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A Solution in Search of a Problem?

Collective Rights and the Antitrust Labour Exemption in Italy

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15.1 INTRODUCTION

This chapter is tasked with examining the Italian legal framework regulating the collective rights of self-employed workers. More specifically, it seeks to investigate potential conflicts (if any) arising between collective labour rights and the application of competition law and free-market policies to self-employed workers and the fragmented constellation of differentiated personal labour relations that escape binary taxonomies.[1] The chapter's overarching goal is to understand whether and to what extent concerted wage-fixing practices are granted a special (express or implied) immunity at the domestic level.

Addressing this issue is vital to unravel the nature and scope of antitrust labour exemptions in the post-industrial society, a topic that is gaining increasing attention at a time when numerous non-standard workers are unreasonably left under- or un-protected due to legal uncertainties and loopholes resulting in their exclusion from the scope of application of several social measures. Amongst other things, a short-sighted interpretation and application of antitrust restrictions may be acutely problematic.[2] Workers face the risk that collective negotiation outcomes could be vulnerable from a legal standpoint, as zealous competition authorities may challenge them, thus potentially undermining the actual exercise of this set of rights. Several commentators are advocating a much-needed revision of competition law, whose 'current interpretations might be too narrow to adequately cater for the changing realities of the labour market'.[3]

Before going any further, we must admit that national attitudes towards this issue mostly echo international debates stemming from the Court of Justice of the European Union's well-known *Albany*[4] and *FNV Kunsten*[5] cases or recent local developments in other EU Member

This chapter is the result of the joint research of the authors; however, Sections 15.1 and 15.4 must be attributed to Antonio Aloisi and Sections 15.2 and 15.3 must be attributed to Elena Gramano. The final remarks have been jointly written by the authors.

[1] International Labour Office, *Non-standard employment around the world: Understanding challenges, shaping prospects* (ILO 2016); Piera Loi, 'Il lavoro autonomo tra diritto del lavoro e diritto della concorrenza' (2018) 40 Giornale di diritto del lavoro e di relazioni industriali 4, 843–69; Vania Brino, *Diritto del lavoro, concorrenza e mercato: le prospettive dell'Unione europea* (Cedam 2012).

[2] Valerio De Stefano and Antonio Aloisi, 'Fundamental Labour Rights, Platform Work and Human Rights Protection of Non-Standard Workers' in Janice R. Bellace and Beryl ter Haar (eds.), *Labour, Business and Human Rights Law* (Edward Elgar 2019) 359–79.

[3] Eurofound, 'Back to the future: Policy pointers from platform work scenarios' (Publications Office of the European Union 2020).

[4] Case C-67/96, *Albany International BV* v. *Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430.

[5] Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2411.

States.[6] Conversely, historical evidence suggests that collective agreements covering the kaleidoscopic and dynamic group of non-standard workers, including genuine self-employed ones, have never been targeted by the Italian competition authority. Existing antitrust rules are not enforced against unions negotiating better employment conditions on behalf, and in the interests of, self-employed workers.

Despite this, the emergence of rapidly changing phenomena such as platform work, to name the most visible one, is putting existing social institutions under intense stress. Not only are policymakers looking for concrete solutions, but the whole system of industrial relations is faced with seemingly insurmountable legal conundrums and practical hurdles. One must, however, admit that – as is the case in many other areas of law – the so-called *gig economy* is exacerbating perennial dilemmas. Therefore, perhaps unconsciously, the hype generated by unorthodox organisational and contractual patterns could be leveraged to address more general queries from both regulatory and practical points of view.[7]

Recent shifts in modern labour markets, in tandem with other long-term trajectories such as casualisation, outsourcing and tertiarisation, have revamped the prolonged, heated controversy on the compatibility between collectively negotiated terms and conditions, including pay rates, and competition-enhancing provisions deriving from EU primary law.[8] Undeniably, platform work is not the only elephant in the social partners' room. Moreover, many courts are already reclassifying platform workers as employees, which renders tensions between antitrust policies and collective labour laws less conflictual in this arena. However, there is a sizeable 'grey area' between employment and self-employment, and workers who occupy it would benefit the most from collective action and negotiation.

What is worse, 'the rising prevalence of atypical forms of labour market engagement takes even larger numbers of workers outside the scope of the competition law exemptions, [and] thereby risks limiting access to meaningful collective bargaining'.[9] Besides, it is becoming evident that, at least in some areas of the labour market, a strict application of antitrust restrictions is inconsistent with the purposes of the discipline,[10] so much so that EU Vice President Margrethe Vestager claimed that it is crucial to 'make sure that there is nothing in the competition rules to stop those platform workers from forming a union, to negotiate proper wages as … in any other business'.[11]

In 2020, the EU Commission launched a consultation on the right of self-employed people to collectively bargain with the aim of 'ensur[ing] that the EU competition rules do not stand

[6] Nicola Countouris and Valerio De Stefano, 'Collective-bargaining rights for platform workers' (*Social Europe*, 6 October 2020) <www.socialeurope.eu/collective-bargaining-rights-for-platform-workers> accessed 10 April 2021.

[7] In Italy, 21 per cent of the working population are self-employed workers, while the average at the EU level is 15 per cent. 66 per cent are own account self-employment workers, while 22 per cent have only one client: Jelle Visser, ICTWSS Database, Version 5.0 (AIAS 2015).

[8] Art. 101 TFEU; Art. 28 of the EU Charter of Fundamental Rights is overlooked, though. At the national level, see Law No. 287 10/10/1990 'Norme a tutela della concorrenza e del mercato' (The Competition and Fair-Trading Act). Art. 2 of the Law bans agreements, practices and decisions of 'associations' of undertakings, which have as their purpose or effect to prevent, restrict, or distort competition within the national market or a substantial part thereof. It is undisputed, however, that trade unions are not undertakings, nor do they pursue economic activity. Camilo Rubiano, *Collective bargaining and competition law: A comparative study on the media, arts and entertainment sectors* (IFM 2013).

[9] Alan Bogg and Tonia Novitz, *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014); Adalberto Perulli, 'Il diritto del lavoro oltre la subordinazione: le collaborazioni etero-organizzate e le tutele minime per i riders autonomi' (2020) WP CSDLE 'Massimo D'Antona' IT 410.

[10] Ewan McGaughey, 'A Human Is Not a Resource' (2020) 31(2) King's Law Journal 215–35.

[11] Javier Espinoza, 'Vestager Says Gig Economy Workers Should "Team Up" on Wages' (*Financial Times*, 24 October 2019) <https://on.ft.com/2pPHst2> accessed 10 April 2021.

in the way of collective bargaining for those who need it'.[12] In December 2021, the EU Commission published its new draft guidelines on collective bargaining of 'solo self-employed persons, namely, service providers who do not have any employees and who rely primarily on their own personal labour for the provision of the services.' [13] A limited antitrust immunity applies to some narrowly defined categories of self-employed workers in a situation comparable to that of workers, should they conclude collective agreements concerning their working conditions.[14] Considering this, the guidelines have been hailed as a concrete step forward compared to the existing situation where the most vulnerable self-employed, including those working with platforms, are on too shaky grounds vis-à-vis (an outdated interpretation of) competition law principles.

Besides offering concrete examples, we will situate the examination of the Italian labour antitrust exemption in the broader picture of the adequacy of the current mechanisms of 'collective self-regulation' for solo, own account, small-scale or dependent self-employed workers. The core of this assessment can be deemed relevant for all forms of work, diverging from the *archetypal* model of a bilateral, full-time, open-ended relationship between a single employer and an employee, a model on which collective bargaining systems are often still predicated.[15]

Appraising this tension, and its latitude, at the domestic level is the ambition of the following sections of this contribution, which is organised as follows. The second section presents a general introduction of the regulation of collective rights in the Italian Constitution. The third section illustrates case law development, especially at the Constitutional Court level, on whether self-employed workers fall within the personal scope of collective rights. It also argues that several provisions corroborate that the lawmaker often entrusts social partners in regulating specific and meaningful aspects of the working relationship of certain categories of self-employed workers, thus proving that there is no inconsistency between antitrust law and collective negotiation of contractual terms. Two arguments run intertwined in the fourth part. On the one hand, we intend to present a selection of collective agreements for non-standard workers, never called into question by competition authorities, and on the other, we discuss how long-established trade unions have attempted to include non-standard workers in their membership through multiple, not necessarily successful, attempts. This section also presents a selection of practical hurdles that make it difficult to build solidarity amongst non-standard workers and negotiate collectively. The fifth section concludes.

15.2 COLLECTIVE RIGHTS IN THE ITALIAN CONSTITUTION

Before proceeding, it is worth introducing some caveats and defining the scope of this legal analysis aimed to address the complicated yet peaceful relationship between collective agreements for non-standard workers and antitrust regulations in Italy.

First, while collective autonomy arose as a complement to the heteronomous intervention of the State, collective rights of trade union association and strike have been exercised 'in the

[12] European Commission, *Competition: The European Commission Launches a Process to Address the Issue of Collective Bargaining for the Self-employed* (European Commission, 30 June 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1237> accessed 10 April 2021.

[13] European Commission, *Guidelines on the Application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons* COM (2021) 8838 final, <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6620> accessed 10 January 2022.

[14] Ibid., para 23.

[15] Bruno Caruso, 'La rappresentanza delle organizzazioni di interessi tra disintermediazione e re-intermediazione' (2017) WP CSDLE 'Massimo D'Antona' IT 326.

shadow' of the constitutional provisions governing them.[16] This is mainly due to historical, cultural, technical and socio-political reasons.[17] Understanding whether and to what extent self-employed workers enjoy collective rights in the Italian system is intriguing.[18] Undoubtedly, the national industrial relations system relies on minimal rules. This causes legal uncertainty about the actual scope of some collective rights. In addition, the legal notion of self-employment encompasses a wide variety of workers who experience dissimilar situations of vulnerability and potential dependency on a client. This might affect the capacity of self-employed workers to unionise and to find stable communities sharing the same interests.

Under the Italian Constitution, the extent to which self-employed workers are entitled to exercise collective rights depends on three main provisions. First, Article 39, paragraph 1 of the Italian Constitution, states that 'trade union organisation is free'.[19] Workers have the right to form and join a union, freely organise all union activities, withdraw from a union and form a new one. Traditionally, the main objective of union activities has been to negotiate better working conditions and decent wage levels. In this respect, an essential role is played by the National Collective Bargaining Agreement ('Contratto collettivo nazionale di lavoro', hereinafter NCBA), which is the contractual source agreed upon by social partners at the national level to govern employment relationships in a certain economic sector by establishing minimum wage rates and general working conditions, from working time to sick leaves and many other aspects.[20]

Second, Article 36 requires that workers are paid 'commensurately' to their work, which is also 'adequate' to ensure for 'them and their families a free and decent existence'. This right is implemented through NCBAs as instruments of ordinary contract law,[21] or to use a legendary formula, 'hybrid with a "contract" shape and a "law" soul'.[22] They are legally binding only for the contracting parties. Yet, collective agreements or, at least, the economic part of them (i.e. the minimum wage-setting elements) cover a significant number of workers (presumably 80 per cent of the Italian workforce), broader than those formally bound by the NCBAs, thanks to a consolidated judicial reading, which, in case of dispute, has long identified the minimum wage set down in the relevant national collective bargaining agreements as an external parameter for assessing the fairness (understood both as sufficiency and proportionality) of an employee's remuneration, declaring individual contractual arrangements that provide for lower pay ineffective since they conflict with Article 36 of the Constitution on remuneration.[23] This has encouraged a pragmatic approach making less urgent the need to conceive a legislative mechanism for extending the effects of collective agreements.

[16] Brian Bercusson, 'The Dynamic of European Labour Law After Maastricht' (1994) 23(1) *Industrial Law Journal* 1–31.

[17] Mariella Magnani, 'The Role of Collective Bargaining in Italian Labour Law' (2018) 7 *E-Journal of International and Comparative Labour Studies* 2; Orsola Razzolini, 'Self-Employed Workers and Collective Action: A Necessary Response to Increasing Income Inequality' (2022) Comparative Labor Law and Policy Journal, *forthcoming*; Rosita Zucaro, 'Lavoro autonomo. Un modello di rappresentanza per un emergente interesse collettivo' (2018) 4(2) *Labour & Law Issues* 178–200.

[18] Elena Gramano, 'Collective Rights of Autonomous Workers Under the Italian Legal System' in Bernd Waas (ed.), *Collective Bargaining for Self-employed Workers in Europe* (Wolters Kluwer 2021).

[19] Gino Giugni, *Diritto sindacale* (L. Bellardi, P. Curzio and V. Leccese eds., Cacucci Editore 2014); Mario V. Ballestrero, *Diritto sindacale* (Giappichelli 2018); Paola Bellocchi, *Libertà e pluralismo sindacale* (Cedam 1998).

[20] In Italy there is no statutory enactment that guarantees a minimum remuneration for workers, therefore the NCBA represents the main source in setting minimum wages.

[21] 'The contract is only binding between its parties. No third parties can claim any rights with respect thereto' (Article 1372 of the Italian Civil Code).

[22] Francesco Carnelutti, *Teoria del regolamento collettivo dei rapporti di lavoro* (Cedam 1927).

[23] According to Article 36 of the Italian Constitution, 'Workers have the right to a remuneration commensurate to the quantity and quality of their work and in all cases to an adequate remuneration ensuring them and their families a free and decent existence.'

Third, Article 40 of the Constitution states that 'the right to strike shall be exercised within the limits set by the laws which govern it'. Strikes are therefore acknowledged as a constitutional right that can be limited *only* via statutory provisions. After more than seventy years from the entry into force of the Constitution (1948), the law to which Article 40 entrusts the regulation of the right to strike has never been enacted, with the sole exception of the regulation of strikes in essential public services (Law No. 146/1990).

Indeed, the Italian lawmaker failed to adopt legislation implementing both Articles 39 and 40 of the Constitution.[24] However, as these constitutional provisions recognise fundamental rights, there is no need for an ordinary law to make these rights *enforceable* in the relationships between the State and citizens and among private individuals. Rather, the absence of ordinary laws on the matter creates a normative vacuum when it comes to defining the scope of such rights and their limits when other fundamental rights are at stake. The Constitutional Court has played a vital role by filling the gaps left by the lawmaker. In light of this, we stress that the Italian industrial relations system essentially developed outside the law in a complex intertwining of collective autonomy, power dynamics, rules governing private law contracts and the Constitution, as interpreted by the Constitutional Court and more in general by case law.

There is no denying that, being essential vehicles for *securing* decent working conditions for all workers,[25] collective bargaining agreements have an inherently *anti-social dumping* nature, preventing unfair competitive advantage through wage-cutting.[26] They are specifically aimed at reducing the detrimental competition between workers and at alleviating 'the pressure to undercut the price of each other's labour'.[27] By default, workforce coalitions function to increase contractual power and reduce the imbalance of power vis-à-vis the management and employers; an ineluctable condition of the labour market explained by the number of individuals selling labour energies being higher than the number of those who can buy them.

15.3 COLLECTIVE RIGHTS FOR SELF-EMPLOYED WORKERS

Neither the lawmakers nor case law or scholars ever suspected that the mandatory application of the wage rates to self-employed workers could constitute an illegal cartel and a breach of antitrust laws.

[24] A relevant piece of legislation entered into force in 1970, known as the Statute of Workers (Law No. 300/1970), and promotes union activities and ensures that these rights can be lawfully exercised within the premises of the firm. The parts of the Statute aimed at ensuring the right to constitute and promote union activities within the company's premises are considered as non-applicable to self-employed workers. The same goes for Article 28 of the Statute, which provides a particular judicial instrument aimed at repressing anti-union conduct, such as impeding or limiting the exercise of trade union activity or the right to strike. The Constitutional Court affirmed that the special union promotion and protection in the workplace must be considered as limited to employees, since they continuously perform their work within the employer's organisation and in a situation of dependence and subordination. Contrariwise, self-employed workers do not perform their work at the exclusive service of an employer, nor are they permanently included in a business organisation. As a result, self-employed workers do not enjoy collective rights to the same extent as subordinate employees, at least with reference to those pieces of legislation promoting union activity inside the firm.

[25] Roberto Voza, *Interessi collettivi, diritto sindacale e dipendenza economica* (Cacucci 2004); Luigi Mengoni, *Il contratto collettivo nell'ordinamento giuridico italiano* (1975) 2 JUS 167; Luigi Mengoni, *Diritto e valori* (Il Mulino 1985) 247.

[26] Opinion of AG N. Wahl in Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2215, paras. 76–94.

[27] Michael Doherty and Valentina Franca, 'Solving the "Gig-saw"? Collective Rights and Platform Work' (2020) 49(3) Industrial Law Journal 352–76.

While it is undisputed that subordinate employees are fully entitled to exercise collective rights recognised by the Italian legal system,[28] neither the Constitution nor any other source of regulation in the Italian legal system stipulate the scope of Articles 39 and 40 and clarify whether non-subordinate workers are entitled to exercise these fundamental rights. This uncertainty has been addressed thanks to several combined factors:

(1) the Constitutional Court repeatedly extending the scope of collective rights beyond the boundaries of the narrow notion of employment;
(2) while never expressly clarifying the personal and material ambit of application of Articles 39 and 40 of the Constitution, on many occasions the lawmaker has left it to the collective autonomy of self-employed workers to regulate certain aspects of their working relationship, implicitly recognising its lawfulness;
(3) associations representing the interests of some categories of self-employed workers have progressively been developed (this is the case of coordinated and continuous collaborators, consultants, commercial agents and sales representatives, doctors affiliated with the national public health system, artisans, farmers, etc.) and their activities have never been deemed to be unlawful.

Overall, the Italian legal system seems oriented towards broadening the scope of collective rights for self-employed workers.[29]

Generally, self-employed workers enjoy the right of association and perform in many sectors collective action to promote and bolster their collective interests, but also to improve working conditions and increase remuneration. However, it is unclear whether such freedom shall be framed specifically under Article 39 of the Italian Constitution on trade union freedom or whether it constitutes a manifestation of the general freedom of association among citizens, recognised by Article 18 of the Constitution.[30]

Some scholars have denied the conflation between the collective action of self-employed workers and trade union activities.[31] Conversely, many have advocated the extension of the scope of trade union freedom to such workers, considering their condition of social-economic inferiority as the precondition that enables the extension of the scope of Article 39.[32] According to several commentators, the right to strike must also be granted to self-employed workers if they experience a situation of weakness and precariousness.[33] The issue was dealt with by the Constitutional Court over time, through different judgments that

[28] According to Article 2094 of the Italian Civil Code 'An employee is a person who is under the obligation by remuneration to collaborate in the company, providing for an intellectual or manual activity, at the dependence and under the direction of the entrepreneur.' For an analysis of the concepts of subordination and self-employment see Maurizio Del Conte and Elena Gramano, 'Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under the Italian Legal System' (2018) 39(3) Comparative Labor Law & Policy Journal 579–605.

[29] Gino Giugni, 'La funzione giuridica del contratto collettivo di lavoro' in *Atti del terzo congresso nazionale di diritto del lavoro sul tema "Il contratto di lavoro"* (Giuffrè 1967); Anna M. Grieco, *Libertà e azione sindacale dei lavoratori autonomi* (Jovene 2005); F Carinci, Tamajo R. De Luca, P. Tosi and T. Treu, *Diritto del Lavoro* (1st ed., Il Diritto Sindacale 2018) 106–08.

[30] Paolo Tomassetti, 'Il lavoro autonomo tra legge e contrattazione collettiva' (2018) 3 Variazioni su Temi di Diritto del Lavoro 717–60.

[31] Renato Scognamiglio, *Il lavoro nella costituzione italiana* (Franco Angeli 1978).

[32] Gino Giugni, 'Articolo 30' in G. Branca (ed.), *Commentario della Costituzione* (Zanichelli 1979); Gino Giugni, *Digesto Italiano* IV (vol. IX, 17th ed., Libertà sindacale 1993).

[33] Maria Vittoria Ballestrero, *Diritto sindacale* (Giappichelli 2018); Giuseppe Santoro-Passarelli, *Il lavoro parasubordinato* (Franco Angeli 1979) 119; Giorgio Ghezzi and Umberto Romagnoli, *Il diritto sindacale* (Zanichelli 1992); Mattia Persiani, *Diritto sindacale* (Cedam 1994).

progressively drew the boundaries of Articles 39 and 40 and their personal scope. In Case No. 1 of 1960, the Constitutional Court stated that trade union freedom is not exclusively granted to employees. In Judgment No. 29 of the same year, the Constitutional Court declared the unconstitutionality of the crime of lock-out, precisely referring to the principle of trade union freedom recognised by Article 39 as applicable also to employers and, more in general, non-subordinate workers.

In 1975, the Constitutional Court (Case No. 222/1975) stated that Article 39 enshrines the freedom of trade union organisation of all workers, either subordinate or self-employed and declared the unconstitutionality of Article 506 of the Criminal Code, which prohibited the lock-out of small-scale entrepreneurs.[34] According to the Court, the stay-away of small entrepreneurs who do not employ any other worker cannot be classified as a lock-out. It is instead a form of protest similar to the strike, which is also made available to the self-employed.[35]

The Supreme Court ('Corte di Cassazione') has also classified as a lawful strike industrial action conducted by doctors who have an agreement with the National Health Service, agents and sales representatives and, in general, self-employed workers in conditions of weakness.[36] In addition to the relevant case law of the Constitutional Court, the Italian lawmakers, over time, also provided clear indicators of the extension of the collective right at least to the area of coordinated and continuous self-employment.[37]

The following paragraphs map a set of regulations aimed at coupling autonomous workers' conditions with the standard enshrined in collective agreements.

15.3.1 *Project-Based Coordinated and Continuous Collaborations*

According to Article 409 of the Italian Code of Civil Procedure, coordinated and continuous collaborators ('collaboratori coordinati e continuativi', para-subordinate workers) are workers 'who collaborate with a principal under a coordinated, continuous and mainly personal relationship, *without subordination*. [Such relationship] is understood to be coordinated when, in compliance with the methods established by mutual agreement between the parties, the collaborator autonomously organises the execution' (emphasis added). In the absence of an employment relationship, para-subordinate workers are considered self-employed workers. However, given some features (personal nature of the working activities, requiring little if any organisational structure, continuous activity to the benefit of the same principal over time, coordination between the principal's organisation and the worker), they have been covered by multiple pieces of legislation, aimed at protecting a vulnerable group of workers through diverse approaches.

[34] For a similar conclusion, Italian Constitutional Court No. 145/1988.

[35] The extension of Article 40 is excluded when it comes to categories of 'economically strong' self-employed workers or small entrepreneurs employing other workers based on judgment No. 222/1975 of the Constitutional Court. According to the Constitutional Court No. 171/1996, stay-away carried out by lawyers cannot be qualified as a strike in a technical sense and therefore does not fall within the scope of Article 40. The Court stated that the protest of lawyers does not fall under the scope of trade union freedom, but it is based and justified in the wider freedom of association provided by the Constitution. Adriana Topo, 'Tutela e rappresentanza degli interessi collettivi nel lavoro autonomo' (1997) 2 Lavoro e Diritto 203–15; Francesco Santoni, 'Lo «sciopero degli avvocati» nel giudizio della Corte costituzionale' (1996) Massimario di Giurisprudenza del Lavoro 465.

[36] Italian Supreme Court No. 3278 [1978].

[37] Franco Scarpelli, 'Autonomia collettiva e autonomia individuale nella regolazione del rapporto dei lavoratori parasubordinati' (1999) 4 Lavoro e diritto 553–69.

In 2003 the first systematic regulation of coordinated, continuous collaborations entered into force imposing, with few exceptions, that they should be hired under a specific 'project',[38] agreed upon by the parties at the signing of the contract, yet autonomously managed by the worker for the whole duration of the working relationship (so-called project-based collaborations, 'collaborazioni a progetto'). The goal was to force the parties to articulate in the contract the reasons vindicating the autonomy of the worker, fully independent in the execution of the project and the expected results.

Interestingly, some years later, the law was amended by Law No. 92/2012, which required that the compensation paid to project-based collaborators should have been 'not lower than the minimum wage established by collective bargaining for each sector'.[39] In the absence of specific collective bargaining agreements, the pay rates had to be not lower than the minimum wages provided for in the national collective agreements applied to 'standard' workers operating in the same sector and performing similar tasks.

The provision recognised that a collective bargaining agreement could lawfully determine the minimum wage rates of para-subordinate workers and that those rates were *mandatory* for the relevant sector and could not be reduced by means of the individual contract signed between the principal and the workers. This mandatory provision represents yet another telling example of how the terms included in collective agreements for the standard worker can be used as an 'external parameter' benefiting self-employed workers as well.[40] By requiring compensation compliant with minimum wage levels in collective agreements, this regulatory technique was expected to make the economic treatment less convenient, thus discouraging the use of 'project work' to disguise an employment relationship.

The purpose of the lawmaker was clear: securing the fairness of the minimum remuneration levels for project-based collaborators by extending the application of the wage rates identified in the collective bargaining agreements of the same sector or similar ones.

15.3.2 *Self-Employed Workers Organised by the Other Party*

The case of self-employed workers organised by the other party represents another good argument in favour of the recognition of self-employed workers' collective rights in Italian law. Legislative Decree No. 276 of 2003 was entirely abolished by Legislative Decree No. 81 of 2015, part of the Jobs Act reform package, and project-based collaborations no longer exist.[41] Instead, Article 2 of the Legislative Decree No. 81 of 2015 broadened the scope of application of employment legislation, now applicable to workers who do not fall within the notion of 'subordinate employee' set forth by Article 2094 of the Civil Code. The new law states that 'employment regulation also applies to relationships that are mainly personal, continuous work, whereby the principal organises the execution. The provisions shall also apply when the performance is organised through digital platforms.'[42]

[38] Gaetano Natullo, 'Lavoro parasubordinato e contrattazione collettiva: un "progetto" ancora incompleto' in M. Rusciano, C. Zoli and L. Zoppoli (eds.), *Istituzioni e regole del lavoro flessibile* (Editoriale Scientifica 2006).

[39] Monti-Fornero Reform Law No. 92/2012; For instance, '*outbound*' call centres have been authorised to resort to coordinated and continuous collaboration arrangements without complying with the stringent limits insofar as the pay rates were anchored to the levels set in the corresponding collective agreements.

[40] E. Villa, 'Crisi della funzione anticoncorrenziale del contratto collettivo nazionale' in A. Lassandari, F. Martelloni, P. Tullini and C. Zoli (eds.), *La contrattazione collettiva nello spazio economico globale* (Bononia University Press, 2017) 73.

[41] Del Conte and Gramano (n. 28).

[42] Legislative Decree No. 81/2015, Art. 2 (as amended by Law No. 128/2019); Antonio Aloisi, 'Platform Work in Europe: Lessons Learned, Legal Developments and Challenges Ahead' (2022) 13(1) European Labour Law Journal 4–29.

As of 2016, Italian statutory employment protection is also applicable to those coordinated and continuous collaborations, whereby the principal unilaterally organises the work performance. The law does not exclude any portion of the regulation of employment from the application to this category of workers. Article 2 states that employment law *applies* to them. That would suggest that these workers fully enjoy collective rights as much as subordinate employees.

Importantly though, the second Paragraph, letter a), of Article 2 provides that national collective bargaining agreements, signed by trade unions that are comparatively more representative at the national level, can provide for a specific framework regarding economic and regulatory conditions due to the organisational needs of the relevant sector. This precludes the application of the employment law to self-employed workers organised by the other party. Social parties who fall under the conditions set by the law, therefore, are entitled to *exclude* certain collaborators from the application of statutory employment law if (and only if) a national collective agreement covers them and provides for specific economic and regulatory frameworks.[43]

Such provision further stresses the 'trust' of the Italian lawmaker towards the representativeness and the capacity to bargain for fair working conditions and wages by unions representing self-employed workers.[44] These examples implicitly recognise the lawfulness of self-employed workers' collective action and bargaining activity.

Indeed, a principle of the Italian legal system is that private parties (either at the individual level or at the collective level) cannot derogate from the application of employment law: if a worker falls within the notion of employment (Civil Code Article 2094), the whole statutory employment regime must apply. Consequently, if the lawmaker allows for a national collective bargaining agreement to *exclude* the application of employment law, these workers cannot per se be considered as subordinate employees. They are self-employed workers who *would* enjoy the application of the employment law. However, if a national collective bargaining agreement fulfilling the conditions set by the law is signed, they are subject not to the application of employment law, but to the collective bargaining agreement instead.

Once again, a legal provision confirms that the collective representation of self-employed workers' interests by a union and its concrete result are part of the ordinary make-up of the Italian industrial relations system. Collective autonomy is expected to complement the law.[45]

15.3.3 *The Strange Case of Self-Employed Platform Riders*

In 2019, a new law was adopted, allowing collective agreements to set the pay rate for 'self-employed riders' providing services for online platforms in urban areas using mopeds or motor vehicles. A specific framework has been introduced for self-employed platform riders in the last-mile logistics sector (hereinafter, for the sake of simplicity, 'self-employed riders').[46] Oddly

[43] Lucio Imberti, 'L'eccezione è la regola?!' (2016) 2 Diritto delle Relazioni Industriali 393.

[44] Note that Article 2 belongs to the same Legislative Decree (No 81/2015) which abolished Legislative Decree No. 276/2003 that in the past governed coordinated and continuous collaborations (see above Section 15.3.1).

[45] Armando Tursi, 'L'articolo 8 della legge n. 148/2011 nel prisma dei apport tra legge e autonomia collettiva' (2013) 4 Diritto delle Relazioni Industriali 958.

[46] Legislative Decree No. 81/2015 (Amended by Law Decree No. 101) [2019], converted by Law No. 128 of 2019. Andrea Lassandari, 'Problemi di rappresentanza e tutela collettiva dei lavoratori che utilizzano le tecnologie digitali' (2017) 2 Quaderni Rivista Giuridica del Lavoro e della Previdenza Sociale 59; Michele Forlivesi, 'Interessi collettivi e rappresentanza dei lavoratori del web' in P. Tullini (ed.), *Web e lavoro* (Giappichelli 2017) 179; Federico Martelloni, 'Individuale e collettivo: quando i diritti dei lavoratori digitali corrono su due ruote' (2018) 4 (1) Labour & Law Issues 21.

enough, the Italian lawmaker decided to introduce a regulation for this residual category of self-employed workers, who are genuinely autonomous.

Under certain conditions,[47] in light of the specific technical and production needs of the sector, only collective agreements signed by the 'comparatively most representative organisations on a national level' can legitimise an opt-out from the mandatory regime, determining the overall remuneration that takes into account the way in which the service is rendered and the organisation of the principal. In the absence of a collective bargaining agreement, workers cannot be exclusively remunerated on a per-delivery basis. They must be paid in accordance with a minimum hourly remuneration based on the pay rates established by national collective agreements *in similar or equivalent sectors* signed by the trade unions and employer organisations that are comparatively more representative at the national level. They must also be guaranteed an extra indemnity for those deliveries completed during the night, holidays or adverse weather conditions.[48]

Collective bargaining is tasked with establishing the protection and the 'criteria for determining the overall compensation that takes into account the manner in which the service is performed and the organisation of the client' (Article 47-*quater*, paragraph 1). Although this regulation does not apply to *all* self-employed workers, it is clear proof that lawmakers entrusted collective bargaining agreements to determine the minimum rates of wages of autonomous platform riders. The lawmaker intended to leave the floor to the social partners in defining the minimum wages of these workers, once again demonstrating that antitrust law has nothing to do with personal working relationships but shall be referred exclusively to regulating enterprises on the market.[49]

15.4 FRAGMENTATION, COLLECTIVE BARGAINING AND COMPETITION LAW

The legitimacy of collective agreements has never been questioned by the 'Autorità Garante della Concorrenza e del Mercato' (the Italian antitrust authority), an administrative independent authority concerned primarily with defending consumers from anticompetitive practices by sellers.

In short, in the Italian legal order, this is a question that has never arisen as such, although labour scholars have been stimulated by the CJEU case law stigmatising collective agreement as irreconcilable with competition law. In principle, the outcome of a collective agreement reached by companies or business organisations and representatives of non-subordinate workers could be allegedly considered in breach of EU competition law. This view blatantly neglects the fact that the right to bargain collectively is a 'fundamental labour right recognised as such by a number of supranational and regional sources'.[50] There are indeed several collective agreements setting wages for genuine self-employed workers. The antitrust authority has been accepting them for decades.[51]

[47] Trade unions must be those 'comparatively most representative at the national level', the agreement must be justified based on the special, explicit needs of the industry and must include both economic and contractual provisions.

[48] Law No 128/2019, Art. 1, para. 2 [2020].

[49] Marco Biasi, '"We Will All Laugh at Gilded Butterflies": The Shadow of Antitrust Law on the Collective Negotiation of Fair Fees for Self-Employed Workers' (2018) 9(4) European Labour Law Journal 354–73.

[50] Nicola Countouris, Valerio De Stefano and Ioannis Lianos, Chapter 19 in this collection. See also Silvia Rainone and Nicola Countouris, *Collective Bargaining and Self-Employed Workers* (ETUI 2021).

[51] Amedeo Arena, 'La *labor antitrust exemption* al vaglio della Corte di giustizia: quale contrattazione collettiva per i lavoratori cd falsi autonomi? (Commento a C. Giust. 4 dicembre 2014, causa C-413/13)' (2016) 1 Diritti lavori mercati 143–63.

At the outset, collective bargaining agreements have been deemed legitimate for all workers who are in a condition of contractual and economic weakness, considering their beneficial objectives in terms of 'race to the bottom' prevention.[52] In addition, throughout the years, this system has become de facto a way to ensure accountability while promoting mutual trust between social partners and workers who have not traditionally been represented by long-established unions (more on this below).

This 'fragile' arrangement, based on the conflictual equilibrium achieved by the social partners thanks to their self-regulation, is far from perfect. Its weaknesses are becoming increasingly pressing because of the fragmentation of actors, actions and institutions. Collective bargaining is unpopular among self-employed workers, but we claim that this is mainly due to a wide variety of reasons examined in the following paragraphs. In fact, declining union power, falling union membership rates, decreasing collective bargaining coverage and the shift towards decentralised bargaining are straining the underlying assumptions of the model.

15.4.1 *'If It Ain't Broke, Don't Fix It': The State of Play and New Trajectories*

However limited, there are and have always been initiatives of collective representation of self-employed workers. NCBAs for self-employed workers have been signed in credit recovery institutions, organisations providing occupational training, non-state schools and universities, private research centres, market research institutes, active labour market policies centres, local public authorities and non-governmental institutions. They have never been the subject of dispute or even assessment by the national antitrust authority.[53]

Moreover, some genuine self-employed workers have their collective agreements explicitly recognised by legislation. The most prominent example is the 'collective economic covenant' signed by agents and sales representatives. Indeed, according to Article 1751 of the Italian Civil Code, when a non-compete clause is in force, the compensation to be paid to a commercial agent by her principal 'shall be determined according to the criteria established by the relevant collective bargaining agreements applicable to the parties'. In addition, these collective bargaining agreements extensively set the terms and conditions applicable to self-employed workers, ranging from the rights and duties of the parties to the criteria to calculate the fees and the termination allowance, as well as notice in the case of termination.[54]

In a thorough overview, Tomassetti introduces a catalogue of several NCBAs, often presented under alternative labels, covering self-employed workers.[55] A detailed taxonomy of collective agreements for non-standard workers should include: (1) agreements precluding the application of labour law regulation to self-employed workers organised by the other party; (2) agreements promoting the transition from self-employment to employment in the service sector, in particular for marketing professionals such as 'promoters' and 'merchandisers'; (3) the hybrid model in the banking sector where workers sign two parallel contracts, a part-time employment contract

[52] Opinion of AG N. Wahl in Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI: EU: C:2014:2215, paras. 51 and 55; Giuseppe Santoro-Passarelli, *Il lavoro parasubordinato* (Franco Angeli 1979); Persiani (n. 33).

[53] In 2004 the first NCBA for para-subordinate workers in outsourced call-centres was signed; L. Fulton, Trade Unions Protecting Self-Employed Workers (ETUC 2018); Salvo Leonardi, 'Contrattare i parasubordinati' (2001) (II)3 Quaderni Rassegna Sindacale-Lavori 105–23; Domenico Garofalo, 'Commento al CCNL ASSOCALL-UGL del 22 luglio 2013' (2016) 5 Quaderni degli Annali del Dipartimento Jonico in Sistemi Giuridici Economici del Mediterraneo.

[54] Nicola Countouris and Valerio De Stefano, *New Trade Union Strategies for New Forms of Employment* (ETUC 2019).

[55] Tomassetti, (n. 30).

and a consultancy agreement;[56] and (4) agreements extending welfare packages to self-employed workers.

These practical solutions address the specific needs of professional categories and industries, representing a testament to the longevity of organised labour and collective negotiations. Given the high level of technical 'creativity' of the arrangements, this vitality further proves that successful collective bargaining is the best means to enhance the attractiveness of organisations and companies, but also to maintain employment in labour-intense and low value-added economic segments.[57]

In Italy, there are unions for the self-employed with cross-cutting structures; such organisations include the 'Colap' (short for 'Coordinamento Libere Associazioni Professionali'), 'Confprofessioni' (short for 'Confederazione Italiana Libere Professioni', focused on collective bargaining) and 'Associazione Consulenti del Terziario Avanzato' (ACTA, a quasi-union mainly engaged in political advocacy; e.g. they achieved a reduction in social contributions by self-employed workers). Similarly, there are several examples of unions 'opening themselves to certain self-employed persons'.[58] Promising efforts of mutual aid and organisations with cross-cutting structures have been identified.

Unions' attitude towards non-standard workers has undergone a substantial change: from the refusal to organise non-standard workers on the grounds that this would have legitimated atypical and precarious arrangements, to the creation of specific 'one-stop' trade-union branches 'adopt[ing] strategies aimed at improving working conditions, social rights and wages of such workers'.[59] The 'first wave' of atypical employment relationships (part-time, fixed-term, temporary work agency contracts) has allowed unions to equip themselves to face the 'second generation' of casual work. Major unions have launched several specific representational initiatives: CGIL opened confederations for 'new work identities' ('Nuove identità di lavoro', Nidil) and Consulta delle Professioni; CISL launched Alai ('Associazione dei lavoratori atipici e interinali'), Clacs and, more recently, vIVAce and FeLSA; UIL created CpO ('Coordinamento per l'occupazione dei lavoratori atipici'), UILTemp and Sindacato Networkers. New representational 'units' are based on employment classification rather than on industry segmentation. These organisations try combining a 'service unionism' at territorial and regional levels with a general policy of advocacy at the national and supranational level.[60]

It would be inaccurate to claim that regulators have been completely blind to these practices or, otherwise, that their scarce popular resonance does not justify a direct intervention. As illustrated above, in 2015, the Italian Parliament legislated that collective agreements can exclude the application of a legal framework extending employment protection to self-employed workers under certain conditions.[61] Something similar occurred in 2019, with the law encouraging social partners to reach an agreement concerning remuneration levels for self-employed riders. There is no doubt that the policymakers have created a strong, direct incentive for social

[56] Financial advisers at the banking group Intesa work as part-time employees and self-employed.

[57] Roberto Voza, 'Collaborazioni organizzate dal committente e autonomia collettiva' (2016) 3 Diritti lavori mercati 527–51.

[58] Bernd Waas, *Challenges and Trends in Collective Labour Relations* (Mimeo 2020).

[59] Valeria Pulignano, Luis O. Gervasi and Fabio De Franceschi, 'Union Responses to Precarious Workers: Italy and Spain Compared' (2015) 22(1) European Journal of Industrial Relations 39–55; Rebecca Gumbrell-McCormick, 'European Trade Unions and "Atypical" Workers' (2011) 42(3) Industrial Relations Journal 293–310.

[60] Michele Forlivesi, 'La sfida della rappresentanza sindacale dei lavoratori 2.0' (2016) 3 Diritto delle relazioni industriali 664–78.

[61] The law extends employment protective legislation *en bloc*, including collective rights. What is problematic is that this mechanism operates *ex post*, in case of a legal dispute, see Rosa Di Meo, 'I diritti sindacali nell'era del caporalato digitale' (2019) 5(2) Labour & Law Issues 63–79.

partners to draw up dedicated agreements with the purpose of derogating from the application of a more protective framework.

Paradoxically, policymakers have explicitly allowed even collective agreements that do not rigorously comply with the *Albany* requirements since they are not aimed at adopting 'measures to improve conditions of work and employment'.[62] These agreements cover self-employed workers by deregulating labour protection, and their material goal is to mitigate the legal risk of litigation or grievances.

Although not a novelty of the Italian legal panorama, these cases – as the regulation of project-based collaborations of 2012 described above – corroborate the *anti-wage dumping* purpose of NCBAs. The analogy between the tasks executed by employees and independent contractors is used to pursue objectives of social policy discouraging low-cost alternatives, while promoting competition 'on the merits'.[63] Italian lawmakers realise that workers in the so-called 'hybrid area'[64] deserve to be protected considering their economic weakness and their continuous and functional integration into the client's business.[65]

Today, as shown by the OECD, 'independent unions of platform workers are *de facto* negotiating working conditions for their members even if they are classified as self-employed without any intervention from national antitrust authorities'.[66] There are several cases dominating the news headlines. At the local level, the municipality of Bologna encouraged the adoption of a 'Charter of fundamental digital workers' rights within an urban space', signed in 2018 by the city's Mayor, the Riders Union (a civic worker-led initiative), the representatives of the main national trade unions, and by the managers of a local food-delivery company. Irrespective of the workers' status, the Charter sets out a fixed hourly rate in line with the minimum wage in the respective industry, compensation for overtime, public holidays, adverse weather conditions and bicycle maintenance, insurance to cover occupational accidents and sickness.[67] This activism marks a new chapter in the long tradition of social dialogue, which has proven to be a sophisticated yet adaptable tool.

Despite this, the situation is less straightforward than expected. Conventional wisdom has long suggested that non-standard workers do not fall under the personal ambit of the application of collective bargaining rights. This discourse is predominantly justified by the practical hurdles frustrating the exercise of those rights. The next paragraph will sketch out these obstacles hampering collective action among non-standard workers.

15.4.2 *Organising the Unorganisable: A Tentative Overview of the Main Barriers for Non-standard Workers*

The need to extend collective bargaining agreements to the benefit of workers in the 'grey area' is an increasingly pressing matter due to rising social inequalities. Many non-standard workers

[62] 'It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty *when seeking jointly to adopt measures to improve conditions of work and employment*' (para. 59, emphasis added).

[63] *Intel* v. *Commission* [2017] C-413/14, P [133]–[4].

[64] Annalisa Murgia et al., 'Hybrid Areas of Work Between Employment and Self-Employment: Emerging Challenges and Future Research Directions' (2020) 86(4) Frontiers in Sociology 86.

[65] More than sixty years ago, the legislature attempted to establish the full enforceability of collective agreements, but without success. In so doing, the law included a system for setting mandatory economic and contractual minimum levels covering all workers in each industry, regardless of their status, Vigorelli Law (Law No. 741/1959).

[66] OECD, *Expert Meeting on Collective Bargaining for Own-Account Workers* (2020).

[67] Comune de Bologna, Carta dei Diritti fondamentali del lavoro digitale nel contesto urbano (2018) <www.comune.bologna.it/sites/default/files/documenti/CartaDiritti3105_web.pdf> accessed 10 April 2021.

are indeed in a position of economic disparity and express concrete yet unfulfilled demands regarding improvements of their contractual and working conditions.[68] It is hard to believe that collective negotiation for these categories would hinder competition or annihilate consumers' welfare, thus triggering a pushback by antitrust authorities.

Nonetheless, although non-standard workers are increasingly involved in advocacy and demonstrations in the public arena to express their concerns, practical – in addition to legal – obstacles hamper or make less attractive the exercise of collective bargaining rights for non-standard workers. The barriers can be divided into two major categories,[69] which are strictly entwined: (1) internal and (2) external.

From an internal viewpoint, there are, in turn, two subcategories of obstacles. Organisationally, many non-standard workers are barely in physical proximity, while frequent turnover reduces well-drilled membership and a robust activist base. There are neither proper workplaces nor recreational spaces where forces can coalesce or simply come into contact. This sequence of challenges is compounded by the solitary structure of emerging labour markets with the illusion of 'placelessness' and high levels of mobility.[70] A freelance workforce tied to the same company or final client may operate in multiple jurisdictions simultaneously, potentially on a global scale.[71] Regrettably, these two conditions are now spreading all over the labour market due to the massive adoption of work-from-home schemes to weather the risks in the context of the COVID-19 pandemic. Not surprisingly, among the downsides of remote working patterns, many commentators include the lack of impromptu 'watercooler talks' (while privacy is not granted in online 'breakout rooms') and the severe limitations to tangible collective action deriving from scarce organising opportunities. Moreover, while the traditional Italian union pattern is industrial, the emerging self-employed workers model is craft or occupational.

From a purely motivational standpoint, the literature also highlights several 'internal' barriers to the potential emergence of collective voice practices, such as a lack of self-perception and legitimate reluctance justified by the supposed absence of strong common interests.[72] In some highly segmented markets, individualism is perceived as intrinsic. Inevitably, the distribution of contracts over time and space leads to a fragmentation of aspirations, needs and preferences. This is especially relevant for some workers who do not see the convenience of joining unions since they do not even see themselves as traditional workers, bedazzled by the persistent myth of auto-entrepreneurship. The intermittent, short-term and on-demand nature of novel forms of work end up placing workers in direct rivalry with each other in an intense struggle for better-paid jobs and survival. They may have multiple and conflicting agendas as well as opposite interests, thus making the building of effective alliances over common demands hardly practicable. Psychologically, the fear of retaliation plays a significant role in discouraging collective action.

[68] Razzolini (n. 18).

[69] This section owes a debt to a previous article, which explored these issues in greater length: Antonio Aloisi, 'Negotiating the digital transformation of work: non-standard workers' voice, collective rights and mobilisation practices in the platform economy' EUI MWP WP (2019); see also Michele Forlivesi, 'Alla ricerca di tutele collettive per i lavoratori digitali: organizzazione, rappresentanza, contrattazione' (2018) 4(1) Labour & Law Issues 35–58.

[70] Hannah Johnston, 'Labour Geographies of the Platform Economy: Understanding Collective Organizing Strategies in the Context of Digitally Mediated Work' (2020) 159(1) International Labour Review 25–45.

[71] Valerio De Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach' (2017) 46(2) Industrial Law Journal 185–207.

[72] Many platform workers mention that they 'cannot afford to attend meetings and instead prefer completing another task to increase their earnings', Karolien Lenaerts et al., 'Traditional and New Forms of Organisation and Representation in the Platform Economy' (2018) 12(2) Work Organisation, Labour and Globalisation 60–78.

Moving on to the 'external' obstacles, it is possible to distinguish two subcategories. First, non-standard workers lack information and bargaining power, which, in turn, is exacerbated by the short-lived nature of assignments, and the triangular relationship with a self-proclaimed intermediary and a final client (often in highly uneven global supply chains). In addition to the weakness of the occupational and social identity, one must also consider relational hurdles resulting from multilayered contractual arrangements. Finding the counterpart may represent a serious challenge in many cases. As a direct effect of the triangular arrangements in the service-based sector, the worker's relationship with the final client may be a factor affecting the propensity to engage in collective action. While the extreme replaceability in some sectors could prompt a sense of dissatisfaction towards the management, the personal attachment to a regular client is likely to discourage any antagonistic approach.[73] There can be a system of relational outsourcing, which makes the employing entity unapproachable.[74] Very often, a principal may decide to discontinue workers' contracts to prevent collective action without having to face a classical dismissal procedure with all procedural and substantive safeguards. Despite the existing provisions prohibiting antiunion conduct, open or surreptitious hostility (if not even the victimisation of activists) represents a serious hindrance.

Second, this situation is further aggravated by the fact that self-employed workers can find it difficult to access the formal structures of representation or existing redress mechanisms that are in principle restricted to workers in an employment relationship, as defined by national laws and practices. When the counterpart is known, something that is not always obvious, the client could be reluctant to engage in functioning collective relationships as labour rights such as paid time off for trade union duties, spaces, and other resources come at a cost. In addition, new surveillance devices may help employers uncover and deter emerging conflictual initiatives or allow the exclusion of protest leaders and 'troublemakers',[75] thus weakening the unity of the protestors' group. Where reputation and ratings play a considerable role in securing the relationship with a final client or access to better-paid jobs, workers may feel particularly hesitant to exercise any collective right as it could adversely impact their status. In the platform economy, the legal status is a crucial element: undocumented workers tend to avoid public engagement to protect themselves from police background checks.[76] For all these reasons, non-standard workers may think twice before joining a union or initiating collective action.

15.5 FINAL REMARKS

In Italy, lawmakers and regulators have not viewed collective bargaining agreements for self-employed workers as an obstacle to the proper functioning of the market. The assumption that any form of the coalition and collective bargaining process of self-employed workers would hamper fair competition, leaving space for cartels or other types of concentration, could not be justified under

[73] Niels Van Doorn, 'On the conditions of possibility for worker organizing in platform-based gig economies' (2018) <https://platformlabor.net/blog/on-the-conditions-of-possibility-for-worker-organizing-in-platform-based-gig-economies> accessed 10 April 2021.

[74] International Labour Office, 'Digital labour platforms and the future of work: Towards decent work in the online world' (ILO 2018).

[75] Kurt Vandaele, *Will Trade Unions Survive in the Platform Economy? Emerging Patterns of Platform Workers' Collective Voice and Representation in Europe* (ETUI 2018).

[76] Hannah Johnston and Chris Land-Kazlauskas, 'Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy' (2018) 94 ILO Conditions of Work and Employment Series.

any equity and factual argument.[77] As we hope to have demonstrated, collective agreements can indeed introduce measures in a way that is faster, more responsive and accurate than through legislative intervention or onerous and individual protection and enforcement mechanisms.

Traditionally, the right to collective bargaining has been exercised both by trade unions solely representing self-employed workers and by trade unions chiefly representing employees. In this second case, union members may extend negotiated outcomes to non-negotiating parties, including self-employed workers.[78] Simultaneously, many social partners are experimenting with novel configurations to include non-standard workers either in their principal membership or in the 'comprehensive' collective agreements they sign. Indeed, the share of non-standard workers can represent an opportunity for unions to attract a new generation of members, thus fostering impactful cooperation and building embryonic solidarity. Moreover, standard employees who do not protect non-standard colleagues might end up undermining their own bargaining power by disempowering themselves and establishing a lower-cost alternative.[79]

After presenting a catalogue of agreements covering non-standard workers, immune to the intervention of competition authorities, we claim that the effective exercise of collective voice by the heterogeneous group of non-standard workers is fraught with manageable, practical difficulties in a highly evolving context. Both formal unions and informal groups are developing various strategies for the representation of workers involved in the most recent waves of restructuring that are the result of the introduction of advanced digital technology and new organisational patterns.[80] New occupational identities have always been difficult to capture for long-established confederations, given their traditional approaches in terms of membership, ideology, organisation or final goals. However, this should not discourage present and promising collective initiative in this changing socio-economic environment.

At the moment, EU institutions are attempting to clarify that certain categories of collective agreements covering solo self-employed workers fall outside the scope of Article 101 TFEU and beyond the Commission's antitrust enforcement priorities.[81] In its draft guidelines, the Commission acknowledges that measures have been already adopted by national policy-makers to grant solo self-employed persons in certain professions the right to collective bargaining or to exclude their collective agreements from the scope of national competition law with the aim of redressing the imbalance in the bargaining power between the contractual parties. This comes as no surprise. In Italy self-employed organising and bargaining are already foreseen by the Constitution, long-standing, embedded in collective agreements and widely acknowledged by national law and practices. Thus, self-employed workers' initiatives can be seen as a vehicle of social, economic and political transformation: a bright road to ensure a sustainable and prosperous future of work.

[77] Guy Lougher and Sammy Kalmanowicz, 'EU Competition Law in the Sharing Economy' (2016) 7(2) Journal of European Competition Law 87–102; Camilo Rubiano, 'Precarious Work and Access to Collective Bargaining: What Are the Legal Obstacles?' (2013) 5(1) International Journal of Labour Research 133–51.

[78] Minawa Ebisui, 'Non-Standard Workers: Good Practices of Social Dialogue and Collective Bargaining' (2012) 1(3–4) E-Journal of International and Comparative Labour Studies 211–46.

[79] Virginia Doellgast, Nathan Lillie and Valeria Pulignano, 'From Dualization to Solidarity: Halting the Cycle of Precarity' in Virginia Doellgast, Nathan Lillie and Valeria Pulignano (eds.), *Reconstructing Solidarity. Labour Unions, Precarious Work, and the Politics of Institutional Change in Europe* (Oxford University Press, 2018).

[80] Antonio Aloisi and Elena Gramano, 'Workers without Workplaces and Unions without Unity: Non-Standard Forms of Employment and Collective Rights' in Valeria Pulignano and Frank Hendrickx (eds.), *Employment Relations for the 21st Century, Bulletin of Comparative Labour Relations* (107th vol., Kluwer Law International 2019) 37–57.

[81] Despoina Georgiou, 'The European Commission's Draft Guidelines on the Application of EU Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons: Overview and Initial Assessment' (2021) <https://bit.ly/3HR8yTj> accessed 10 January 2022.