dumping within the air sector. In a joint statement, the Trade Unions have pointed out that their aim is to conclude with the company a collective agreement 'completely under Italian law' that improves, or at least reiterates, pilots' and cabin crews' labour conditions provided for by the sectorial collective agreement. Therefore, they are determined to oppose any other agreement and to establish Trade Union representative bodies for FILT-CGIL and UILTRASPORTI (RSA) within Ryanair. Next to this, FILT-CGIL and UILTRASPORTI are lobbying the Ministry of Labour and Social Policies to make the sectorial collective agreement signed by the most representative Trade Unions generally applicable to hamper social dumping practices<sup>430</sup>.

Before concluding, it is worthwhile to spend some words on the ballots organised in relation to both the agreements signed in the latest months. Right after the pilots' agreement between ANPAC and Ryanair was signed, the association organised an on-line ballot restricted to its members, without applying any of the standards set by the sectorial collective agreement. According to ANPAC, 72% of the voters has approved the agreement. Subsequently, FILT-CGIL and UILTRASPORTI organised a further ballot on the same agreement open to all Ryanair pilots (also those not directly employed, who were anyway concerned with the agreement), following the sectorial collective agreement's rules. The result was overturned and the agreement rejected by 82% of voting pilots, who have not appreciated a company agreement that lowers the labour standard set by Italian law<sup>431</sup>.

Nearly the same approach has been adopted as regards the cabin crew agreement. The three Trade Unions have organised a ballot addressed only to their members, and 88% of voters have

<sup>425</sup> See Chapter 3, *supra*.

<sup>426</sup> It is consolidated that the airline companies sign company agreements with the Italian branch.

<sup>427</sup> See Collective Labour Agreement FIT CISL, ANPAC, ANPAV & RYANAIR, 1 November 2018 - 31 December 2021, paras 10.1-10.2.

<sup>428</sup> See Collective Labour Agreement FIT CISL, ANPAC, ANPAV & RYANAIR, 1 November 2018 - 31 December 2021, para. 9.4.

<sup>429</sup> See Collective Labour Agreement FIT CISL, ANPAC, ANPAV & RYANAIR, 1 November 2018 - 31 December 2021, paras 1.2, 1.4.

<sup>430</sup> FILT-CGIL, UILTRASPORTI. *Piloti ed assistenti di volo Ryanair basati in Italia: perché diciamo no agli accordi siglati*. Rome, 22 Oct. 2018.

<sup>431</sup> [https://www.ecodibergamo.it/stories/Cronaca/i-piloti-ryanair-bocciano-il-contrattonelle-urne-del-referendum-82-di-no-1289175\\_11/](https://www.ecodibergamo.it/stories/Cronaca/i-piloti-ryanair-bocciano-il-contrattonelle-urne-del-referendum-82-di-no-1289175_11/) (last access 6 Nov. 2018).

approved the agreement. Likely FILT-CGIL and UILTRASPORTI will soon organise a new, and inclusive, ballot, as for the pilots' agreement, in order to show that the actual majority of Ryanair's workers do not agree on agreements that increase the company's power at the detriment of individual and collective rights.

Under Italian law, the ballot does not have a proper legal value as in other legal systems, it rather represents a – strong – political tool. However, Art. 21, Law 300/1970, imposes upon the employer the duty to allow Trade Unions to organise ballots, outside working hours, and it provides for 'the right to participate to all workers belonging to the interested production unit and/or category'. This norm represents a strong legal ground to question the legitimacy, even if just political, of the ballots executed on the recent Italian Ryanair's company agreements.

## 5. Conclusions.

From the analysis carried out in this essay, mainly two connected points of criticism emerge: first, the ability of Ryanair in exploiting the transnational dimension, both in legal and industrial relations' terms, and, hence, the transnational dimension of the *Ryanair issue*; second, the workers' difficulties in organising and tackling the Ryanair's approach.

As seen above, the poor working conditions in the airline company are the result of a systematic exploitation of the grey areas of transnational labour law, facilitated by the absence of Trade Unions, which is a direct consequence of the Ryanair's manifest anti-union policy.

Some important responses have been provided by the EU Institutions, especially by means of the ECJ decisions. Regardless of the ambiguities, which still persist (as for the uncertainties around the 'home base' concept), the criteria to identify the applicable contract law, the applicable social security and administrative law as well as the competent jurisdiction are increasingly clear. However, the simple existence of these transnational issues, which hamper a full enforcement of national labour rights and, on the other hand, do not favour a strong transnational Trade Union response, is an indicator of the difficulties of the EU to build a social dimension. After all, transnational rules have been designed in an individual perspective, without a careful consideration of the collective profile of labour law<sup>432</sup>. It is worth mentioning that the EU has attempted to regulate the conflict of laws on strike, with a specific norm. The reference is to Article 9 Rome II Regulation<sup>433</sup> which states that, in case of non-contractual liability for damages caused by an industrial action, the legislation of the *locus actus* – namely where the strike has taken place - must be

<sup>432</sup> G. Orlandini, *Il Tribunale di Busto Arsizio condanna Ryanair per condotta antisindacale*, [http://www.europeanrights.eu/public/commenti/Bronzini12-Orlandini\\_nota\\_Busto\\_Arsizio.pdf](http://www.europeanrights.eu/public/commenti/Bronzini12-Orlandini_nota_Busto_Arsizio.pdf) (accessed 19 Oct. 2018). In the absence of any indication from the European law, for example, the Collective Labour Agreement FIT CISL, ANPAC, ANPAV & RYANAIR, 1 November 2018- 31 December 2021, para 1.1 claims that the agreement itself is governed by Italian law and the courts of Italy have jurisdiction over the disputes arising from its implementation.

<sup>433</sup> Art. 9 Regulation 864/2007: "Without prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken".

applied<sup>434</sup>. Nevertheless, the lack of EU rules on strike is not surprising as Article 153, para. 5, TFEU explicitly excludes strike from the EU competences. For these reasons, the scarcity of collective transnational labour law rules is probably a relevant issue to be dealt with at EU level, as in the present globalised and integrated economic scenario, where undertakings have no borders, limiting labour law to the individual dimension carries serious risk for workers' rights and freedoms, which can be guaranteed only if supported by a collective freedom properly and equally protected, in accordance with the higher national standards<sup>435</sup>. The Ryanair case proves, generally speaking, that EU labour law is currently facing several difficulties in containing the diffusion of neoliberal economic practices, according to which Trade Unions represent a dangerous social monopoly for workers and for the market, so that labour relations should be founded exclusively on the individual employment contract<sup>436</sup>.

However, to respond to these leanings and to fill the 'collective' gap left by transnational labour law, in the Ryanair case, Trade Unions have organised collective actions, claiming for better working conditions. In order to avoid the deterioration of its public image before the customers<sup>437</sup>, the airline company is partially opening to a form of social dialogue. In Italy, first, it has recognised a less representative pilots' Trade Union and concluded a dubious agreement for pilots. Second, it has negotiated a cabin crew agreement with two minor organizations and one of the most representative Trade Unions. Ryanair's availability to negotiate the first company agreements, for both pilots and cabin crew, is an evidence of the topical value of strike actions, which remain, also nowadays, the main tool in the hands of the workforce. Indeed, the decision of the company to negotiate has causally followed months of strikes that have seriously undermined its credibility in front of the customers, as further demonstrated by the strong industrial peace clause included in the Italian agreements for cabin crew of October 2018.

The Italian judgments on the anti-union conduct of Ryanair have been effective in shining a light on Ryanair's violations. Nevertheless, their national nature is structurally unable to guarantee the construction of a transnational social dialogue in Ryanair, which could widely improve the working conditions, as the transnational nature of the activity requires a transnational approach. Therefore, the transnational coordination and solidarity among Trade Unions is a pivotal element to take actions, which can affect the consumers' needs in a meaningful way and, as a consequence, force Ryanair to invert its anti-union tendency.

In September 2017, the three Italian confederated Trade Unions, FILT-CGIL, FIT-CISL and UILTRASPORTI, had sent an official call for an international solidarity action against Ryanair to ITF (International Transport Workers' Federation) and ETF (European Transport Workers' Federation)<sup>438</sup>. But, with the FIT-CISL signature of the cabin crew agreement in October 2018, that the other Trade Unions completely oppose, the context has changed and the national divisions – among

<sup>434</sup> On this rule see *amplius* F. Dorssemont & A. van Hoek, *Collective action in labour conflicts under the Rome II Regulation (part I)*, 1 *European Labour Law Journal* 48-75 (2011) and *id.*, *Collective action in labour conflicts under the Rome II Regulation (part II)*, 2 *European Labour Law Journal* 101-118 (2011).

<sup>435</sup> A. Loffredo, *supra* n. 4, 16.

<sup>436</sup> V. Speciale, *La mutazione genetica del diritto del lavoro*, 322 *W.P. C.S.D.L.E. "Massimo D'Antona".IT* 19 (2017).

<sup>437</sup> It is worth noting that, besides the collective actions above mentioned, Ryanair had cancelled in the last months a huge number of flights, officially for the necessity of pilots to go on holiday but actually due to the transition of many of them to other airlines which guarantee better working conditions. Because of that Ryanair has had to face several disputes in order to compensate consumers.

<sup>438</sup> Available at: <http://77.43.11.66/notiziari/2017/allegati/ALL164TA1.pdf> (accessed 19 Oct. 2018).



the Trade Unions affiliated to EFT and ITF – risk to seriously affect the supranational organisations' activism against Ryanair's social dumping practices in the aviation sector. However, it is remarkable that Trade Unions in Europe are organising beyond official Trade Union Federations as well, and succeeded in organising an effective and coordinated strike action.