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An Inquiry into the Guidelines on the Application of EU Competition Law to Collective Agreements concerning the Working Conditions of the Solo Self-Employed

Abstract

The purpose of this article is to examine the compatibility of collective agreements for self-employed persons with the principles of European competition law. According to European law, self-employed persons are considered to be on equal footing with companies, thus making them susceptible to violating competition rules by entering into agreements on working conditions. The judgments of the European Court of Justice in the *Albany* and *FNV Kunsten* cases have established that collective agreements for self-employed persons are not generally exempted from the rules prohibiting restrictions on competition. However, considering the protection needs of numerous self-employed persons, a change in approach seems necessary. In 2022, the European Commission adopted Guidelines aiming to clarify the scope of EU competition law regarding collective agreements for self-employed persons. The objective is to exclude self-employed individuals who are most in need of trade union protection. However, there are some critical points in the Guidelines that warrant attention, such as the assessment of the compatibility of collective agreements for self-employed persons with competition law being conducted on an individual basis. A collective approach to the issue appears necessary instead of an individual one. Therefore, it seems appropriate to reflect on the dialectic between market freedom and social rights in European law concerning this specific issue, particularly in light of the recent proposal.

Key words

self-employment, European labour law, collective agreements, European competition law, labour protection.

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1. Collective Action and Competition Law – The Principles at Stake

The issue of the legitimacy, under European law, of collective agreements applicable to self-employed persons involves some of the fundamental principles of the European Union legal system and individual national legal systems. In particular, the principle of free competition in the internal market comes into conflict with those relating to the sphere of trade union freedom, which national legal systems, and to some extent, the European legal system, also recognise for self-employed persons. The tension between these two spheres is not new and is influenced by a historical process that has seen the affirmation and expansion of social rights in the last century at the expense of the rigidity of much older competition law regulation[1].

The conflict is long lasting and stems from the fact that the European Union is an organisation that was founded to create a common market but that soon became a very complex political body with a wide range of competences.

The tension between the need to ensure a fair competition in the internal market and the necessity to meet social needs also emerges in the case law on collective agreements applicable to self-employed persons.

The issue of collective bargaining has not been the only battleground between the social principles of the Union and the rules of competition[2]: one can think of disputes regarding Sunday rest[3], job placement[4], and strikes[5].

As regards European Union law, one has to consider Article 101 of the Treaty on the Functioning of the European Union (TFEU), which states that

> "all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market"

are prohibited because they are incompatible with the internal market[6].

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1 For a historical reconstruction, cf. Minda, 1989, pp. 466 ff; see also Ichino, 2001, pp. 185–188.

2 On this issue, Corti, 2016, pp. 505–509.

3 CJEU C-145/88 *Torfaen Borough Council v B & Q plc* of 23 November 1989; ECLI:EU:C:1989:593 (*Torfaen*).

4 CJEU C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* of 23 April 1991; ECLI:EU:C:1991:161 (*Macroton*); CJEU C-55/96 *Job Centre coop. arl.* of 11 December 1997; ECLI:EU:C:1997:603 (*Job Centre)*.

5 CJEU C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* of 11 December 2007; ECLI:EU:C:2007:772 (*Viking*); CJEU C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* of 18 December 2007; ECLI:EU:C:2007:809 (*Laval*).

6 Article 102 could also be relevant if a union achieves a dominant position. See Lianos, Countouris and De Stefano, 2019, p. 303; and Lianos, 2021, p. 302, also about Article 106(2) (pp. 302–304).

While collective agreements concerning individual rights of employees are generally not considered incompatible with free competition[7], as it is protected by EU law in relation to the market for goods, services, and capital rather than the labour market, issues can arise when provisions in collective agreements result in restrictions on competition in the service market.

However, it is important to clarify that in European law there are rules, including primary legislation, that establish trade union freedom without explicit constraints regarding the subjective qualification of those exercising it. Article 152 of the TFEU states that

> "the Union recognizes and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy".

It has been argued that the new wording of Article 152 introduced in the Treaty of Lisbon has severed the functionalisation constraint of social dialogue to the interests of the Union, recognising it as an autonomous function[8].

The substance of Article 152 is then specified by the subsequent Article 155, with particular reference to social dialogue "at Union level". Article 155 provides that this "may lead to contractual relations, including agreements". The issue of the conclusion and effectiveness of collective agreements at the EU level involves regulatory specificities that partly transcend the subject matter and, therefore, cannot be fully addressed[9].

Moreover, Article 28 of the Charter of the Fundamental Rights of the European Union, which now holds equal status with the Treaties on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), states that

> "workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels"[10].

It can be affirmed that Article 28 constitutes a fundamental vehicle for the principle of solidarity in the EU[11].

It is important to note that Article 28 mentions collective agreements for the first time in the context of primary European sources. In other provisions, including the aforementioned Article 152 of the TFEU, more generic expressions such as "social dia-

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7 In this sense, Ichino, 2001, p. 189. According to Biasi, 2018a, p. 361, "European competition law is specifically directed at undertakings (and their dealings) and it does not – apparently – cover individuals".

8 Caruso and Alaimo, 2011, p. 282.

9 See, on Article 155 TFEU, Comandè, 2010, pp. 210 ff.

10 See Lazzari, 2001, pp. 641 ff.

11 On the issue of solidarity in European labour law, see Zimmer, 2022, p. 47 in particular.

logue" are preferred[12]. It is believed that the recognition of social dialogue itself translates into the recognition of collective bargaining since the latter is the natural outcome of the former. In fact, the reference to the negotiation phase extends the scope of Article 28 to all the necessary steps leading to the conclusion of an agreement[13], even if it is not ultimately reached[14].

No definition of "collective agreement" is provided. The use of the expression "in accordance with Community law and national laws and practice" appears to defer the definition to the legislation of the Member States. Additionally, the reference to "appropriate levels" seems to encompass the various forms and articulations of bargaining in individual national experiences, ranging from company-level agreements to those concluded within the framework of European social dialogue.

Another peculiarity of Article 28 is that it codifies the right to collective bargaining alongside the right to trade union action, in what has been called a "cumulative view"[15]. The right to bargaining, in fact, lacks effectiveness when trade union action is not adequately supported by norms that legitimise and facilitate it within a framework characterised by democratic principles. Therefore, it is significant that the connection between these two rights has been recognised and codified at the European level in Article 28, based on the constitutional traditions of the Member States[16].

2. Collective Agreements and Competition Law in the ECJ Case Law

2.1. Collective Agreements Applicable to Workers as Defined by ECJ Case Law

European law, as mentioned, has long been a battleground for the principles discussed so far.

Before analysing the case law of the ECJ on collective agreements applicable to self-employed persons, it is worth briefly reviewing the steps that led the Court of Justice to consider agreements applicable only to employees compatible with European law.

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12 Schnorr, 1993, p. 328; Caruso and Alaimo, 2011, p. 274. Sciarra, 2020, p. 86, affirms that it might be required, "in the long run", a reform of Article 152.

13 Veneziani, 2002, p. 54.

14 Ales, 2019, p. 43.

15 Ales, 2019, pp. 42–43.

16 According to the ILO 'General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008', "specific provisions in relation to collective bargaining are present in 66 constitutions" (p. 4).

As early as 1999, in the judgement of *Becu*,[17] the Court established that, for the purposes of competition law, workers are not considered undertakings[18].

Just a few days later, in the well-known *Albany* case[19], the Court ruled on the compatibility with EU law of an obligation for an undertaking to affiliate with a pension fund set up by a collective agreement. According to the Court, despite "certain restrictions of competition being inherent in collective agreements between organisations representing employers and workers", "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" (now Article 101) "when seeking jointly to adopt measures to improve conditions of work and employment". In the Court's reasoning, objectives of social relevance have a recognised space in the Treaties[20] and must, therefore, be taken into account in a proper balance with competition rules. Thus, an agreement that pursues social objectives falls outside the scope of EU competition rules.

The exemption from competition law established by the Court is, therefore, subject to a "double filter"[21]. The first filter concerns the nature of the agreement, that has to be that of a "collective agreement". The second filter concerns the object of the collective agreement[22]. For this reason, Article 101 remains applicable in cases where workers' associations act as economic actors comparable to undertakings. Collective agreements, therefore, fall outside of Article 101, and the so-called *Albany* exemption applies to them only when they pursue certain objectives of social relevance[23]. The notion of social objectives has been further specified in subsequent judgments of the Court[24], which have more clearly stated that collective agreements, in order not to be unlawful under Article

17 CJEU C-22/98 of 16 September 1999; ECLI:EU:C:1999:419.

18 Para. 26: workers (in the specific case, dockers) "do not therefore in themselves constitute 'undertakings' within the meaning of Community competition law". According to CJEU C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* of 10 December 1991; ECLI:EU:C:1991:464 (*Merci*) a person's status as a worker is not affected by the fact that "the worker, whilst being linked to the undertaking by a relationship of employment, is linked to other workers by a relationship of association".

19 CJEU C-67/97 of 21 September 1999; ECLI:EU:C:1999:430.

20 According to De Vries, 2016, p. 221, the Court raises collective bargaining "to a legitimate European social value".

21 Di Via, 2000, p. 283.

22 According to Pallini, 2000, p. 242, the control over the object makes the freedom of bargaining "supervised".

23 Schiek, 2020, p. 402.

24 CJEU C-222/98 *Hendrik van der Woude v Stichting Beatrixoord* of 21 September 2000; ECLI:EU:C:2000:475 (*van der Woude*), para. 21; CJEU C-437/09 *AG2R Prévoyance v Beaudout* Père et *Fils SARL* of 3 March 2011; ECLI:EU:C:2010:676 (*AGR2*), para. 29. Cfr. Evju, 2001, pp. 165 ff.

101, must be "intended to improve employment and working conditions". Other judgments have subsequently confirmed what was established in *Albany*[25].

For the aforementioned reasons, the exemption space guaranteed by *Albany* has been defined as "arguably narrow"[26] and the ruling has been considered partially consistent with the Court's previous orientations[27]. The prohibition on restrictions to competition remains the general rule, but a space of exemption, albeit limited and based on "at least too generic" argumentations[28], is carved out in favour of collective agreements aimed at improving working conditions.

2.2. Collective Agreements Applicable to (False) Self-employed Persons

It should be noted that the decisions analysed so far pertain to cases where the agreements were applicable only to employees, and not to self-employed persons as well. It is worth noting that the Court of Justice, while referring to the workers in the *Albany* judgement, "does not go on to specify who does and who does not qualify as a worker for the purpose of this exception"[29].

It is now necessary to understand what the Court has established when it has had to judge the compatibility with competition law of agreements between self-employed persons and their clients. In many EU Member States, it is very common for unions and workers' associations to conclude collective agreements that regulate the working con-

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[25] Among those not yet mentioned, CJEU C-219/1997 *Schenker AG przeciwko Koninklijke Luchtvaart Maatschappij NV i Komisja Europejska* of 21 September 1999; ECLI:EU:C:2012:334 (*Maatschappij*); CJEU C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* of 21 September 1999; ECLI:EU:C:1999:434 ('*Brentjens*').

[26] Freedland and Countouris, 2017, p. 59; cf. Biasi, 2018b, p. 450. It's worth noting that AG Wahl, in the opinion given in *FNV Kunsten* (CJEU C-143/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* of 4 December 2014; ECLI:EU:C:2014:2411) affirmed that "the notion of direct improvement of the employment and working conditions of employees must not be too narrowly construed".

[27] Allamprese, 2020, p. 35. The previous orientation of the judges emerges from the opinion of the Advocate General Lenz (20 September 1995) in the *Bosman* case (CJEU C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* of 15 December 1995 ECLI:EU:C:1995:463): "[T]here is in my opinion no rule to the effect that agreements which concern employment relationships are in general and completely outside the scope of the provisions on competition in the EC Treaty", paras. 273 and 274); see also CJEU C-241/94 *French Republic v. Commission of the European Communities* of 26 September 1996; ECLI:EU:C:1996:353.

[28] Ichino, 2001, p. 193.

[29] Risak and Dullinger, 2018, p. 21.

ditions of self-employed individuals[30]. Although collective bargaining for self-employed persons is not as widespread and effective as it is for employees, the interests at stake and the established protections are still of great relevance[31]. Furthermore, in some countries, this phenomenon has also developed with the collective regulation of the work relationship of platform workers, whose legal classification is still subject to extensive debates[32].

The first judgement that addressed the issue was the *Pavlov* case[33]. According to the Court, the *Albany* exclusion

> "cannot be applied to an agreement which, whilst being intended, like the agreement at issue in the main proceedings, to guarantee a certain level of pension to all the members of a profession and thus to improve one aspect of their working conditions, namely their remuneration, is not concluded in the context of collective bargaining between employers and employees".

Therefore, the Court determined that the pension fund created under the collective agreement in question did not have social objectives that would exempt it from competition rules, as the Treaties

> "did not contain any provisions 'encouraging the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment and working conditions".

An only partially different assessment was made subsequently in the well-known *FNV Kunsten* case[34]. According to some scholars, a factor that influenced the Court of Justice's different approach was the entry into force of the Lisbon Treaty, which has equated the provisions of the Charter of Fundamental Rights of the European Union, including the aforementioned Article 28, with those of the Treaties themselves[35].

It is necessary to analyse the judgement in detail. In the case of *FNV Kunsten*, a Dutch union signed a collective agreement that applied to both employees and self-employed musicians, specifically those substituting for members of an orchestra. The Dutch Competition Authority deemed this agreement to be in violation of both internal and European competition rules.

After reaffirming that a union acting on behalf of self-employed persons is not considered a social partner but an association of undertakings, the Court examined the interpretation of the term "undertaking" in the context of Article 101 to determine whether the agreement should still be exempted from the application of that article. According to

30 See Hießl, 2021, pp. 279 ff.

31 In particular, this is true for those who perform personal work and are subject to a power imbalance with their counterpart. Cf. Countouris and De Stefano, 2021, p. 10.

32 An effective summary of the debate is provided by Bellomo, 2022, pp. 155 ff.

33 CJEU C-180/98 to C-184/98 of 12 September 2000; ECLI:EU:C:2000:428.

34 CJEU C-143/13 of 4 December 2014; ECLI:EU:C:2014:2411.

35 Lianos, Countouris and De Stefano, 2019, p. 308.

the judges, the concept of an undertaking includes those who "perform their activities as independent economic operators in relation to their principal"[36]. Consequently,

> "a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking".

If the self-employed persons to whom the agreement is applied can be said "entirely dependent", they "are in fact 'false self-employed', that is to say, service providers in a situation comparable to that of employees". The Court affirmed also that

> "the classification of a 'self-employed person' under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional"[37].

As a result of the Court's ruling, only service providers in a situation comparable to that of workers are exempted from competition law. This exemption applies to those who perform the same activities as the employees in the same company and are considered "false self-employed". The Court stated that "is for the national court to ascertain whether that is so". In summary, only collective agreements that apply to "false" self-employed individuals are exempted from the competition rules.

The characteristics that the Court outlines to describe false self-employment seem to refer, partially, to the notion of economic dependence[38], which has been occasionally used in some national legal systems as a basis for providing protections to workers[39]. It is possible to say that the Court has identified criteria that can be used to interpret the European notion of worker (in an extensive manner) for the purpose of applying the *Albany* exemptions, using an approach that has been defined "functional"[40].

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[36] Cf. CJEU C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio (CEEES) and Asociación de Gestores de Estaciones de Servicio v European Commission* of 14 December 2006; ECLI:EU:T:2014:60 (*CEEES*), para. 38.

[37] As stated before in CJEU C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* of 13 January 2003; ECLI:EU:C:2004:18 (*Allonby)*, para. 71.

[38] Grosheide and ter Haar, 2017, p. 37; Menegatti, 2019, pp. 80–81, according to whom the EU notion of worker is "much broader to that of 'employee' commonly endorsed by national judiciaries, to the point of including intermediate categories workers – variously referred by some legislations to as dependent contractors, economically dependent, 'parasubordinate' workers, employee-like persons".

[39] Consider, for example, the figure of the TRADE (Trabajador Autónomo Económicamente Dependiente) in the Spanish legal system. Cf. also Delfino, 2017, p. 46, where he affirms that almost all of the requirements described by *FNV Kunsten* are formally present in "hetero-organised" employment relationships as regulated in Italy by Article 2, d.lgs. 81/2015.

[40] Lianos, Countouris and De Stefano, 2019, p. 313.

While this solution is reasonable in ensuring that even those who are only formally self-employed receive the protections guaranteed by collective agreements, on the other hand, it appears to be somewhat excessively cautious as it continues to strongly link the applicability of collective agreements to the qualification of a worker, albeit in the form of false self-employment[41].

Nevertheless, there are several categories of self-employed persons who, although not falling within the Court's definition of false self-employment, are deserving of the protections provided by collective agreements (as well as, primarily, the right to engage in collective bargaining)[42].

3. The European Commission Guidelines – The Contents

3.1. Purposes of the Guidelines and General Scope of Application

From 2013 to the present, the debate on the inadequate protection of self-employment and the growing inadequacy of labour law categories (both at the European and national level) has progressively intensified. As mentioned, the emergence of platform work, which has long been a matter of interest to labour law scholars, has highlighted the need for concrete interventions to ensure greater protections for self-employed persons.

On 9 December 2021, the European Commission presented Guidelines on the application of the Union competition law to collective agreements regarding the working conditions of solo self-employed persons[43], not by chance alongside the proposal for a directive on working conditions in digital platforms. These Guidelines, presented as an annex to communications, aimed to establish criteria for extending the scope of the antitrust exemption to certain collective labour agreements. The Guidelines were finally adopted as a Communication of the Commission on 30 September 2022[44].

Aware of the developments in the Court of Justice case law and the challenges arising from it, the Commission has attempted to strengthen and clarify the criteria established by the case law.

A comprehensive introduction provides an overview of the current state of the conflict between labour law and competition law and outlines the objectives of the Guidelines.

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41 Probably "false self-employed" cannot constitute a third intermediate category between workers and entrepreneurs. Cf. Risak and Dullinger, 2018, p. 21; and Loi, 2018, pp. 864–865.

42 Lianos, Countouris and De Stefano, 2019, p. 314, mention, for example, creative workers, who can easily be excluded by the Court definition of false self-employed because they "have autonomy regarding the 'time, place, and content' of the task".

43 C(2021) 8838 final of 9 December 2021.

44 Communication from the commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons 2022/C 374/02, OJ C 374 of 30 September 2022.

Points 3 and 4 highlight the different values involved, namely antitrust law (specifically Article 3 TEU and Article 101 TFEU) on one hand, and Article 28 CFREU and Article 152 TFEU on the other. The Court of Justice case law is then mentioned in detail (points 5, 6 and 7). Lastly, attention is given to the changes in work organisation that have occurred in the last decades (point 8).

As to the general scope of application, point 13 affirms that the Guidelines apply to collective agreements as previously defined by them. Point 2(c) defines collective agreements, for the purpose of the Guidelines, as agreements

> "negotiated and concluded between solo self-employed persons or their representatives and their counterparty/-ies to the extent that it, by its nature and purpose, concerns the working conditions of such solo self-employed persons".

This definition is certainly derived from the Court of Justice case law generally stating that a collective agreement, to be considered exempt from competition law, must have the specific objective of improving the working conditions of workers[45]. However, for the sake of completeness, point 15 provides an exemplary—and perhaps redundant—list of the subjects that fall within the scope of working conditions regulated by collective agreements. The list includes, in particular,

> "conditions under which the solo self-employed person is entitled to cease providing his/her services or under which the counterparty is entitled to cease using their services".

Similarly, for illustrative purposes, cases are also mentioned where collective agreements cannot be exempted from competition rules, as they do not concern working conditions. In particular, the Guidelines explicitly do not apply to agreements that determine "the conditions (in particular, the prices) under which services are offered by solo self-employed persons or the counterparty/-ies to consumers" or which limit "the freedom of undertakings to hire the labour providers that they need".

As for the subjective scope of application, the Guidelines apply to solo self-employed persons, defined as individuals who do not

> "have an employment contract or who is not in an employment relationship, and who relies primarily on his or her own personal labour for the provision of the services concerned".

Solo self-employed persons are thus distinguished, on one hand, from employees, and on the other hand, from entrepreneurs, as it is expected that the solo self-employed person must perform predominantly personal work (therefore, the contribution of other means in addition to personal work, such as the use of machinery or the help of substitutes or assistants, cannot prevail on personal work but should be ancillary)[46].

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[45] See para. 2.1.

[46] It is worth noting that CJEU C-692/19 *B v Yodel Delivery Network Ltd* of 22 April 2020; ECLI: EU:C:2020:288 (*Yodel*), para. 45, considered the fact that a person uses "subcontractors or substi-

After outlining the definitions, general principles, and scope of application, the Guidelines describe specific cases that fall outside the scope of Article 101 (and are therefore exempt) in Section 3, as well as cases in which the Commission chooses not to intervene in Section 4. The distinction between these two scenarios could generate ambiguity since, concerning the cases provided for in Section 4, the legitimacy of collective agreements is not explicitly established, thus allowing the intervention of other entities besides the Commission (such as judgments from the Court of Justice that may intervene following a preliminary reference in a dispute between private parties).

3.2. Collectives Agreements Falling Outside Scope of Article 101 TFEU

After mentioning the content of the *FNV Kunsten* judgement regarding the definition of self-employed persons in a situation comparable to that of workers and the loss of undertaking status[47], the Guidelines define three different categories of self-employed persons who are presumed to be exempt from the application of Article 101 with reference to collective agreements applicable to them.

These categories represent a further development of the criteria already identified by the Court of Justice. The criteria are specified through the identification of factual indicators. This approach is commonly used in recent European legislation and is similar to the one used for determining the employment relationship in the proposed directive on work in digital platforms[48].

The first indicator considered in the Guidelines is economic dependency towards the counterparty. According to the European Commission, economic dependency is likely to be a common characteristic of workers who provide services in a predominantly personal way (point 23). The Guidelines refer to certain national legislations, such as those in Germany and Spain[49], which recognise the right of self-employed persons to engage in collective bargaining, subject to certain conditions.

In point 24, the Guidelines define the factual indicators for presuming economic dependency of solo self-employed individuals. According to the Guidelines, economic dependency is presumed if the work-related earnings of the solo self-employed person from a single counterparty exceed 50 percent over a period of either one or two years.

The inclusion of two different and individually assessable timeframes, which was not present in the 2021 draft, aims to maximise the effectiveness of protection and prevent abusive behaviour by the client. In particular, this prevents the client from potentially

tutes to perform the service" as capable of excluding the qualification of "worker".

47 See para. 2.

48 The reference is to the proposal for a directive "on improving working conditions in platform work" of 9 December 2021 (COM(2021) 762 final). See on the issue, *ex multis,* De Stefano, 2022, pp. 107 ff.

49 For Germany: Section 12a of the Collective Agreements Act; for Spain: Article 11 of Law 20/2007, of 11 July 2007.

splitting the payment of fees to minimise their impact within a single year and thus avoid the application of the collective agreement to the solo self-employed person.

The established threshold is objective and easily measurable[50]. Once the threshold is exceeded, the self-employed person is presumed to be economically dependent, without the need for further investigations into specific circumstances.

The second indicator is defined as the "similarity of tasks". If a solo self-employed person works side-by-side with an employee for the same counterparty, is placed under the direction of him, does not bear the commercial risk of the counterparty activities or does not enjoy sufficient independence as regards the performance of the economic activity concerned, then that person can benefit from collective bargaining.

The Guidelines clearly specify that these indicators should not be considered for determining the reclassification of the worker under national laws but only with regard to the applicability of collective agreements under EU law. The EU definition of "false self-employed persons" can in fact also include workers who, under individual national legislation, are considered genuinely self-employed. Furthermore, it is clarified, albeit redundantly, that collective agreements that apply to both employees and self-employed persons can also be exempted from competition law. There is no reason to assume the exclusion of such collective agreements, as they are very common in the practice of collective bargaining in certain Member States[51].

However, it is a fact that, according to the legislation of many Member States, the conditions mentioned in the Guidelines, which clearly reference those of the *FNV Kunsten* judgement, can easily lead to the recognition of employee status. Consequently, it is believed that the concrete application of this indicator would be very limited and reserved for rare cases where such strong indicators of subordination do not result in the reclassification of the self-employed person as an employee[52].

The indicator of task similarity is indeed more indeterminate than the indicator of economic dependency and, as a result, more challenging to apply in concrete terms. It can be envisioned that applying a collective agreement to a self-employed person based on this indicator would not be "automatic" and likely require, instead, a judicial decision explicitly confirming its presence.

The third indicator pertains to the specific case of workers operating through digital platforms. The sector-specific nature of this category is closely tied to the platform work debate in recent years, which has revealed the poor working conditions faced by individuals working through digital platforms, often classified as self-employed.

The Guidelines underline that platform workers often have to accept the conditions imposed by platforms without the opportunity for individual negotiation ("take it or

[50] The threshold has been considered too high in relation to its function of determining a presumption of economic dependency. Cf. Georgiou, 2022.

[51] Fulton, 2018.

[52] Cf. Rainone, 2022, p. 189.

leave it"). The Commission then points out that many national authorities or courts increasingly recognise the dependence of service providers on certain types of platforms, or even recognise the existence of an employment relationship, which supports the comparability of solo self-employed individuals working through platforms with workers.

While what noted above holds true for the recognition of "dependency", which, as we have seen, is a prerequisite for the comparability to workers according to the *FNV Kunsten* judgement, the argument is not equally valid when it comes to the fact of platform workers being recognised as employees. If they were considered employees, they would undoubtedly be regarded as workers under European law, and therefore, the *Albany* exemption would apply in any case. In other words, the fact that some platform workers are recognised as employees does not impact the assessment of comparability with workers because the classification depends on how the actual service is performed and not on the use of a particular tool (the digital platform). It is possible to have both employee platform workers and self-employed platform workers (although, given the current practices of major platforms, the latter scenario is less common).

What really matters in the evaluation of comparability with workers is the state of dependence, even for platform workers considered self-employed under national laws. Determining this state, in the case of platform workers, does not require a specific inquiry from an economic perspective (as outlined in the first indicator) or in terms of working conditions (as examined in the second indicator). According to the Guidelines, the mere fact that a worker operates through a digital platform is enough to consider them as "false self-employed" under European law and, therefore, exempt from the application of Article 101 regarding the collective agreements applicable to them[53].

It is also highlighted that some Member States have implemented specific legislation to protect platform workers. The regulations of Spain[54] and Greece[55] are explicitly mentioned, but it is important to note that France[56] and then Italy[57] have also enacted laws specifically aimed at platform workers or certain subcategories of them. The Italian law, which provides certain protections for self-employed riders, explicitly defers the regulation of some matters, such as compensation, to collective bargaining[58].

To fully understand the scope of this latest index identified by the Guidelines, it is important to carefully examine the definition of "digital platform" provided by them.

[53] The application of collective agreements probably serves as residual protection for those platform workers who cannot be presumed to be employees under the proposed directive. Cf. Giovannone, 2022, p. 222.

[54] Royal Decree-Law 9/2021 of 11 May 2021.

[55] Law 4808/2021.

[56] Law 2016-1088 of 9 August 2016.

[57] D.l. 101/2019 of 3 September that has modified d.lgs. 81/2015 introducing a specific regulation for self-employed riders. See Santoro-Passarelli, 2020, pp. 214 ff.

[58] See Article 47-quater, d.lgs. 81/2015.

A restrictive definition of a digital platform is given. According to point 2(d), a digital platform is

> "any natural or legal person providing a commercial service which meets all of the following requirements: (i) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application; (ii) it is provided at the request of a recipient of the service; and (iii) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location".

This definition is identical to the one given in the proposal for a directive "on improving working conditions in platform work" mentioned above. Furthermore, it is envisaged that if the definition were to change during the approval of the directive, the Commission could consider revising the one contained in the Guidelines as well.

Requirement (iii), regarding the necessary organisation of work by the platform, is better defined in point 30, where it is stated that the organisation of work should imply, at a minimum, a significant role in matching the demand for the service with the supply of labour by an individual who has a contractual relationship with the digital labour platform and who is available to perform a specific task, and can include other activities such as processing payments.

The organisation, as defined by the Guidelines, therefore, may not concern the performance of work itself but only the initial phase of the relationship. However, it is necessary for the platform to have a "significant role", not just in providing a mere service of matching demand and supply, but in the context of the matching phase. It is in this phase that the platform's organisational intervention must be concretely evident.

Finally, with an overly general provision, it is stated that digital platforms, according to the Guidelines, are those for which

> "the organisation of work performed by the individual [...] constitutes a necessary and essential, and not merely a minor and purely ancillary, component".

3.3. Cases in which the Commission Will not Intervene

Section four of the Guidelines addresses cases where solo self-employed persons, although not in comparable conditions to that of workers, still find themselves in a position of contractual weakness compared to the counterparty. In these cases, the Commission intends not to intervene regarding the legitimacy of collective agreements applicable to them, if these aim to improve working conditions.

The Guidelines specifically identify two different conditions under which the Commission foresees non-intervention. In the first case, collective agreements concluded by solo self-employed persons with counterparties of a certain economic strength are involved. This is because solo self-employed persons may have insufficient bargaining pow-

er in these situations to influence the determination of their working conditions[59]. From the Commission's perspective, collective agreements would serve to address this disparity.

The disparity is envisaged under two alternative conditions: 1) if the agreement is negotiated with one or more counterparties which represent the whole sector or industry; 2) if the counterparty/ies have an annual turnover and/or annual balance sheet of more than 2 million euros or the counterparty/ies has a staff headcount equal to or more than 10 persons. If several counterparties negotiate the agreement, they are considered jointly for the calculation of the threshold.

The indices in this case are associated with factual data. It is challenging to imagine the occurrence of the first index, as it refers to an entire sector or industry. The second index can more easily occur, as it sets a low threshold for the number of employees and a high turnover or balance sheet limit. This index appears to be designed to include digital companies that in many cases have few or no employees but generate significant income. One possible side effect of this index could be that it could make the counterparties reluctant to negotiate working conditions jointly, as this could become a condition for the legitimacy of the agreements themselves[60].

The second category of collective agreements in which the Commission establishes non-intervention is those "concluded by self-employed persons pursuant to national or Union legislation". Such legislation must pursue social objectives. This provision suggests a scrutiny of the reasons for intervention, which is difficult to pursue. An example of such a provision is provided in the Guidelines itself, referring to Directive (EU) 2019/790, regarding the right of authors and performers to appropriate and proportionate remuneration.

The Commission thus leaves it to the Member States to identify in abstract the cases in which the social objectives, already referred to in the *Albany* case, are effectively pursued. In other words, the existence of the "social" object of the agreement, as required by EU case law, is presumed through an internal provision that legitimises collective bargaining to pursue it.

4. Effectiveness of the Guidelines – Problems and Possible *de jure condendo* Solutions

The Commission Guidelines identify certain criteria based on which collective agreements applied to self-employed persons are considered exempt from competition law or against which the Commission decides not to intervene in any case.

[59] According to Rainone, 2022, p. 189, the use of bargaining power as an index represents a "paradigm shift" in EU law.

[60] In general, regarding the potential abusive behaviour of companies related to numerical thresholds, see Daskalova, 2021, p. 49.

In the first case, the Guidelines serve to specify the orientations of the *FNV Kunsten* judgement by providing indicators that presume certain self-employed persons to be comparable to employees for the purpose of the applicability of competition law.

In the second case, the Guidelines introduce a partially innovative provision by acknowledging for the first time that some self-employed persons, even if not comparable to workers, may fall within the scope of the *Albany* exemption, based on specific indicators demonstrating the market vulnerability of them.

However, in this latter case, the Commission can only take action in relation to its own proceedings and cannot, through its own autonomous act, overturn the orientation of the Court of Justice.

It is precisely due to the type of act adopted (a Commission communication) that the main issues of effectiveness of the Guidelines arise. On the one hand, these Guidelines merely clarify who is considered a "false self-employed" within the specific subject matter, essentially reaffirming the exclusion of "true" self-employed persons under European law from the application of collective agreements. On the other hand, they establish non-intervention by the Commission even with regard to economically weak "true" self-employed persons (normally comparable to undertakings), but they cannot guarantee total exemption in all circumstances where the legitimacy of the agreement may be called into question.

Moreover, as highlighted in the previous paragraph, some of the criteria identified by the Guidelines have clear limitations, sometimes due to their excessive indeterminacy, and other times due to possible difficulties in verification.

However, the most evident problem of the Commission's approach is that it leaves the evaluation of the legitimacy of collective agreements applied to solo self-employed persons to individual judgement. In some cases, the distinction is even based on indicators closely related to the personal situation of the person (a paradigmatic example being economic dependency)[61]. In other cases, decisive factors concern the counterpart, such as belonging to a particular sector (such as the digital platform sector as defined by the Guidelines) or meeting economic or employee number thresholds.

The potentially contradictory consequence of this approach is that a collective agreement may be legitimately applied only to certain self-employed persons in a specific sector or company, while excluding others based on subjective elements that are not easily verifiable *ab initio*.

Therefore, although the Guidelines are a significant interpretative advancement in relation to the established Court of Justice case law, they may not be the best tool for resolving the issue of the legitimacy of collective agreements applicable to economically

[61] Giovannone, 2022, p. 221, argues the difficulty for social partners to ensure the application only to persons with certain requirements. See also Villa, 2022, p. 306. On the inadequacy of a system based on numerical thresholds, cf. Treu, 2010, p. 615.

vulnerable self-employed persons. Nor is it believed that the economic weakness of an individual self-employed person, based on objective and precise data, can be a suitable criterion for evaluating the legitimacy of collective agreements.

A collective approach to the issue is necessary. A legislative solution, through a specific Regulation, which could be based on the full implementation of Article 28 of the Charter of Fundamental Rights[62], may be needed[63]. This solution could involve redefining the concept of a worker in the European law[64], at least for the purpose of evaluating the legitimacy of collective agreements, to include not only employees and false self-employed persons but also, in general, self-employed persons who provide their services in a personal way[65]. Only such an action can overcome the restrictive orientation of the *FNV Kunsten* ruling and allow the *Albany* exemption to be applied to a broader category of individuals without the need for complex case-by-case assessments.

This type of action, by eliminating uncertainty, would also have the merit of promoting collective bargaining in negotiation and pre-negotiation phases, enabling the full implementation of Article 28 with regard to the freedom of trade union action in general.

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62 Cf. Lianos 2021, p. 318; Piglialarmi, 2021, p. 23.

63 According to some scholars, this article alone could make it possible to consider the interests of the self-employed in bargaining superior to the rules of competition law. Cf. Lianos, Countouris, and De Stefano, 2019, p. 323.

64 Lianos, 2021, pp. 314–316. According to Ferraro, 2019, p. 77, "the absolute equivalence self-employed = undertaking [...] configure an obstacle to the realization of objectives of inclusion and social protection".

65 As suggested by Lianos, Countouris and De Stefano, 2019, p. 323; cf. Biasi, 2018a, pp. 371–372. Partially *contra* Daskalova, 2021, p. 48, who argues that "limiting the collective bargaining exemption to vulnerable self-employed seems necessary to avoid undesirable consequences", but she acknowledges that "a uniform vulnerability criterion may be difficult to spell out".

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