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Collective Bargaining for Solo Self-Employed Persons in the European Union. Assessing the Efficacy of the European Commission's Guidelines

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1. *The Complex Relationship between Competition Law and Collective Workers' Rights in the European Union Framework*

The legitimacy of collective agreements applicable to self-employed persons is a prominent issue that arose in the context of the interaction between European competition law and labour law principles.

The relationship between the principle of free competition in the European internal market and trade union freedoms has always been contentious. This conflict has been influenced by the significant expansion of social rights in the last century, which has challenged the rigidity of older competition law regulations[1]. Social and political changes, which have transformed the European Union from an organisation primarily focused on creating a common market to evolving into a complex political entity with diverse competences, have also influenced this process.

[1] For a historical reconstruction, cfr. MINDA, *The Common Law, Labor and Antitrust*, in *IRLJ*, 1989, 11, p. 466 ff.; see also ICHINO, *Collective Bargaining and Antitrust Laws: an Open Issue*, in *IJCL*, 2001, 17, pp. 185-188.

In the last decades, the tension between ensuring fair competition in the internal market and meeting social needs has become more evident. It is important to note that collective bargaining was not the sole battleground where the social principles of the Union clashed with competition rules[2]. There was notable dispute also regarding matters like Sunday rest[3], job placement[4], and strikes[5], to give just some examples.

As for European Union law, the conflict arises from the provision of Art. 101 of the Treaty on the Functioning of the European Union, which prohibits agreements that have the potential to restrict or distort competition[6]. While collective agreements concerning individual rights of employees are generally considered compatible with free competition[7], issues can arise when provisions in collective agreements result in restrictions on competition in the service market.

However, in EU law, there are norms, including primary legislation, that establish trade union freedom without explicit constraints regarding the subjective qualification of those exercising it, whether they are employees or self-employed[8]. It has been argued that Art. 152 of the TFEU, which recog-

[2] On this issue, CORTI, *Concorrenza e lavoro: incroci pericolosi in attesa di una svolta*, in *DLRI*, 2016, 3, pp. 505-509.

[3] CJEU C-145/88 *Torfaen Borough Council v B & Q plc* of 23 November 1989.

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

[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 (*Viking*); CJEU C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* of 18 December 2007.

[6] Art. 102 could also be relevant if a union achieves a dominant position. See LIANOS, COUNTOURIS, DE STEFANO, *Re-thinking the competition law/labour law interaction: Promoting a fairer labour market*, in *ELLJ*, 2019, 10, 3, p. 303 and LIANOS, *Reconciling Antitrust Standard and Collective Bargaining Rights: Towards a New Analytical Framework in EU Competition Law*, in WAAS, HIESSL (eds.), *Collective Bargaining for Self-Employed Workers in Europe*, Wolters Kluwer, 2021, p. 302, also about Art. 106, pp. 302-304.

[7] In this sense ICHINO, *Collective Bargaining and Antitrust Laws: an Open Issue*, in *IJCL*, 2001, 17, 2, p. 189. According to 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, p. 361 "European competition law is specifically directed at undertakings (and their dealings) and it does not – apparently – cover individuals".

[8] This approach is also followed by the most prominent international sources on labour law and human rights. See, about the importance of taking a human right based approach in considering collective labour rights, STYLOGIANNIS, *Collective Labour Rights for Self-Employed*

nizes and promotes the role of the social partners, introduced in the Treaty of Lisbon, has severed the functionalization constraint of social dialogue to the interests of the Union, recognizing it as an autonomous function[9]. The subsequent Art. 155, with reference to social dialogue "at Union level" provides that this dialogue "may lead to contractual relations, including agreements".

Furthermore, Art. 28 of the Charter of the Fundamental Rights of the European Union, which holds equal status with the EU Treaties, recognise to workers and employers and their respective organisations "the right to negotiate and conclude collective agreements at the appropriate levels"[10]. It was affirmed that Art. 28 constitutes a fundamental vehicle for the principle of solidarity in the European Union[11].

It is important to note that Art. 28 mentions collective agreements for the first time in the context of primary European sources. In other provisions, including Art. 152 of the TFEU, more generic expressions such as "social dialogue" are preferred[12]. However, 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. Furthermore, the reference to the negotiation phase extends the scope of Art. 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.

Workers. A Human Rights-Based Approach of Platform Work, Wolters Kluwer, 2023, p. 167 ff. Cfr. also GIOVANNONE, *Guidelines on collective agreements regarding the solo self-employed persons: another (controversial) immunity to EU competition rules*, in this journal, 2023, 2, p. 3.

[9] CARUSO, ALAIMO, *Il contratto collettivo nell'ordinamento dell'Unione europea*, in *B20M*, 2011, 2, pp. 281-282.

[10] See LAZZARI, *La Carta dei diritti fondamentali dell'Unione e le relazioni industriali: il diritto di contrattazione collettiva*, in *DLRI*, 2001, p. 641 ff.

[11] On the issue of solidarity in European labour law, see ZIMMER, *Solidarity as a Central Aim of Collective Labour Law?*, in LÓPEZ LÓPEZ (ed.), *Inscribing Solidarity. Debates in Labor Law and Beyond*, Cambridge University Press, 2022, p. 47.

[12] SCHNORR, I *contratti collettivi in un' Europa integrata*, in *RIDL*, 1993, 1, p. 328; CARUSO, ALAIMO, *cit.*, p. 274. SCIARRA, *How Social Will Social Europe Be in the 2020s?*, in *GLJ*, Special Issue 1, p. 86 affirms that it might be required, "in the long run", a reform of art. 152.

[13] VENEZIANI, *Right of collective bargaining and action (Article 28)*, in BERCUSSON (ed.), *European labour law and the EU Charter of Fundamental Rights*, ETUI, 2002, p. 54.

[14] ALES, *The Regulatory Function of Collective Agreements in the Light of Its Relationship with Statutory Instruments and Individual Rights: A Multilevel Approach*, in GYULAVÁRI, MENEGATTI (eds.), *The Sources of Labour Law*, Wolter Kluwers, 2019, p. 43.

Since, according to Art. 28, collective agreements should be negotiated and concluded "in accordance with Community law and national laws and practice", the norm 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 Art. 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 recognized and codified at the European level in Art. 28, based on the constitutional traditions of the Member States[16].

2. *Collective Agreements and Competition Law in the European Court of Justice Case Law*

The first significant judgement concerning the compatibility of collective bargaining with EU competition law is the one on the Becu case (CJEU C-22/98 of 16 September 1999). In this decision the Court of Justice of the European Union established that, for the purposes of competition law, workers are not considered undertakings[17].

A few days later, in the well-known Albany case (CJEU C-67/97 of 21

[15] Ales, *cit.*, 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, p. 4 available at https://www.ilo.org/resource/conference-paper/report-iii1b-giving-globalization-human-face-general-survey-fundamental, "specific provisions in relation to collective bargaining are present in 66 constitutions".

[17] Point 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 (*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".

September 1999), the Court stated that collective agreements that pursue social policy objectives by implementing measures to improve conditions of work and employment can be considered exempt from the application of Art. 101. In the Court's reasoning, since objectives of social relevance have a recognized space in the Treaties[18], they must therefore be considered in a proper balance with competition rules.

The exemption from competition law established by the Court is subject to a "double filter"[19]. The first filter concerns the nature of the agreement, that must be that of a "collective agreement". The second filter concerns the object of the collective agreement[20], that must consist in certain objectives of social relevance[21]. For this reason, the exemption has been defined as "arguably narrow"[22] and based on "at least too generic" argumentations[23], and the Albany ruling has been considered partially consistent with the Court's previous orientations[24].

[18] According to De Vries, *Protecting Fundamental (Social) Rights through the Lens of the EU Single Market: The Quest for a More "Holistic Approac"*, in *IJCLLIR*, 2016, 2, p. 221, the Court raises collective bargaining "to a legitimate European social value".

[19] Di Via, *Sindacati, contratti collettivi e antitrust*, in *MCR*, 2000, 2, p. 283.

[20] According to Pallini, *Il rapporto problematico tra diritto della concorrenza e autonomia collettiva nell'ordinamento comunitario e nazionale*, in *RIDL*, 2000, 2, p. 242 the control over the object makes the freedom of bargaining "supervised".

[21] Schiek, *Collective bargaining and unpaid care as social security risk – an EU perspective*, in *IJCLLIR*, 2020, 36, 3, p. 402. The notion of social objectives has been further specified. Cfr. CJEU C-222/98 *Hendrik van der Woude v Stichting Beatrixoord* of 21 September 2000 (*van der Woude*), point 21; CJEU C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL* of 3 March 2011 (*AGR2*), point 29. Cfr. Evju, *Collective Agreements and Competition Law: The Albany Puzzle, and van der Woude*, in *IJCLLIR*, 2001, 2, p. 165 ff.

[22] Freedland, Countouris, *Some Reflections on the "Personal Scope" of Collective Labour Law*, in *ILJ*, 2017, 1, p. 59; cfr. 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*, in *ADL*, 2, 2018, 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) affirmed that "the notion of direct improvement of the employment and working conditions of employees must not be too narrowly construed". Cfr. also, Giubboni, *Libertà d'impresa e diritto del lavoro nell'Unione europea*, in *Cost.it*, 2016, 3, p. 106, according to whom the scope of application of the Albany extempion is indeed wide.

[23] Ichino, *Collective Bargaining and Antitrust Laws: An Open Issue*, in *IJCL*, 2001, 17, 2, p. 193.

[24] Allamprese, *Diritto comunitario della concorrenza e contratti collettivi*, in *LG*, 2000, 8, 1, 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*

These decisions pertain to cases where the agreements were applicable only to employees. 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"[25].

In many member states of the EU, collective agreements that regulate the working conditions of self-employed persons are common[26], although not as widespread and effective as it is for employees. The interests at stake and the established protections are indeed still of great relevance[27]. 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[28].

The first judgement that addressed the issue was on the Pavlov case (CJEU C-180/98 to C-184/98 of 12 September 2000). According to the

and Union des associations européennes de football (UEFA) v Jean-Marc Bosman of 15 December 1995): "there 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" (point 273 and 274); see also CJEU C-241/94 *French Republic v. Commission of the European Communities* of 26 September 1996.

[25] Risak, Dullinger, *The concept of "worker" in EU law. Status quo and potential for change*, ETUI, 2018, p. 21.

[26] See Hiessl, *National Approaches to Collective Bargaining for the Self-Employed: Common Trends, Innovative Potential and Unresolved Problems*, in Waas, Hiessl (eds.), *Collective Bargaining for Self-Employed Workers in Europe*, Wolters Kluwer, 2021, p. 279 ff. The practice it's also very common in Italy: cfr., recently, 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, p. 388 ff.; Centamore, *Sindacato, contrattazione e lavoro non standard,* in *RGL,* 2022, 2, p. 216. It's important to underline that Art. 2113 of the Italian Civil Code seems to indirectly recognize the non-derogability by individual parties of the regulations set by collective agreements, even for para-subordinate self-employed workers. This implies an implicit confirmation of the favorability of Italian legislation towards the possibility of concluding collective agreements for self-employed persons. Other norms implicitly admit this possibility as well, such as art. 47-*quater* of Legislative Decree no. 81/2015, which refers to collective agreements for the integration of the regulation applicable to self-employed platform workers. Some Authors have included within these norms Art. 2, par. 2 of the same Legislative Decree, which allows collective agreements to derogate from the regulations on "hetero-organised collaborations". However, it is likely that this norm does not apply to self-employed persons within the EU definition (Delfino, *Salario legale, contrattazione collettiva e concorrenza*, ESI, 2019, p. 169).

[27] This is true for those who perform personal work and are subject to a power imbalance with their counterpart. Cfr. 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*, Wolters Kluwer, 2021, p. 10.

[28] An effective summary of the debate is provided by Bellomo, *Platform work, protection needs and the labour market in the Labour law debate of recent years*, in this journal, 2022, 2, p. 155 ff.

Court, the Albany exemption "cannot be applied to an agreement which [...] is not concluded in the context of collective bargaining", such as an agreement that applies only to self-employed persons.

A partially different assessment was made subsequently in the well-known FNV Kunsten case (CJEU C-143/13 of 4 December 2014). 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 Art. 28, with those of the Treaties themselves[29].

The Court stated that the concept of an undertaking includes those who "perform their activities as independent economic operators in relation to their principal"[30]. Consequently, a service provider can't be considered as an undertaking, "if he does not determine independently his own conduct on the market, but is entirely dependent on his principal"[31]. If the self-employed persons to whom the agreement is applied can be said to be "entirely dependent", they are considered "false self-employed". In particular, the state of dependency arises from the fact that the worker does not bear any economic or financial risk with the counterparty and operates as an auxiliary within the principal's undertaking. The Court also specified that the classification of a self-employed person under national law does not prevent that person from being classified as an employee according to the EU definition[32].

As a result of the Court's ruling, only service providers in a situation comparable to that of workers are exempted from competition law. Therefore, only collective agreements that apply to "false" self-employed persons can be considered compliant with EU law.

[29] Lianos, Countouris, De Stefano, *cit.*, p. 308.

[30] Cfr. 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, point 38.

[31] Since the term "undertaking" is not defined in either primary or secondary European law, scholars have suggested a "functional approach" in interpreting this notion. This is because provisions that contain the term could serve very different functions in relation to the different fields of regulation. See Arnold, Cerny, *Entrepreneur*, in Bartolini, Cippitani, Colcelli (eds.), *Dictionary of Statuses within EU Law*, Springer, 2019, p. 188. See also Carinci M.T., *Attività professionali, rappresentanza collettiva, strumenti di autotutela*, in *B20M*, 1, 2008, p. 176.

[32] As previously stated 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 (*Allonby)*, point 71.

The characteristics that the Court outlines to describe false self-employment seem to refer, partially, to the notion of economic dependence[33], which has been occasionally used in some national legal systems as a basis for providing protections to workers[34]. FNV Kunsten has identified criteria that can be used to interpret the EU notion of worker for the purpose of applying the Albany exemptions, using an approach that has been defined "functional"[35].

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 excessively cautious as it continues to strongly link the applicability of collective agreements to the qualification of "worker", albeit in the form of "false self-employed"[36]. There are indeed several categories of self-employed persons who, although not falling within the Court's definition of false self-employment, deserve the protections provided by collective agreements[37].

[33] Grosheide, ter Haar, *Employee-like worker: competitive entrepreneur or submissive employee? Reflections on CJEU, C-413/13, FNV Kunsten Informatie*, in Łaga, Bellomo, Gundt, Miranda Boto (eds.), *Labour Law and Social Rights in Europe*, Gda sk University Press, 2017, p. 37; Menegatti, *The Evolving Concept of "worker" in EU law*, in *ILLeJ*, 2019, 1, 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".

[34] Consider, for example, the figure of the TRADE (*Trabajador Autónomo Económicamente Dependiente*) in the Spanish legal system. TRADEs, as outlined in the *Estatuto del Trabajo Autónomo* established in Spain in 2007, are the sole category of self-employed individuals granted the right to enter into collective agreements, known as "Professional Interest Agreements" (see Art. 13 of the *Estatuto*). Cfr., on this point, García-Muñoz Alhambra, *Spain*, in Waas, Hiessl (eds.), *Collective Bargaining*, cit., p. 237. Cfr. also, in relation to the Italian context, Delfino, *Statutory minimum wage and subordination. FNV Kunsten judgment and beyond (CJEU, C-413/13)*, in Łaga, Bellomo, Gundt, Miranda Boto (eds.), *Labour Law and Social Rights*, cit., p. 46, where he affirms that almost all the requirements described by *FNV Kunsten* are formally present in "hetero-organised" employment relationships as regulated in Italy by art. 2, d.lgs. 81/2015.

[35] Lianos, Countouris, De Stefano, *cit.*, p. 313.

[36] Cfr. Perulli, *A new category within European Union Law: Personal work*, in *ELLJ*, 2024, 1, p. 199, "basically, in FNV, the Court did nothing but reaffirm an absolutely undisputed principle in all legal systems regarding the classification of the employment relationship, that is the 'primacy of facts'". "False self-employed" cannot therefore constitute a third intermediate category between workers and entrepreneurs. Cfr. Risak, Dullinger, *cit.*, p. 21 and Loi, *Il lavoro autonomo tra diritto del lavoro e diritto della concorrenza*, in *DLRI*, 2018, 4, pp. 864-865.

[37] Lianos, Countouris, De Stefano, *cit.*, p. 314 mention, for example, creative workers,

3. *The scope of the "labour law exemption" according to the European Commision Guidelines*

From 2013 to the present, the discourse surrounding the insufficient protection of self-employment and the increasing inadequacy of labour law categories, both at the European and national levels, has steadily intensified. The emergence of platform work has underscored the necessity for concrete interventions to enhance protections for self-employed persons.

With the aim of addressing these new protection needs, the European Commission adopted Guidelines[38] on the application of the Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02) on September 30, 2022. The Guidelines were initially proposed on December 9, 2021, coinciding with the proposal for a Directive on working conditions in digital platforms.

The Guidelines clarify some of the criteria established by the case law of the Court of Justice, as highlighted in the introduction of the act. This introduction provided an overview of the current state of the conflict between labour law and competition law, while also outlining the objectives of the Guidelines. Points 3 and 4 highlight the different principles involved. The case law of the Court of Justice 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 for the general scope of application, point 13 affirms that the Guidelines apply to collective agreements as previously defined in point 2(c), which are agreements "negotiated and concluded between solo self-employed persons or their representatives and their counterparty" that "concerns the working conditions of such solo self-employed persons". This definition is

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". Cfr. also, on platform workers, Doherty, Franca, *Solving the "Gig-saw"? Collective Rights and Platform Work*, in *ILJ*, 2019, 3, p. 352 ff.; Cordella, *Il lavoro dei rider: fenomenologia, inquadramento giuridico e diritti sindacali*, in *VTDL*, 2021, 4, p. 941 ff.; Guarriello, *L'accesso alla contrattazione collettiva per i lavoratori delle piattaforme: una corsa a ostacoli*, in Aimo, Fenoglio, Izzi (eds.), *Studi in memoria di Massimo Roccella*, ESI, 2021, p. 550 ff.

[38] A similar action was taken in the Netherlands, where the Authority for Consumers & Markets adopted Guidelines on price arrangements between self-employed workers in 2021, which also "codified" European Court of Justice jurisprudence (see Monti, *Collective labour agreements and EU competition law: five reconfigurations*, in *ECJ*, 2021, 17, 3, p. 721).

derived from the case law of the Court of Justice, that generally states that a collective agreement, to be considered exempt from competition law, must have the specific objective of improving the working conditions of workers[39]. Point 15 provides an exemplary – and perhaps redundant – list of the subjects that fall within the scope of working conditions regulated by collective agreements.

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" (point 2(a)). Solo self-employed persons are thus distinguished, on the one hand, from employees, and on the other hand, from undertakings, as solo self-employed persons are expected to predominantly perform personal work. Therefore, the contribution of other means, such as the use of machinery or the help of substitutes or assistants, cannot prevail on personal work but should be ancillary. It's worth noting that the CJEU, in its judgement on the Yodel case, considered the use of "subcontractors or substitutes to perform the service"[40] as a factor that could exclude the qualification of "worker". It's important to underline that the definition provided in the Guidelines should be interpreted more flexibly, to include workers who use substitutes or have a basic organisation of their own means but perform the activity primarily in a "personal" way.

It's important to note that the definition of "solo self-employed person" coincides with the notion of "false self-employed person" as defined by the FNV Kunsten judgement. This is not surprising, as the Guidelines do not aim to alter the definitions of "worker" and "undertaking" within EU law. As noted by scholars, the initiative behind the Guidelines was taken by the Directorate-General on Competition of the European Commission[41]. Therefore, it's understandable why the Guidelines appear to have a limited effect on reshaping the fundamental notions and principles in European labour law. The aim of the Guidelines seems to be more about identifying the limits of action of competition law in a more accurate manner, rather than extend-

[39] See par. 2.

[40] CJEU C-692/19 *B v Yodel Delivery Network Ltd* of 22 April 2020, point 45.

[41] Senatori, *EU law and digitalization of employment relations*, in Gyulavàri, Menegatti (eds.), *Decent Work in the Digital Age. European and Comparative Perspectives*, Hart-Bloomsbury, 2021, p. 68.

ing or reshaping those limits[42] to promote broader application of labour law protections[43].

After outlining the definitions, general principles, and scope of application, the Guidelines detail specific cases that fall outside the scope of Art. 101 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 potentially lead to ambiguity, as in the cases outlined in Section 4, the legitimacy of collective agreements is not explicitly established. Therefore, if the Commission cannot definitively intervene in these cases, it remains possible for other entities to intervene. For example, the Court of Justice may intervene through a judgement following a question for a preliminary ruling in a dispute between private parties.

Following the reference to the content of the FNV Kunsten judgement, the Guidelines delineate three distinct categories of self-employed persons presumed to be exempt from the application of Art. 101 to collective agreements that apply 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, an approach commonly used in recent EU legislation.

A similar approach was also followed in the first draft of the proposal for a Directive on improving working conditions in platform work, where five different criteria were established to facilitate the qualification of a relationship as a working relationship: if at least two criteria were concretely verified, the relationship would be legally presumed to be a working relationship. The use of this technique aimed to guarantee more homogeneity in the qualification of platform workers across different member States, identifying the determination of worker status as crucial for recognising labour protections. The most recent text of the proposal (March 8, 2024), likely the

[42] Pallini, *L'approccio "rimediale" della Commissione UE alla tutela del diritto di contrattazione collettiva dei lavoratori autonomi*, in *LDE*, 2023, 3, p. 8.

[43] The Commission has therefore disregarded the hopes of some scholars, who had imagined the possibility that the labour exception could also be extended to some genuine self-employed workers, proposing a case-by-case evaluation of the agreements by the antitrust authorities of the Member States. See on this point Razzolini, *Organizzazione e azione collettiva nei lavori autonomi*, in *PS*, 2021, 1, p. 60. A similar case-by-case evaluation of the compatibility of the collective agreements with antitrust law is adopted in Australia (Giovannone, *Guidelines on collective agreements*, cit., p. 13-14).

final one, narrowed the application of the legal presumption by eliminating the factual criteria.

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[44], which recognise the right of self-employed persons to engage in collective bargaining, subject to certain conditions.

The issue of economic dependence as a valid criterion for distributing labour law protections has long been a topic of discussion in many European legal systems[45]. The notion of economic dependence is particularly considered when making internal distinctions in the field of genuine self-employment[46]. However, as mentioned, the Guidelines do not aim to identify a group of self-employed persons deserving of protections. Rather, the goal is to specify the notion of false self-employed persons within European Union law.

In this case, the Guidelines seem to use a criterion useful for making distinctions within genuine self-employment to differentiate, instead, between workers (in the form of "false self-employed persons") and self-employed persons[47]. The use of this his criterion highlights the contradictions

[44] For Germany: Section 12a of the Collective Agreements Act; for Spain: Art. 11 of L. 20/2007, of 11 July 2007.

[45] See the comprehensive research by PERULLI, *Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects*, Report for the European Commission, 2003. More recently, scholars used the criterion of economic dependency to analyse the regulations applicable to gig economy workers: see CHERRY, ALOISI, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, in *AULR,* 2017, 66, 3, pp. 635 ff.; RAZZOLINI, *Self-employed workers and collective action: a necessary response to increasing income inequality*, in *CLLPJ*, 2021, 42, 2, p. 18. See also PERULLI, *The legal and jurisprudential evolution of the notion of employee*, in *ELLJ*, 2020, 2, p. 10 ff.; PALLINI, *Il lavoro economicamente dipendente*, Cedam, 2013, pp. 39 ff.; CORAZZA, *Dipendenza economica e potere negoziale del datore di lavoro*, in *DLRI*, 2014, 4, pp. 654-655.

[46] Cfr. FERRARO, *Studio sulla collaborazione coordinata*, Giappichelli, 2023, p. 599.

[47] See, regarding the border between genuine self-employment and false self-employment, with reference to the Italian legal framework and in particular to a law that employs factual criteria to identify "economic dependence", SANTORO-PASSARELLI, *Falso lavoro autonomo e lavoro autonomo economicamente dipendente ma genuino: due nozioni a confronto*, in *RIDL*, 2013, 1, p. 108 ff. The Author argues that the category of "economic dependence" could be more useful for

of the Commission's approach, which on the one hand does not want to depart from the state of the art of Court of Justice case law, and on the other hand, attempts to introduce criteria that goes "beyond subordination"[48] to include in the notion of worker individuals who have the characteristics of genuine self-employed[49].

In point 24, the Guidelines define the factual indicators for presuming economic dependency of solo self-employed persons. 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 incorporation of two distinct and individually assessable timeframes, a feature absent in the 2021 draft, is designed to enhance the efficacy of protection, and deter abusive practices by clients. Specifically, this measure prevents clients from potentially dividing the payment of fees to diminish their impact within a single year, thereby evading 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. This criterion was probably introduced in relation to a collective bargaining praxis adopted in

identifying self-employed workers deserving of protection rather than false self-employed persons.

[48] DAVIDOV, *Setting Labour Law's Coverage: Between Universalism and Selectivity*, in *OJLG*, 2014, 34, 3, pp. 564-566; PERULLI, *Oltre la subordinazione. La nuova tendenza espansiva del diritto del lavoro*, Giappichelli, 2021.

[49] SCHIEK, GIDEON, *Outsmarting the gig-economy through collective bargaining - EU competition law as a barrier to smart cities?*, in *IRLCT*, 2018, 32, 3, p. 290, noted that using the category of "economic dependency" to determine who can access collective bargaining "would go well beyond the *FNV Kunsten* case law".

[50] The threshold has been considered too high in relation to its function of determining a presumption of economic dependency. Cfr. GEORGIOU, *An Assessment of the EU's Draft Guidelines on the Application of EU Competition Law to Collective Agreements of the Solo Self-Employed*, in *competitionpolicyinternational.com*, 2022.

some countries, such as Netherlands and Slovenia, to conclude agreements applicable both to employees and self-employed[51].

The Guidelines clearly specify that these indicators should not be considered for determining the reclassification of the worker under national laws but only regarding 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[52].

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[53], 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[54]. This belief could be reinforced, especially concerning platform workers, by the most recent version of the text of the Proposal for the Directive on Improving Working Conditions in Platform Work dated March 8, 2024, which establishes a legal presumption of an employment relationship when "facts indicating control and direction" are identified (Art. 5).

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.

[51] Perulli, *A new category within European Union Law*, cit., p. 202.

[52] Fulton, *Trade Unions Protecting Self-Employed Workers*, ETUC, 2018.

[53] Romei, *Contratto di lavoro e diritto della concorrenza*, in Del Punta, Romei, Scarpelli (eds.), *Il contratto di lavoro*, in *Enciclopedia del Diritto - I tematici*, VI, Giuffrè, 2023, p. 299.

[54] Cfr. Rainone S., *Labour Rights Beyond Employment Status: Insights from the Competition Law Guidelines on Collective Bargaining*, in Addabbo *et al.* (eds.), *Defining and Protecting Autonomous Work*, Palgrave, 2022, p. 189.

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 must accept the conditions imposed by platforms without the opportunity for individual negotiation ("take it or leave it"). The Commission highlights that many national authorities or courts are increasingly recognising the dependence of service providers on certain types of platforms, or even acknowledging the existence of an employment relationship. According to the Commission itself, this recognition supports the comparability of solo self-employed persons working through platforms with workers.

This argument holds true only concerning the recognition of "dependence", which is a prerequisite for comparability to workers according to the FNV Kunsten judgement. However, the same argument does not hold the same weight regarding the recognition of platform workers as employees. If platform workers are deemed employees in national legal systems, they would unquestionably be regarded as workers under EU law, and thus, the Albany exemption would apply regardless. Therefore, the recognition of some platform workers as employees does not significantly affect the assessment of comparability with workers.

What truly matters in assessing comparability with workers is the level of dependence, even for platform workers classified as self-employed under national laws. Determining this level, in the case of platform workers, does not necessitate 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 sufficient to consider them as false self-employed under European law and, therefore, exempt from the application of Art. 101 regarding the collective agreements applicable to them[55].

It is also highlighted that some Member States have implemented specific legislation to protect platform workers. The regulations of Spain[56] and

[55] 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. Cfr. GIOVANNONE, *La contrattazione collettiva dei lavoratori autonomi nell'orizzonte UE: tra tutela della concorrenza e autotutela collettiva*, in *fdl.it*, 2022, p. 222.

[56] Royal D.l. 9/2021, of 11 May 2021.

Greece[57], are explicitly mentioned, but it is important to note that France[58] and then Italy[59] 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[60].

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. A restrictive definition of 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 was identical to the one given in the first draft of the Proposal for a Directive on improving working conditions in platform work of 2021. It's noteworthy that the latest version of the Directive added another condition that must be met to define a platform as a "digital labour platform" for the purposes of the Directive. The platform should involve "the use of automated monitoring or decision-making systems". The introduction of this additional condition reduces the scope of application of the Directive, but obviously does not directly apply to the Guidelines that were approved before. Nonetheless, since the proposed Directive and the Guidelines are closely linked, it cannot be ruled out that an interpretation of the definition of digital platform consistent with that of the Directive could be favoured by the Commission. This observation is further supported by the language of the Guidelines, which stipulates that if the definition were to evolve during the process of approving the Directive, the Commission could contemplate revising the definition contained in the Guidelines accordingly.

[57] L. 4808/2021.

[58] L. 2016-1088 of 9 August 2016.

[59] 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, *Ancora su eterodirezione, etero-organizzazione, su coloro che operano mediante piattaforme digitali, i riders e il ragionevole equilibrio della Cassazione n. 1663/2020*, in *MGL*, 2020, numero straordinario, p. 214 ff.

[60] See art. 47-*quater*, d.lgs. 81/2015.

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" and "can include other activities such as processing payments". The organisation, as defined by the Guidelines, may therefore not concern the performance of work itself but only the initial phase of the relationship[61]. 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 that recalls the notion of personal work, 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".

Section four of the Guidelines addresses cases where solo self-employed persons, although not in comparable conditions to that of workers[62], 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 power in these situations to influence the determination of their working conditions[63]. Then, from the Commission's perspective, collective agreements would serve to address this disparity.

[61] On the distinction between an "initial phase" and a "working performance phase" in platform work see FALSONE, *Lavorare tramite piattaforme digitali: durata senza continuità*, in *DLRI*, 2022, 2, pp. 250-251

[62] For this reason, it was stated that in this case the Guidelines "fade the exact equivalence between undertakings and self-employment" (DELEONARDIS, *La disciplina del rapporto di lavoro autonomo e il ruolo dell'autonomia collettiva*, in *VTDL*, 2023, 3, p. 756).

[63] According to RAINONE S., *cit.*, p. 189 the use of bargaining power as an index represents a "paradigm shift" in European Union law.

The disparity is envisaged under two alternative conditions: a) if the agreement is negotiated with one or more counterparties which represent the whole sector or industry; b) 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[64]. 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 adopted to include digital companies that in many cases have few or no employees but generate significant income. One possible side effect of the application 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[65].

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. An example of such legislation is given in the Guidelines itself, referring to Directive (EU) 2019/790, regarding the right of authors and performers to appropriate and proportionate remuneration. This provision suggests a scrutiny of the reasons for intervention by the EU institutions, which is difficult to accomplish.

The Commission thus leaves it to the Member States to identify in abstract the cases in which the social objectives, already mentioned in the Albany case[66], 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. This

[64] The requirements are the same as those identified for defining a "microenterprise" in Art. 2 of Annex I to the Commission recommendation of 6 May 2003 concerning the definition of micro, small, and medium-sized enterprises.

[65] In general, regarding the potential abusive behaviour of companies related to numerical thresholds, see DASKALOVA, *The Competition Law Framework and Collective Bargaining Agreements for Self-Employed: Analysing Restrictions and Mapping Exemption Opportunities*, in WAAS, HIESSL (eds.), *Collective Bargaining*, cit., p. 49.

[66] GIOVANNONE, *Guidelines on collective agreements*, cit., p. 10.

provision allows room for States to identify and, in some cases, protect certain common practices in collective bargaining for solo self-employed persons that are viewed favourably. Until now, the legislative solutions provided by States in this direction were "framed with EU Law in mind"[67]. The provision in the Guidelines regarding non-intervention could potentially encourage States to make less cautious and more autonomous evaluations.

4. *Efficacy of the Guidelines in guaranteeing social rights to solo self-employed persons*

The nature of the act adopted, specifically a Commission communication, raises concerns regarding the effectiveness of the Guidelines, as it lacks the capacity to introduce substantial changes to the state of the art established by EU legislation.

On one hand, the Guidelines simply clarify who is considered a false self-employed within the specific subject matter, specifying 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. Essentially, they reaffirm the exclusion of genuine self-employed persons under EU law from the application of collective agreements. In other words, the Guidelines do not "create new rights or new regulatory categories" and leave "completely unprejudiced the legislative and jurisprudential dynamics at national and supranational level"[68].

On the other hand, they 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 vulnerability of them. However, in the latter scenario, the Commission can only act within the scope of its own proceedings and cannot interfere with the judgments and orientations of the Court of Justice. Therefore, the Guidelines cannot guarantee total exemption in all circumstances where the legitimacy of a collective agreement may be called into question.

[67] Monti, *cit.*, p. 726. The Author mentions, in particular, the Irish legislation adopted through the Competition (Amendment) Act 2017, Section 2.

[68] Perulli, *A new category within European Union Law*, cit., p. 200.

Moreover, as highlighted in the previous paragraph, some of the criteria identified by the Guidelines have clear defects, sometimes due to their excessive indeterminacy, and other times due to possible difficulties in concrete 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[69]. In some cases, the distinction is based on indicators closely related to the personal situation of the person (a paradigmatic example being economic dependency)[70]. In other cases, decisive factors concern the counterpart, such as belonging to a particular sector 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 represent an important interpretative advancement in relation to the established case law of the Court of Justice, they may not be the best tool for resolving the issue of the legitimacy of collective agreements applicable to economically 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 the application of a collective agreement.

A collective approach to the issue is necessary. A legislative solution, through a specific regulation, which could be based on the full implementation of Art. 28 of the Charter of Fundamental Rights[71], may be needed[72].

[69] Cfr. Pallini, *L'approccio "rimediale"*, cit., p. 13.

[70] Giovannone, *La contrattazione collettiva dei lavoratori autonomi*, cit., p. 221 argues the difficulty for social partners to ensure the application only to persons with certain requirements. See also Villa, *Lavoro autonomo, accordi collettivi e diritto della concorrenza dell'Unione europea: prove di dialogo*, in *RGL*, 2022, 2, p. 306. On the inadequacy of a system based on numerical thresholds, cfr. Treu, *Uno Statuto per un lavoro autonomo*, in *DRI*, 2010, 3, p. 615 and Treu, *Lavoro autonomo e diritti collettivi nell'Unione europea*, in *LDE*, 2023, 3, pp. 9-10.

[71] Cfr. Lianos, *Reconciling Antitrust Standard and Collective Bargaining Rights: Towards a New Analytical Framework in EU Competition Law*, in Waas, Hiessl (eds.), *Collective Bargaining*, cit., p. 318; cfr. Piglialarmi, *Lavoro autonomo, pattuizioni collettive e normativa antitrust: dopo il caso FNV Kunsten, quale futuro?*, in *LDE*, 2021, 4, p. 23.

[72] According to some scholars, this article alone could make it possible to consider the

This solution could involve redefining the concept of a worker in the European law[73], at least for the purpose of evaluating the legitimacy of collective agreements, to include not only employees and false self-employed persons[74] but also, in general, self-employed persons who provide their services in a personal way[75]. This type of action could align with some scholars' suggestions to overcome the rigid dichotomy between workers and the self-employed as the sole means to assign labour protections[76].

The relevance of the notion of "personal work" as a tool to redefine the scope of application of European labour law is indeed gaining attention. A proper understanding of this notion would generally encompass individuals "who make a living from their own work", excluding only entrepreneurs that "make a living by organising the work of others, by organising capital"[77]. If this is true, all genuinely self-employed persons would be included in the definition, making it quite broad.

Therefore, it's important to emphasise that the concept of "personal work" may only be useful in cases where there's a need to expand the scope of a protection to cover all workers, whether they are employees or self-employed. There may indeed be instances where the notion of "personal work" is too broad to ensure a fair distribution of protections[78]. Indeed, it has been

interests of the self-employed in bargaining superior to the rules of competition law. Cfr. LIANOS, COUNTOURIS, DE STEFANO, *cit.*, p. 323.

[73] LIANOS, *Reconciling Antitrust Standard*, cit., pp. 314-316. According to FERRARO, *The Challenge of Self-employment protection in the European Union*, in BELLOMO, PRETEROTI (eds.), *Recent Labour Law Issues. A multilevel Perspective*, Giappichelli, 2019, p. 77, "the absolute equivalence self-employed = undertaking [...] configure an obstacle to the realization of objectives of inclusion and social protection".

[74] LA TEGOLA, *Le fonti di determinazione del compenso nel lavoro non subordinato*, Cacucci, 2022, p. 181, after analysing the Guidelines, argues that the protection of economically dependent self-employed persons cannot solely rely on their classification as "false self-employed".

[75] As suggested by LIANOS, COUNTOURIS, DE STEFANO, *cit.*, p. 323; cfr. BIASI, "*We will all laugh at gilded butterflies*", cit., pp. 371-372. Partially *contra* DASKALOVA, *The Competition Law Framework*, cit., p. 48, who argues that "limiting the collective bargaining exemption to vulnerable self-employed seems necessary to avoid undesirable consequences", but acknowledges that "a uniform vulnerability criterion may be difficult to spell out".

[76] See the works mentioned in footnote 48 and also TREU, PERULLI, *"In tutte le sue forme e applicazioni". Per un nuovo Statuto del lavoro*, Giappichelli, 2022, particularly pp. 33-34.

[77] See PERULLI, *A new category within European Union Law*, cit., p. 188.

[78] According to PERULLI, *A new category within European Union Law*, cit., p. 190, the notion of personal work "has no selectivity". See also p. 209. Cfr. ROMEI, *cit.*, p. 298.

observed that the concepts of "employee" and "self-employed" within the EU context should be regarded as "plural", as they serve different functional purposes depending on the type of protection being discussed[79]. In the context of recognizing the right to collectively bargain, considering its significance as a fundamental human right in many legal systems[80], the notion of "personal work" appears suitable for fairly determining who should have access to this right. Excluding genuinely self-employed individuals from collective bargaining would not be coherent with the principles emerging from the EU Treaties, given the reasons outlined above.

In conclusion, the valorisation of the notion of "personal work", if applied in this case, could help 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 action, by eliminating uncertainty, would also promote collective bargaining for self-employed persons in negotiation and pre-negotiation phases, enabling the full implementation of Art. 28 CFREU.

[79] Pallini, *Libertà di contrattazione collettiva dei lavoratori autonomi e tutela della concorrenza: apologia della giurisprudenza della Corte di giustizia dell'UE*, in Aimo, Fenoglio, Izzi (eds.), *Studi in memoria di Massimo Roccella*, ESI, 2021, p. 864.

[80] De Stefano, *Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach*, in *ILJ*, 2016, 46, 2, p. 11. See also Stylogiannis, *Collective Labour Rights for Self-Employed Workers. A Human Rights-Based Approach of Platform Work*, Wolters Kluwer, 2023, p. 163 ff.

Abstract

The purpose of this paper 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, and as a result, they may violate 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 many 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.

Keywords

Self-employment, European labour law, Collective agreements, European competition law, Labour protection.