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Guidelines on collective agreements regarding the solo self-employed persons: another (controversial) immunity to EU competition rules

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1. *Introduction*

Collective labour market regulation is the subject of much doctrinal debate. On the one hand, hyper-liberal theories conceive collective bargaining as an anti-competitive tax on corporate profits[1]. Conversely, it is argued that by setting protection standards for workers, irrespective of market performance, collective bargaining contributes to a fair, stable, and efficient economic order[2]. According to this view, the labour market is primarily a social space within which collective self-regulation organises forms of redistributive justice[3].

[1] In this sense, HIRSCH, *Sluggish Institutions in a Dynamic World: Can Unions and Industrial Competition Coexist?*, in *JEP*, 2008, 22, 1, p. 153 ff.

[2] CELLA, *Quale futuro per la contrattazione collettiva?*, in *DLRI*, 2016, 150, 2, p. 217 ff.

[3] TANKUS, HERRINE, *Competition Law as Collective Bargaining Law*, in PAUL S., MCCRYSTAL, MCGAUGHEY (eds.), *Cambridge Handbook of Labor in Competition Law*, Cambridge University Press, 2022, pp. 72-95; TIRABOSCHI, *Sulla funzione (e sull'avvenire) del contratto collettivo di lavoro*, in *DRI*, 2022, 3, p. 804; BELLARDI, *Le relazioni industriali in transizione: nodi critici e ipotesi di riforma*, in *DRI*, 2003, 3, pp. 362-407.

The tension between the rules of competition and collective rights is nothing new in European law, where market logic has strongly conditioned the exercise of these rights[4]. One only has to think of the EU Court of Justice rulings known as the "Laval Quartet", with the ultimate aim of protecting and making the Single Market efficient, social (especially collective) rights were compressed in favour of economic freedoms[5], with the effect that the Court restricted the limits of trade union autonomy, interfering in a selective way in worker/company conflict dynamics[6].

However, for some time the Court of Justice has granted a sort of "immunity" to collective bargaining from the competition rules to prevent the application of the prohibition of restrictive agreements (Art. 85 TEC, now Art. 101 TFEU) from jeopardising the effective exercise of the right to collective bargaining (the so-called "Albany exception")[7]. This is a non-automatic exemption, which is triggered by the fulfilment of specific requirements: collective agreements must be negotiated between representative organisations and must have a social policy objective (the improvement of employment and working conditions). Therefore, collective bargaining remains a right conditioned by competition law, granted "by subtraction" from its rules[8].

The issue becomes even more complicated when collective bargaining looks at the self-employed[9]. They are, in fact, included in the European

[4] Among all, Sciarra, *How Social Will Social Europe Be in the 2020s?*, in *GLJ*, 2020, 21, 1, pp. 85-89; Giubboni, *Libertà d'impresa e diritto del lavoro nell'Unione europea*, in *Costituzionalismo.it*, 2016, 3, p. 88 ff.

[5] CJEU, C-438/05, *Viking*; CJEU, C-341/05, *Laval*; CJEU, C-346/06, *Rüffert*; CJEU, C-319/06, *Commission vs Luxembourg*. On topic, *ex multis*, Giovannone, *La tutela dei labour standards nella catena globale del valore*, Aracne editrice, Roma, 2019, p. 39 ff.; Peonovsky, *Evolutions in the Social Case Law of the Court of Justice: The Follow-up Cases of the Laval Quartet: ESA and Regiopost*, in *ELLJ*, 2016, 7, 2, pp. 294-309; Novitz, *The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?*, in *IJCL*, 2015, 31, 3, pp. 243-262.

[6] Brancati, *Il bilanciamento tra diritti sociali e libertà economiche in Europa. Un'analisi di alcuni importanti casi giurisprudenziali*, Servizio Studi, Corte Costituzionale, 2015, p. 5 ff.

[7] CJEU, C-67/97, *Albany*, in *Il lavoro nella giurisprudenza*, 1, 2000, with a note by Allamprese, pp. 22-38. A short time later, this orientation was consolidated in other judgments: cases CJEU, C-180/98-184/98, *Pavlov* e CJEU, C-222/98, *van der Woude*.

[8] Evju, *Collective Agreements and Competition Law. The Albany Puzzle, and van der Woude*, in *IJCL*, 2001, 17, 2, p. 166.

[9] For a broader reflection on the topic, La Tegola, *Le fonti di determinazione del compenso nel lavoro non subordinato*, Cacucci, Bari, 2022.

Union concept of "undertaking" and, therefore, collective agreements of self-employed workers are prohibited as "agreements between undertakings [...] which have as their object or effect the prevention, restriction or distortion of competition within the internal market" (Art. 101 TFEU)[10]. This conception contrasts with the orientation adopted in several fora at the international level (ILO, ECtHR, ECSR)[11], according to which the right to collective bargaining is recognised for workers regardless of their contractual status.

In rare cases, the Court of Justice has legitimised collective agreements of the self-employed because they pursue a general interest or legitimate objectives[12]. However, since the FNV *Kunsten* case, the Court has ruled that the collective agreements of the self-employed affect free competition and that the organisations representing these workers act as associations of undertakings[13]. Therefore, only collective agreements for the benefit of false self-employed workers, who are comparable to employees, are lawful. In this circumstance, such workers are in a condition of dependence on the client since they act as an auxiliary integrated into the enterprise and do not share any economic and financial risk with the client[14].

The figure of the self-employed worker is thus assimilated to any independent economic operator offering services for remuneration in a given (goods and services) market. Its nature as a natural person exercising work in a personal manner in the (labour) market is totally disregarded[15]. It can

[10] On topic, PAUL S. M., *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, in *LUCLJ*, 2016, 47, 3, p. 977.

[11] ILO CFA, Compilation of Decisions of the Committee on Freedom of Association, 6th edn, Geneva, ILO, 2018; International Labour Conference (ILC), Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), 2016, ILO, Geneva, 2016; *Vör ur Ólafsson v Iceland*, ECtHR of 27 April 2010, Application no. 20161/06; *Irish Congress of Trade Unions (ICTU) v Ireland*, ECSR Decision on the merits of 12 September 2018, Complaint No. 123/2016.

[12] In particular, CJEU, C-180/98-C-184/98, *Pavlov*; CJEU, C-309/99, *Wouters*; CJEU, C-1/12, *Ordem dos Técnicos Oficiais de Contas*; CJEU, C-427/16 and C-428/16, *Chez*.

[13] CJEU, C-413/13, *FNV Kunsten*, in *RIDL*, 2015, 2, with note by Ichino, pp. 566-580. See also BABIRAD, *Case comment: FNV Kunsten Informatie en Media v Staat der Nederlanden*, in *ECLR*, 2015, pp. 181-186.

[14] CJEU, C-413/13 FNV, *Kunsten*, cit., par. 33 ff. On the criteria revealing false self-employment, CJEU, C 256/01, *Allonby*.

[15] Rightly speaking of "double nature" ENGBLOM, *Equal Treatment of Employees and Self-Employed Workers*, in *IJCL*, 2001, 17, 2, p. 216.

therefore be deduced that the criterion for imputation of protection continues to be the contractual qualification according to the rigid autonomy-subordination dichotomy, without admitting that *vulnerability* and (economic-organisational) *dependence* are concepts that now also describe self-employment[16].

2. *Collective dynamism in self-employment: brief overview on Italy*

Contrary to the orientation of the ECJ, the trade union's focus on work beyond subordination is motivated by the frequent position of weakness (when not outright dependence) of the self-employed worker *vis-a-vis* the client, as has been noted for decades in the most attentive labour literature[17]. The "factual legal reality"[18] shows that the concept of vulnerability is now extended to a wide range of workers exposed to the risk of in-work poverty due to inadequate social (and contractual) protection. These include economically dependent self-employed workers, who suffer a weak position in the labour market and the employment relationship[19].

In Italy, Article 39(1) of the Constitution, in conjunction with Article 3, broadly protects trade union freedom and the right to collective bargaining in pursuit of substantive equality. The Constitutional Court has repeatedly recognised the collective rights of the economically weak self-employed. Recently, the national legislature has entrusted collective bargaining with regulating hetero-organised self-employment (Art. 2, para. 2, Legislative Decree No. 81/2015). In this area, collective agreements for platform work and outbound call centre[20] activities are relevant. Indeed, the social partners have

[16] On the need to overcome this conceptual dichotomy, Perulli, Treu, *"In tutte le sue forme e applicazioni": per un nuovo Statuto del lavoro*, Giappichelli, 2022.

[17] Among all, Davidov, *Collective Bargaining Laws: Purpose and Scope*, in *IJCL*, 2004, 2, 1, pp. 81-106. For a comment, Perulli, *A Purposive Approach to Labour Law by Guy Davidov: A Comment*, in *DLRI*, 2017, 156, 4, pp. 759-772.

[18] Tiraboschi, *Appunti per una ricerca sulla contrattazione collettiva in Italia: il contributo del giurista del lavoro*, in *DRI*, 2021, 1, p. 599 ff.

[19] Ratti, *In-Work Poverty in Europe: Vulnerable and Under-Represented Persons in a Comparative Perspective*, in *BCLR*, 2022.

[20] Among all, Piglialarmi, *La contrattazione collettiva, il lavoro parasubordinato e i rapporti di collaborazione ex art. 2, comma 2, d.lgs. n. 81/2015*, in *DRI,* 2019, 1, pp. 388-405. On call centres, see also T. Roma 6 maggio 2019 in *RGL*, 2020, 2, pp. 330-335, with note by Giovannone.

long organised representation and bargaining for other forms of self-employment (coordinated and continuous collaborators, agents, etc.)[21]. However, experimentation with representation beyond salaried employment has encountered several obstacles. On the one hand, the unionisation of the self-employed is held back by the difficulty of identifying homogenous interests, sectoral boundaries, and bargaining counterparts. On the other hand, the union still adopts the rigid coordinates of subordinate employment (tasks, vertical organisation, etc.), while the self-employed escape these logics as well as product and sectoral classifications[22]. However, it cannot be denied that trade unions are reinterpreting collective demands inclusively[23]. First, "traditional" collective agreements are progressively extending the field of beneficiaries of protections beyond subordination. Second, trade unions increasingly rely on judicial strategies to protect the new self-employed (especially platform workers), including recourse to class actions[24].

The Italian experience is by no means isolated. On the contrary, the bargaining practice in many European states is broadening the scope of beneficiaries beyond standard workers with the *placet* of national legislators. Suffice it to say that, albeit with different nuances, the right to collective bargaining is recognised for economically dependent self-employed workers in Spain, Germany, and Ireland[25], for self-employed platform workers in

[21] Ferrario, *Rappresentanza, organizzazione e azione sindacale di tutela del lavoro autonomo caratterizzato da debolezza contrattuale ed economica*, in *RGL*, 2009, 1, pp. 47-69; Scarpelli, *Autonomia collettiva e autonomia individuale nella regolazione del rapporto dei lavoratori parasubordinati*, in *LD*, 1999, 4, pp. 553-569; Vettor, *Le ricerche empiriche sul lavoro autonomo coordinato e continuativo e le nuove strutture di rappresentanza sindacale Nidil, Alai e Cpo*, in *LD*, 1999, 4, p. 630.

[22] Centamore, *Sindacato, contrattazione e lavoro non standard*, in *RGL*, 2022, 2, p. 216; Tullini, *L'economia digitale alla prova dell'interesse collettivo*, in *LLI*, 2018, 4, 1, p. 1 ff.; Lassandari, *La tutela collettiva del lavoro nelle piattaforme digitali: gli inizi di un percorso difficile*, in *LLI*, 2018, 4, 1, p. I ff.; Forlivesi, *La sfida della rappresentanza sindacale dei lavoratori 2.0*, in *DRI*, 2016, 3, p. 672 ff.

[23] Caruso, *La rappresentanza delle organizzazioni di interessi tra disintermediazione e intermediazione*, in *ADL*, 2017, 3, p. 563.

[24] Gaudio, *Algorithmic management, sindacato e tutela giurisdizionale*, in *DRI*, 2022, 1, pp. 30-74; Donini, *Condotta antisindacale e collaborazioni autonome: tre decreti a confronto*, in *LLI*, 2022, 1, R.1-R.33; Razzolini, *Azione di classe e legittimazione ad agire del sindacato a prescindere dall'iscrizione nel pubblico elenco: prime considerazioni*, in *LDE*, 2021, 4, pp. 1-12; Recchia, *Il sindacato va al processo: interessi collettivi dei lavoratori e azione di classe*, in *LDE*, 2021, 4, pp. 1-13; Protopapa, *Strategie legali delle organizzazioni sindacali e Statuto dei lavoratori*, in *LD*, 2020, 4, pp. 655-672.

[25] For Spain and Germany, see Gil Y Gil J. L., *Collective Bargaining for the Self-Employed*, in *CLLPJ*, 2021, 42, 2, pp. 327-370; Sorge, *German Law on Dependent Self-Employed Workers: A Comparison to the Current Situation under Spanish Law*, in *CLLPJ*, 2010, 31, 2, pp. 249-252. For

France[26], and, in the Netherlands, for the self-employed who work "side-by-side" with subordinate colleagues or negotiate an adequate wage to safeguard their livelihood[27].

3. *EU Commission Guidelines*

Faced with this scenario that goes against European rules, the EU Commission adopted the "Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons"[28], with which it in fact supports that negotiating dynamism for the benefit of self-employed workers already experienced in many Member States.

This is not a revolutionary act. Indeed, the Commission has adopted a soft law act that does not expressly recognise the (positive and fundamental) right to collective bargaining of the self-employed[29]. Instead, following the precedents of European case law, the Guidelines grant "immunity" from competition law to collective agreements signed by certain categories of individual self-employed workers – in other words, another "exception to the rule" on competition. This is hardly surprising, considering that the initiative was initiated within the framework of the Directorate-General (DG) for Competition[30].

The scope of this soft law is restricted to individual self-employed workers. This decision has been supported by a large part of the literature according to which, albeit with different nuances[31], extending the right to collective

Ireland, Doherty, Franca, *Solving the 'Gig-saw'? Collective Rights and Platform Work*, in *ILJ*, 2020, 49, 3, pp. 352-376.

[26] Cavallini, Avogaro, "*Digital work" in the "platform economy": the last (but not least) stage of precariousness in labour relationships*, in Kenner, Florczak, Otto (eds.), *Precarious Work. The Challenge for Labour Law in Europe*, Elgar, 2019, p. 186 ff.

[27] Monti, *Collective labour agreements and EU competition law: five reconfigurations*, in *ECJ*, 2021, 17, 3, pp. 714-744.

[28] OJEU (C-374/2, 30.9.2022).

[29] Supported by Creighton, Mccrystal, *Who is a ''Worker'' in International Law?*, in *CLLPJ*, 2016, 37, pp. 694-704.

[30] As pointed out by Senatori, *EU law and digitalization of employment relations*, in Gyulavàri, Menegatti (eds.), *Decent Work in the Digital Age. European and Comparative Perspectives*, Hart-Bloomsbury, pp. 57-81.

[31] According to many, the work is predominantly personal and carries strong social de-

bargaining to personal self-employment is functional to guaranteeing the integrity and dignity of the working person[32]. On first reading, the EU Guidelines broaden the immunity in favour of predominantly personal self-employment[33] in which goods and commodities may be used as auxiliary means for personal performance[34]. This clarification makes it possible to include in the field of beneficiaries those self-employed workers who have been denied contractual requalification because they have a micro-organization[35]. Among the positive aspects is the fact that the immunity covers the self-employed worker as such (and not because he is bogus, wrongly qualified) due to his difficulties in influencing working conditions[36]. In the face of an increasingly monopsonistic and oligopsonistic labour market, the Commission has adopted this exemption from competition rules based on the condition of economic-contractual imbalance in the employment relationship[37].

3.1. Collective agreements of individual self-employed workers comparable to employees

The Commission articulates different classes of exemption so that full immunity covers collective agreements concluded by individual self-employed persons comparable to employees. This macro-category brings to-

mands and negotiating weaknesses. Cfr. Piglialarmi, *Lavoro autonomo, pattuizioni collettive e normativa antitrust: dopo il caso FNV Kunsten, quale futuro?*, in *LDE*, 2021, 4, p. 16; Countouris, De Stefano, *The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively*, in Waas, Hiessl (eds.), *Collective Bargaining for Self-Employed Workers in Europe*, Bulletin of Comparative Labour Relations, 2021, 109; Biasi, *"We will all laugh at gilded butterflies". The shadow of antitrust law on the collective negotiation of fair fees for self-employed workers*, in *ELLJ*, 2018, 9, 4, pp. 354-373; Freedland, Kountouris, *Some Reflections on the "Personal Scope" of Collective Labour Law*, in *ILJ*, 2017, 46, 1, pp. 52-71. According to others, this right should be extended to exclusively personal work. Cfr. Engblom, cit., p. 212; Ichino, *Sulla questione del lavoro non subordinato ma sostanzialmente dipendente nel diritto europeo e in quello degli stati membri*, note to the ruling *FNV Kunsten*, in *RIDL*, 2015, 2, p. 579 ff.

[32] Razzolini, *Organizzazione e azione collettiva nei lavori autonomi*, in *PS*, 2021, 1, p. 59.

[33] Point 2, Section. 1 "Introduction" in which the Commission specifies that "'solo self-employed person' means a person who […] relies *primarily* on his or her own personal labour".

[34] Point 18.

[35] CJEU, C-692/19 *Yodel*.

[36] As specified in Point 8, Section 1.

[37] On the role of collective bargaining in the monopsonistic labour market structure Ichino, *Collective Brgaining and Antitrust Laws: an Open Issue*, in *IJCL*, 2001, 17, 2, pp. 185-198.

gether three groups: self-employed workers in situations of economic dependence[38], self-employed workers working "side by side" with employees[39], and self-employed workers on digital platforms[40]. For this class, an *ex-ante* exemption is granted since the collective agreements of these workers fall outside the scope of Article 101 TFEU.

Concerning the first group, a percentage threshold of labour income from a single principal is set to quantify economic dependency, corresponding on average to at least 50 per cent over one or two years, following the example of Spain and Germany. Even though economic dependency is a more measurable element than organisational dependency, it will be difficult for social partners to guarantee the application of a collective agreement only to those workers who comply with this numeric threshold[41]. As suggested in the past by the doctrine, it would have been more useful to introduce an indicative criterion such as *prevailing* dependence on a client[42]. This flexibility, for example, has been adopted in Germany where, as an alternative to the numerical threshold (50%), the criterion of personal activity is set mainly under a mono-client regime[43].

The second group includes agreements signed by self-employed workers in a situation comparable to subordinate workers since they work "side by side" and perform tasks identical or similar to theirs. However, the extension of immunity to this category of workers is severely limited by the elements that identify it: together with the absence of the business risk and organisational autonomy, the managerial power proper to subordination is relevant. In essence, these are the false self-employed workers evoked by the FNV ruling, in relation to which the method of carrying out the work and the personal nature of the activity come into play[44]. It seems clear that this only concerns workers exposed to contractual reclassification by the courts

[38] Section 3.1.

[39] Section 3.2.

[40] Section 3.3.

[41] Similarly, Villa, *Lavoro autonomo, accordi collettivi e diritto della concorrenza dell'Unione europea: prove di dialogo*, in *RGL*, 2022, 2, p. 306.

[42] Treu, *Uno Statuto per un lavoro autonomo*, in *DRI*, 2010, 3, p. 615.

[43] Brameshuber, *(A Fundamental Right to) Collective Bargaining for Economically Dependent, Employee-Like Workers*, in José, Boto, Brameshuber (eds.), *Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models*, Hart Publishing, Oxford, 2022, p. 248 ff.

[44] Cfr. Romei, *Contratto di Lavoro e Diritto della Concorrenza*, in *Enciclopedia del Diritto*, Voce, *Il contratto di lavoro*, Giuffrè, 2023.

and competent authorities[45]. On the other hand, those self-employed workers bound by contractual forms that entrust a series of commercial risks to the provider and provide varying degrees of autonomy in the performance of the service remain without collective protection[46].

With respect to the third group, self-employed platform workers are *per se* considered to be in a position of dependence comparable to that of employees. In truth, this immunity seems to be posited as a remedial tool with respect to the hypothesis of contractual requalification facilitated by the legal presumption of subordination envisaged by the proposal for a directive on platform workers[47]. In other words, collective bargaining is called upon to protect those platform workers for whom the requalification operation will fail anyway[48].

3.2. The other "tolerated" collective agreements: reflections on social objectives and the fight against social dumping

The broad scope of the Guidelines is found above all in the residual provisions where the European Commission stipulates that it will not intervene against other categories of collective agreements, even if they fall within the scope of Article 101 TFEU[49]. These collective agreements aim to correct an obvious imbalance of bargaining power. In these cases, the counterparties must either represent the entire sector or possess considerable economic strength calculated, again, using numerical thresholds referring to the actual turnover and employees[50]. Therefore, the European Commission decides to "tolerate" collective agreements aimed at correcting the distortions of the labour market generated by its monopsonistic structure, leading to the providers' contractual weakness[51]. The best example of this is the digital

[45] As indicated in Point 26.

[46] In this sense also RAINONE, *Labour Rights Beyond Employment Status: Insights from the Competition Law Guidelines on Collective Bargaining*, in ADDABBO, ALES, CURZI, RYMKEVICH, SENATORI (eds.), *Defining and Protecting Autonomous Work*, Palgrave, 2022, pp. 167-191.

[47] COM(2021) 762 final, Bruxelles, 9.12.2021.

[48] GIOVANNONE, *La proposta di direttiva UE sui* platform workers*: tecniche regolative ed effettività delle tutele per i lavoratori autonomi*, in *Federalismi.it*, 2022, 25, pp. 129-160.

[49] Section 4.

[50] Point 34. Point 35 further specifies that these thresholds may also be deemed to be exceeded in the case of a joint agreement with several counterparties.

[51] ICHINO, *Collective Brgaining and Antitrust Laws: an Open Issue*, cit., p. 186 ff.

economy, where the "big companies" commercial strength and bargaining power are out of proportion[52]. Furthermore, the Commission will not act against those collective agreements concluded under national or EU law that pursue "social objectives [...] to address an imbalance in bargaining power faced by certain categories of sole self-employed persons"[53]. Therefore, collective agreements already concluded under national law now appear to be shielded from competition law.

Concerning the latter sub-class of exemption, the clarification on social objectives calls to mind some of the arguments in the Albany case. Indeed, as mentioned, the Court granted immunity to collective agreements pursuing a "social policy objective" in that case[54]. However, contrary to that decision, these collective agreements must be entered into under national (or European) law and are not legitimised because they pursue the social objective of safeguarding and improving pay/compensation and working conditions. Indeed, this restrictive orientation runs counter to recent European case law – the Court of Justice has only prohibited those collective agreements with the restrictive effect on competition as their only plausible purpose[55]. For this reason, collective agreements that pursue a social objective as a legitimate interest of general scope[56] should be lawful regardless of legislative investiture. The notion of legitimate interest, in fact, should not be limited to the hypotheses contemplated in Art. 36 TFEU (public morality, public order, etc.): this notion should also include social objectives that protect those fundamental (workers') rights enshrined in national constitutions and international treaties and recognised as general principles of EU law under Art. 6(3) TEU[57].

It must also be said that the meeting point between social objectives and the protection of competition is the fight against social dumping. It is hard to see how competition law can stand in the way of collective agreements that attempt to curb social dumping, which is recognised as an unfair

[52] Sanjukta, *Antitrust as Allocator of Coordination Rights*, in *UCLA Law Review*, 2020, 67, pp. 380-431.

[53] Point 36.

[54] Cfr. *supra* § 1.

[55] CJEU, C-307/18, *Generics*; CJEU, C-228/18, *Budapest Bank*.

[56] For similar arguments, CJEU, C-309/99, *Wouters*; CJEU, C-184/13, *API*.

[57] As argued by Donini, Forlivesi, Rota, Tullini, *Towards collective protections for crowdworkers: Italy, Spain and France in the EU context*, in *Transfer*, 2017, 23, 2, p. 213.

competition practice. This objective, by the way, is just as relevant for subordinate employment as it is for self-employment, given that labour cost savings are frequently practised through the use of the disparate types of contract inscribed in the area of autonomy[58]. This line of interpretation is, in fact, known to European jurisprudence. The Court of Justice has recognised the fight against social dumping as an overriding reason of general interest justifying the restriction of fundamental freedoms[59]. Furthermore, the European Court of Justice recalled that safeguarding employment falls within the scope of the objectives that Article 85(3) allows for "as an improvement of the general conditions of production"[60]. Consistently, in the *Albany* case, the Court specified that improving employment conditions may appear as a social policy objective to be pursued through collective bargaining[61]. Therefore, in these circumstances the restriction of competition should be considered lawful to the extent that it is proportionately necessary for the pursuit of the legitimate aim[62].

4. *The borderline between self-employed worker and small entrepreneur: from the Italian to the Australian case*

The most observant doctrine has begun to advance interesting reflections on the appropriateness of recognising the legitimacy of the collective agreements of small entrepreneurs. *A priori*, in fact, many scholars have pointed out the factual assimilation of the small entrepreneur to self-employment, *i.e.*, where the entrepreneurial nature of the organisation moves away from the enterprise's production factors and approaches the minimal and accessory organisation of the self-employed worker[63]. The distinction

[58] Schiavo, *Il dumping contrattuale e le azioni di contrasto*, in *RGL*, 2022, 2, p. 176.

[59] CJEU, C-577/10, *European Commission v Kingdom of Belgium*. Cfr. Schömann, *Collective bargaining and the limits of competition law, Protecting the fundamental labour rights of self-employed workers*, ETUI Policy Brief, 2022, 8.

[60] CJEU, C-42/84, *Remia* recalls the ruling *Metro* (CJEU, C-26/76, *Metro*).

[61] Cfr. *supra* § 2.

[62] Lianos, Countouris, De Stefano, *Re-thinking the competition law/labour law interaction: Promoting a fairer labour market*, in *ELLJ*, 2019, 10, 3, pp. 291-333.

[63] Razzolini, *Piccolo imprenditore e lavoro prevalentemente personale*, Giappichelli, 2012. Also, Putaturo Donati, *Agenti e Jobs Act degli autonomi*, in Zilio Grandi, Biasi (eds), *Commentario Breve allo Statuto del Lavoro Autonomo e del Lavoro Agile*, Padova, 2018, p. 254.

between self-employment and small enterprise is often elusive, especially in the dematerialised enterprise where personal labour becomes preponderant with respect to organisational factors: for example, Uber drivers or Amazon couriers, who equip themselves with an instrumental organisation, are united by economic and organisational dependence on the "super-contractor", whether they are qualified as self-employed or as small entrepreneurs. For this reason, the intervention of collective bargaining should not be excluded a priori[64]. In this perspective, the small individual enterprise is identified with personal labour exposed to the risk of abuse of dependence and, therefore, needs social protection like the self-employed worker[65].

In Italy, there is a codified distinction between a self-employed worker (Article 2222 of the Civil Code), an enterprise (Article 2082 of the Civil Code), and a small entrepreneur (Article 2083 of the Civil Code). The latter is endowed with a minimum organisation that does not conflict with the predominantly personal professional activity. In the past, the Constitutional Court has recognised that small entrepreneurs who perform exclusively personal work are entitled to trade union freedom[66]. To identify the distinction between the self-employed and the small entrepreneur, the most convincing solution so far rests on assessing the entrepreneurial organisation. In essence, the small entrepreneur is endowed with an organisation that exceeds individual work, the problematic assessment of which should be addressed through a judgement of the merits of labour protections (Art. 35 Const.) according to a case-by-case approach[67]. On the contrary, the jurisprudence has

[64] As argued by Biasi, *Ripensando il rapporto tra il diritto della concorrenza e la contrattazione collettiva relativa al lavoro autonomo all'indomani della l. n. 81 del 2017*, "Massimo D'Antona", 358/2018, p. 24.

[65] Perulli, *Un Jobs Act per il lavoro autonomo: verso una nuova disciplina della dipendenza economica?*, in *DRI*, 2015, 1, p. 126 ff.; Freedland, *Application of labour and employment law beyond the contract of employment*, in *ILR*, 2007, 1-2, p. 3 ff.

[66] C. Cost. 17 July 1975 no. 222. It is also recalled that the Constitutional Court ruling no. 880 of 26 July 1988 extended the right to social security to artisans. In contrast, the right to strike was denied to small entrepreneurs with workers in their employ. See Constitutional Court, 24 March 1986, no. 53. Even the most recent statutory protections do not lean towards such assimilation. In fact, Law No. 81/2017 protecting self-employment has excluded entrepreneurs, "including small entrepreneurs referred to in Article 2083 of the Civil Code" from the scope of application (Art. 1, para. 2).

[67] Santoro-Passarelli G., *Il lavoro autonomo non imprenditoriale, il lavoro agile e il telelavoro*, in *RIDL*, 2017, 3, p. 374 ff.

legitimised the use of pure self-employment even in the presence of a business organisation, in the hypothesis in which the work of the obliged person is prevalent with respect to the entrepreneurial organisation[68]. However, such a technically operated distinction acts ineluctably on the level of protection, clashing with the factual reality that shows how small entrepreneurs are, today more than yesterday, in an evident position of weakness in the market when compared to the self-employed.

This issue has also been addressed in other jurisdictions. An interesting case study is that of Australia, where the Antitrust Authority has adopted a class exemption that, as of June 2021, provides immunity from competition law to agreements entered into by small businesses and the self-employed[69]. Thus, small companies may organise limited forms of collective bargaining with larger companies on condition that arrangements improve contractual terms and conditions and reduce information asymmetries[70]. Although this is a progressive approach, it must be emphasised that the trade union is expressly excluded from the list of representatives designated to fulfil the exemption requirements. In effect, these collective agreements are covered by general common law principles on contracts, with no room for the guarantees typical of traditional collective agreements. As in the case of the EU Guidelines, this regulation constitutes an exemption from competition law without adopting the labour law viewpoint envisaged so far[71]. However, it cannot be denied that the Australian experience projects collective negotiation beyond the fence between work and business in all those cases in which, regardless of the *status* of worker or small entrepreneur, a person finds himself in a condition of strong contractual weakness *vis-a-vis* the other party. On the other hand, this exemption from the competition rules starts from situations of the evident disproportion of the negotiating power, in line with the rationale adopted by the European Commission in the new Guidelines.

There is no doubt that, being at the crossroads of labour law and competition law, this model further blurs the boundaries of sectoral disciplines[72].

[68] Cass. 2 September 2010 no. 19014; 29 May 2001 no. 703; 4 June 1999 no. 5451.

[69] Competition and Consumer (Class Exemption – Collective Bargaining) Determination 2020, Australian Competition and Consumer Commission – ACCC.

[70] On this point Mccrystal, *Collective Bargaining by Self-Employed Workers in Australia and the Concept of "Public Benefit"*, in *CLLPJ*, 2021, 42, 2, pp. 253-291.

[71] Mccrystal, Hardy, *Filling the Void? A Critical Analysis of Competition Regulation of Collective Bargaining Amongst Non-employees*, in *IJCL*, 2021, 37, 4, pp. 355-384.

[72] Section 4. Cfr. *supra* § 3.2.

However, if protecting labour means protecting the economic order based on the principles of fairness and fair competition, the objective fact of a global market in which the self-employed and the small entrepreneur can be equally crushed by the economic force of very large corporations is relevant. For this reason, the interpretative effort should focus on the judgement of merits through the lens of labour law that assesses the need for protection in all those hypotheses in which the self-employed, *albeit* with a streamlined organisation, depends on companies with strong bargaining power. Transferring this line of interpretation to the European legal system is a complex operation in the face of the binary labour-enterprise split that has often engulfed self-employed workers in the notion of "enterprise"; imagine trying to avoid this centripetal effect involving the small entrepreneur with a lean organisation! With respect to this issue, the Commission's Guidelines do not provide any particular room for interpretation since they only refer to individual self-employed workers who perform predominantly personal work, possibly with the aid of goods and services. No useful criteria are found for determining the prevalence of personal work and the permissible instrumental baggage within the boundaries of non-entrepreneurial self-employment; nor does the European Commission expressly open up for collective agreements of small entrepreneurs. Therefore, it must be concluded that the Guidelines do not clarify the legitimacy of collective bargaining for a wide range of subjects that can hardly be qualified as self-employed or small entrepreneurs. And yet, collective agreements may represent a valid guarantee against abuses in "hierarchical"[73] inter-entrepreneurial relations, intervening in the imbalance of bargaining power openly opposed by the Guidelines.

5. *Conclusion*

The Guidelines do not represent a radical step change in the relationship between antitrust law and collective bargaining. However, this act of soft law represents the first acknowledgement of the dynamism that collective bargaining is showing in the new challenges of labour, especially platform labour[74]. Indeed, the EU Commission could no longer stall in the face of

[73] PERULLI, *Il lavoro autonomo e il perdurante equivoco del lavoro a progetto*, in *DRI*, 2013, 1, p. 5.

[74] Profusely, CORDELLA, *Il lavoro dei rider: fenomenologia, inquadramento giuridico e diritti sin-*

the lively debate on the need for collective labour protection beyond subordination. The European legislator thus decided to show some openness to the protection of those workers who are in a position of contractual weakness to the detriment of their effective independence in the labour market[75]. Contractual weakness is indeed the root of a series of social risks independent of how the service is performed and can only be countered through the exercise of fundamental rights[76]. These considerations must then be contextualised in digital labour markets. Here, collective bargaining is now legitimised to protect those workers with a high social risk in the new digital markets, where it is easier to engage in downward competition between workers[77]. At the same time, collective bargaining can help limit those obligations and responsibilities of economic operators that result from the transposal of the successful European legislation on the digital economy[78].

Finally, some open questions remain. First of all, the Guidelines do not clarify whether the immunity covers those collective agreements, including those that worsen working conditions, provided for in some jurisdictions (such as Italy)[79]. Moreover, no guidance is provided on agents with negotiating legitimacy. Indeed, it needs to be clarified whether the most recent self-employment organisations are considered trade unions, even though they do not belong to large confederations and have no negotiating tradition. Limiting the field of legitimate agents could constitute a restriction of the freedom of association for the benefit of only the most traditional represen-

dacali, in "Massimo D'Antona", 441/2021; La Tegola, *Il conflitto collettivo nell'era digitale*, in *DRI*, 2020, 3, p. 638 ff.

[75] Tomassetti, *Il lavoro autonomo tra legge e contrattazione collettiva*, in *VTDL*, 2018, 3, p. 717 ff.

[76] Loi, *Il lavoro autonomo tra diritto del lavoro e diritto della concorrenza*, in *DLRI*, 2018, 160, 4, p. 857 ff.

[77] Casiello, *Note a caldo sugli Orientamenti della Commissione UE sull'applicazione del diritto della concorrenza dell'Unione agli accordi collettivi dei lavoratori autonomi individuali*, in *LDE*, 2022, 3, p. 4.

[78] The reference is, in addition to the above-mentioned proposal for a directive on platform workers, Regulation (EU) 2022/2065 on the single market for digital services, Regulation (EU) 2022/868 on data governance and the proposal for a European regulation on artificial intelligence.

[79] These are "accordi ablativi" (art. 2, co. 2, letter a), Legislative Decree no. 81/2015) which regulate working conditions *in pejus*. Cfr. Villa, "*Gli amori difficili": contrattazione collettiva e lavoro autonomo*, in Lassandari, Villa, Zoli (eds.), *Il lavoro povero in Italia: problemi e prospettive*, Variazioni su Temi di Diritto del Lavoro, Giappichelli, Torino, 2022, p. 121.

tative organisations, which, however, scarcely represent the self-employed. This is a complex issue because it calls into question the problematic measurement of the representativeness of the agent-organisation, especially for the new associations that adopt action strategies very far removed from 20th century trade unionism[80]. Without a clear European guideline, it will be up to the Member States to determine the legitimate negotiating agents. In doing so, states should consider that, in supranational contexts, the governance systems that set social standards have adopted a multi-stakeholder participatory model, open to new forms of structured representation such as NGOs[81].

[80] ZUCARO, *Lavoro autonomo. Un modello di rappresentanza per un emergente interesse collettivo*, in *LLI*, 2018, 4, 2, p. 197, who highlights the similarities between these representative associations and entrepreneurial associations.

[81] *Ex multis*, BACCARO, MELE, *Pathology of Path Dependency? The ILO and the Challenge of New Governance*, in *ILR Review*, 2012, 65, 2, pp. 195-224; BOSTRÖM, TAMM HALLSTRÖM, *NGO Power in Global Social and Environmental Standard-Setting*, in *GEP*, 2010, 10, 4, pp. 36-59.

Abstract

The coexistence between collective labour rights and competition rules has always been complex in the European legal order. This tension is exacerbated when collective agreements of self-employed workers, considered restrictive agreements of competition under Article 101 TFEU, come into question. However, factual reality shows that self-employed workers are frequently in a position of significant contractual weakness in the labour market and economic-organisational dependence in the employment relationship. Therefore, promoting the collective dynamism experienced in many Member States, the European Commission adopted the Guidelines granting antitrust immunity to collective agreements signed by certain categories of individual self-employed workers. This act of soft law represents the first important recognition of collective protections beyond subordination. However, there is evidence of critical issues and gaps in content that limit its expansive scope. Finally, reflection is proposed on the appropriateness of legitimising the collective agreements of small entrepreneurs in a situation comparable to the self-employed workers, due to their position of weakness with respect to the negotiating counterpart. The rationale proposed in the commentary is based on the real need for social protection arising from the risk of abuse of dependency in unbalanced inter-private relations.

Keywords

Collective bargaining, EU competition rules, Guidelines, Self-employment, Small entrepreneur.