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ABSTRACT

The CJEU FNV Kunsten *case law opened a debate on the application of EU competition law to collective agreements that include self-employed workers in their personal scope. The Commission has recently participated in this debate with the issuing of a document of Guidelines on the topic. The present contribution analyses the Guidelines, assessing their potential and limitations. It is argued that, even if the approach in the Guidelines is a step in the right direction, it falls short of addressing the problem. To achieve a better protection of increasing numbers of vulnerable self-employed in the labour market demands a more comprehensive approach where the legal fields of competition law and labour law are better coordinated.*

La sentenza della CGUE nel caso FNV Kunsten *ha aperto un dibattito sull'applicazione del diritto della concorrenza euro-unitario ai contratti collettivi che includono nel loro ambito i lavoratori autonomi. La Commissione ha recentemente partecipato a questo dibattito pubblicando Orientamenti sull'argomento. Il contributo analizza tali Orientamenti, valutandone le potenzialità e i limiti, e sostenendo che l'approccio ivi adottato, anche se rappresenta un passo nella giusta direzione, non riesce a risolvere il problema. Per ottenere una migliore protezione del crescente numero di lavoratori autonomi vulnerabili presenti nel mercato del lavoro, è infatti necessario un approccio più completo, in cui il diritto della concorrenza e il diritto del lavoro siano meglio coordinati.*

Introduction

Collective bargaining of self-employed in the European Union is more relevant than ever, due to the growing numbers of self-employed workers across European countries. This expansion is influenced by several factors, including the development of new forms of work in the digital and platform economy that, frequently, rely on self-employed workers for their functioning. Against this backdrop, interesting legal questions arise in connection with the possibilities self-employed workers have to engage in collective bargaining: questions such as where to set the boundaries of the personal scope of labour

law, how can we think the relation between labour law and EU competition law or who has legitimacy to negotiate collective agreements on behalf of self-employed workers. In this contribution, I will focus on the second of these questions: what are the legal possibilities and constraints for the collective bargaining of self-employed workers in the EU resulting from the interaction between competition law and labour law.

In the EU, the CJEU case-law in *FNV Kunsten* (C-413/13) started a wide debate on the application of Article 101 TFEU to the collective agreements of self-employed workers. The European Commission, on its part, has intervened recently in this debate with the publication of a document with 'Guidelines' on the application of competition law in this field to solo self-employed. In the present contribution the focus is on which legal implications these guidelines may have and which legal obstacles remain for the collective bargaining of self-employed workers in the EU and its future development.

The analysis is structured in four parts. First, I introduce the FNV case law. Second, I elaborate on what is, in my opinion, the core of the problem: the clash of *rationales* between (EU) competition law and labour law. Third, I present the Guidelines on the application of competition law to collective bargaining of the self-employed and discuss how these may impact the current legal framework that defines the relations between collective bargaining of self-employed workers and competition law at EU level. Fourth, I conclude by reviewing some proposals to move forward towards a legal framework that allows the self-employed, or at least the most vulnerable among them, to fully engage in collective bargaining to improve their working conditions.

1. The *FNV Kunsten* case law

The *FNV Kunsten* case, with originated in the Netherlands, is about the boundaries between competition law and labour law. More particularly, it is about the substantive scope of application of Article 101(1) TFEU. Dutch law, in its definition of what is a collective agreement, opened the door to the possibility that independent service providers could join a trade union (or employer's or professional's association), being these actors entitled to conclude a collective labour agreement on behalf of self-employed. At the same time, collective labour agreements are exempted from the application of competition law rules under Dutch law.

In this context, a union of musicians (FNV) concluded a collective agreement concerning musicians substituting members of orchestras. This collective agreement established minimum fees both for employees and self-employed substitutes. At some point, the Dutch competition authority considered that such an agreement was not excluded from competition law rules, since it did not fit within the exception carved out in the *Albany* case law (C-67/96) for 'collective labour agreements'. Since the collective agreement covered self-employed professionals, the reasoning of the Dutch competition authority goes, it acquires the characteristics of an inter-professional agreement, and therefore competition law must apply. Following this opinion, the employers terminated the

collective agreement and decided not to negotiate a new one. It is then when FNV decided to start proceedings seeking a declaration that such collective agreements on behalf of self-employed were not contrary to Dutch or EU competition law. The Dutch Court that was hearing the case decided to request a preliminary ruling to the CJEU on the question of the substantive scope of Article 101(1) TFEU.

In its judgment, the CJEU recalled the rationale of the '*Albany* exemption': the social policy objectives pursued by collective labour agreements, that inherently imply certain restrictions of competition, justify their exemption from the application of Article 101 TFEU. The problem in this case was, for the CJEU, that the self-employed workers included in the agreement were to be considered, in principle, undertakings within the meaning of Article 101 TFEU because: 1) they offered their services for remuneration in a given market and 2) performed their activities as independent economic operators in relation to their principal. Therefore, when a trade union (FNV in this case) is negotiating on behalf of self-employed workers is acting as an association of undertakings. This is why, the CJEU concluded, a provision setting minimum fees on a collective agreement including self-employed is not the result of a collective agreement between employers and employees and consequently cannot be excluded from the scope of application of Article 101 TFEU. In other words: collective agreements by self-employed or involving self-employed are not 'immune' to competition law in the EU legal order.

However, the CJEU conceded that, if such self-employed persons would be found to be 'fake' or 'bogus' self-employed, inasmuch as they are in a situation 'comparable to that of employees', then the collective agreement would be the result of negotiations between employers and employees and would be, in consequence, excluded from the application of competition law rules.

FNV Kunsten raises then different legal issues. First, the question of whether a self-employed should be considered as an 'undertaking' or rather as an 'employee', which will in turn depend on: i) the employment status of the person and ii) the status of the self-employed contractor as an undertaking. On this second point, the relevant criterion highlighted by the Court to decide such a question is whether the self-employed determines independently his own conduct in the market or is entirely dependent on his principal, not bearing any of the financial or commercial risks operating as an 'auxiliar' within the principal's undertaking.

The first question, on the employment status, has become even more relevant nowadays in the framework of the expansion of the gig and platform economy and new forms of organization of work. National case law and legal reforms have directly engaged with the issue of the employment status of workers in the gig economy, and there is also case law at EU level. Two trends are emerging: first, a majority of case law decisions leaning towards the consideration of gig workers as employees and the introduction by legislator of a legal presumption of application of labour law to workers in the gig economy. The

proposal for an EU Directive on platform work seems to follow this idea. But this is a topic in itself and not the focus of the present contribution.

The second question, that of the status of self-employed persons as undertakings under competition law, remains unresolved. The key element here is whether these workers who are not employees, *i.e.* the 'real' self-employed (or those belonging to a third category), can organize and negotiate collective agreements. And, if so, whether EU competition law would then apply. The small door that *FNV Kunsten* opens in this respect comes from the reference to self-employed being in a situation 'comparable to that of employees' and to the possibility that a self-employed may not be considered an 'undertaking'. The Guidelines further develop these points. I will come back to them in section three.

2. A clash of rationales: labour law vs. (EU) competition law

The clash of rationales between competition law and labour law is apparent. Whereas competition law tends to repeal all those arrangements that may restrict free market competition, collective bargaining purpose is exactly the opposite: by collectively bargaining *vis-à-vis* with employers (at company, sectoral or other levels), the workers and their organizations seek to limit competition in the labour market on a number of issues, namely wages (that could be understood as the 'price' for work), working time, etc. This clash of rationales has been also acknowledged by the CJEU: *Albany* acknowledges the inherent restrictions to competition resulting from collective labour agreements, but these are accepted in the name of the social policy objectives of labour law. Here we can recognise a variation of a classical clash in EU law between an economic or 'market making' rationale and a social or 'market correcting' one.

We have to admit that this framing is a construction alien to most of the legal traditions of EU Member States. Collective bargaining is here construed as a *derogation* from EU competition rules. As a consequence, the shadow of Article 101 TFEU, that would otherwise apply, is always there, strictly limiting the possibilities of collective agreements both on their personal and material scope. Furthermore, this construction disregards the fact that collective bargaining is formulated in several EU Member States as a fundamental right and, consequently, limitations to it must be narrowly interpreted, which is obviously not the case when formulated as a derogation. On the other hand, however, we must admit that this is a coherent construction if one considers the internal logic of the EU Treaties and the underpinning rationales of EU law, where the principle of 'undistorted competition' is one of the driving forces of the European integration project.[1] The rationale of competition law is therefore not easy to overcome. On its part, a proper labour law rationale, one in which the protection of the worker as a social policy objective trumps competition concerns, is only allowed to express under two cumulative

[1] See for a critique of EU law in its relation to the regulation of labour E Christodoulidis., *The Redress of Law,* OUP, 2021, in particular chapters 3.3 and 3.4.

conditions: there must be, first, a labour collective agreement that, second, aims at improving the employment and working conditions of those under its personal scope.

Therefore, self-employed workers are in principle excluded of the possibility to engage in collective bargaining in the EU, since, as we have seen, the concept of 'labour collective agreement' is restricted to those agreements reached by those who are considered 'workers', in the CJEU understanding of the concept, that does not include the self-employed. Self-employed, on the contrary, are to be considered in principle as undertakings under EU competition law.

This vision can be, however, challenged with base in at least two arguments. First, a close reading of *FNV Kunsten* allows to argue that self-employed workers, when they are in a position 'comparable to that of employees', should not be considered as 'undertakings' and, therefore, deserve the protection of collective agreements. A fundamental rights' perspective that engages in a teleological interpretation of Article 28 CFRs may assist in defending this argument[2]. The question of the comparability between employees and other service providers in connection with the derogation for collective agreements from the application of Article 101 TFEU, becomes, therefore, crucial. Second, Advocate General Wahl's opinion in *FNV Kunsten,* using a typical competition law argument, provides us with a further reason to defend the inclusion of self-employed 'in a comparable situation to employees' in the derogation from Article 101 TFEU: the distortions of competitions that may arise from the 'unfair' competition of these 'comparable' self-employed with employees protected by collective agreements, that could potentially lead to a downward competition on salaries.

Obviously, other approaches different to the 'derogation from competition law' could be possible. In my view, as I make explicit in the conclusions, they are indeed preferable, since they would allow for a structural revision of the relation between labour law and competition law. One of the most convincing of such alternative visions is the one formulated by Lianos, De Stefano and Countouris when they propose '*to adopt a more proactive agenda in envisioning the relationship of competition law and labour, by putting forward the enforcement of competition law, rather than, or in conjunction with, the establishment of exceptions to the enforcement of competition law in order to preserve the possibilities of collective bargaining, in order to deal with the market failures affecting the optimal performance of labour markets and leading to the exploitation of workers, in particular to tackle labour market power*'.[3] The idea would be to develop new concepts and techniques on competition law to achieve its original aim to prevent monopsony and distortions in competition between firms. This would, at *the same time*, protect better the interest of workers. A 'market power' test approach, that would look into the asymmetry of power between the parties in order to decide whether competition law applies or, on the contrary, self-employed are allowed to organise and

[2] E. Brameshuber, *(A Fundamental Right to) Collective Bargaining for Economically Dependent, Employee-Like Workers*, in J.M Miranda Boto and E. Brameshuber (eds.), *Collective Bargaining and the gig economy. A traditional tool for new business models,* Hart Publishing, 2022, 227-252.

[3] I. Lianos, N. Countouris, V. De Stefano, *Re-thinking the competition law/labour law interaction: promoting a fairer labour market*, in *European Labour Law Journal,* Vol. 10(3), 2019, 324.

engage in collective bargaining would be an expression of this approach. To some extent, this has been the perspective adopted by the European Commission in its Guidelines, as I explain in the next section.

3. The Guidelines on collective bargaining for the self-employed

The uncertainties and discomfort caused by the *FNV* case law in its approach to the collective bargaining of the self-employed have prompted a reaction by the European Commission. It is against this background how we need to understand the Commission's initiative on collective bargaining agreements for the self-employed, launched by DG competition in 2021. This initiative is at the origin of the 'Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons', issued in September 2022.

The aim of these Guidelines is to clarify that some categories of self-employed, namely, the 'solo self-employed', can negotiate (or being included in) collective agreements without violating EU competition law. The underlying rationale of the Guidelines is arguably a 'market power' approach: since some self-employed are in a weak position in the market *vis-à-vis* with their clients, to the point that they are dependent on them and therefore cannot freely determine their own conduct in the market, competition law should not apply to their collective agreements (or those collective agreements of which they are part). This resonates with the *FNV Kunsten* idea that self-employed being in a situation 'comparable to that of employees' may not be considered an undertaking.

The Guidelines on collective bargaining for the solo self-employed insist on other two ideas: i) that certain categories of collective agreements fall outside the scope of competition law and ii) that the Commission will not intervene (by applying Article 101 TFEU) on other categories of collective agreements involving self-employed. Therefore, the Guidelines are about '*how the Commission will apply EU competition law*'.

The scope of application of the Guidelines is a composite of certain types of agreements (or material scope) and certain categories of persons covered (or personal scope). Regarding the first, the Guidelines apply to agreements negotiated by certain categories of 'solo self-employed' persons that, by their purpose and nature, concern working conditions of such solo self-employed persons. Agreements, coordination, decisions or practices that go beyond the regulation of working conditions are not covered. Regarding the persons covered by the guidelines, these are the solo self-employed 'comparable to workers.' This does not mean that those agreements not covered by the Guidelines automatically violate Article 101 TFEU, but this needs to be assessed on a case by case basis.

Which are, according to the Guidelines, the collective agreements 'by solo self-employed persons comparable to workers' that fall outside the scope of Article 101 TFEU? Those that, effectively, are concluded by (or on behalf of) persons in a situation comparable of workers. These persons are: i) economically dependent solo self-employed persons

(earning at least 50% of her total annual working income from a single counterpart); ii) solo self-employed persons working 'side-by-side' with workers; and iii) solo self-employed working through digital labour platforms (this can be read as a complement to the presumption of employment status in the EU proposal for a Directive on platform work).

To complement this, the Commission announces that it will not pursue the implementation of competition law against other categories of collective agreements involving self-employed, inasmuch as they aim at: 1) correcting a clear imbalance of power affecting solo self-employed persons relative to their counterparties and 2) are intended to improve working conditions.

In particular, the Commission will not intervene against those agreements that are concluded by solo self-employed persons with counterparties of a certain economic strength or when self-employed engage in collective bargaining pursuant to national or EU legislation (such as stated, for instance, in some provisions of the copyright Directive).[4] Economic strength is defined in the Guidelines by reference to qualitative and quantitative criteria. It will be considered that a counterparty has economic strength when it represents a whole sector or industry or when it has either a turnover of 2 million Euros or at least 10 persons in its staff.

Although the Guidelines are helpful in clarifying the *FNV Kunsten* case law in some aspects, carving out some extra space for collective agreements that include some categories of self-employed, some other issues remain problematic. It is clear that the Guidelines apply only to self-employed, in the sense that 'bogus' self-employed or those who should be considered as employees were not problematic, since in *FNV Kunsten* they are included in the exemption for collective agreements of competition law. The Guidelines help, therefore, to clarify who are those self-employed considered to be in a position '*comparable to that of employees*.' And here comes the first problem: in the categories that are considered exempted from the application of Article 101 TFUE only solo self-employed are to be found, indirectly implying that other categories of self-employed may not be in a 'comparable position to that of employees.' Cannot other categories of self-employed find themselves in a position of weakness vs. their clients and, therefore, experience an imbalance of power that should be redressed? Here maybe an approach that is closer to the analysis of the economic (and power) reality irrespective of the typology of self-employment would be preferred. Although it has to be admitted that the criterion considering the 'solo self-employed' as structurally vulnerable is easier to apply in practice.

Also, the second category of agreements, i.e., those against which the Commission will not intervene, but are not exempted, in principle, of the application of Article 101 TFEU, remain in a weak position, since they are extremely vulnerable to be challenged by other parties than the Commission. Here the question that arises is whether the CJEU will

[4] Recitals 72 and 73 and Article 18 of Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market, (OJ L 130, 17.5.2019).

follow the indications of the Commission regarding these agreements, or, on the contrary, it will be compelled to apply Article 101. These questions must remain unanswered for the time being.

4. Conclusions: the need for a paradigm change to move forward

The Guidelines go as far as they go. Although they contribute to the expansion of those categories of collective agreements that are exempted from the application of Article 101 TFEU, they do not guarantee the right to engage in collective bargaining to all self-employed, not even to all those that may need it because of their vulnerability in the market. Time and litigation seem necessary to further clarify and delimit the boundaries of Article 101 TFEU and its application to collective agreements including 'real' self-employed. At the end, the core questions are whether a self-employed is acting in the market as an 'undertaking' and whether an agreement of self-employed is negatively affecting competition.

It seems that the collective bargaining of self-employed workers is one of those legal fields (or rather battlefields) where no easy and definitive legal solutions are possible. The often conflicting (even antagonistic) rationales of competition law and labour law prevent a legal solution that makes everyone happy. The root of the problem, as Lianos, De Stefano and Countouris have proposed, may be in the construction of the respective legal fields as separate and isolated.[5] I would add that the architecture of the Treaties and the conceptualisation of collective agreements as 'exceptions' to the application of the rule (competition law) adds to the problem. There have been, however, a number of proposals to move forward towards a legal framework that is more inclusive with the self-employed and guarantees they can freely engage in collective bargaining. Lianos, De Stefano and Countouris have systematised and described some of these proposals, namely the expansion of the concept of worker, the adoption of a fundamental rights' perspective to approach the relation between competition law and labour law or what they call a 'change of paradigm'.[6]

It seems to me that a teleological approach to collective bargaining and its aims combined with the human rights approach and strategic use of the Charter of fundamental rights (CFRs) and other human rights instruments is a promising path, but it also comes with limitations. On the one hand, this teleological approach may contribute to a more complementary vision of the relation between labour law and competition law. After all, competition law also has a social objective, since competition shouldn't be conceived as an end it itself, but as an instrument to guarantee a healthy economic able to deliver progress and well-being. A fundamental rights approach may reinforce the position of collective bargaining vis-à-vis competition law because: 1) a fundamental right must be approached as the rule, that can only be restricted when restrictions are justified and

[5] I. Lianos, N. Countouris, V. De Stefano, *Re-thinking the competition law/labour law interaction et al.*
[6] Ibid.

proportionate and do not affect the essential core of the right and 2) the personal scope of fundamental rights must be interpreted broadly.[7]

In this search for complementarity, also some ideas coming from competition law should be welcome, such as the idea that not every restriction necessarily falls within the prohibition of Article 101 TFEU, since the overall context and effects of such restriction of competition need to be considered (see C-309/99, *Wouters and Others*). Along these lines I find the aforementioned proposal of 'paradigm change' in the relation between competition law and labour law very promising. This change of paradigm would operate from a realignment of the scope of both legal domains taking into account their normative function. The core idea here is that both legal fields share ultimately a common goal: to correct the uneven distribution of market power that can lead to abuses of that power with negative social consequences. In this sense, competition law shouldn't be conceived exclusively from a price-centred approach, since is a legal field also oriented towards the pursuing of the social objectives of the Union as set in Article 3 TEU.[8] Therefore, collective bargaining and competition law shouldn't be necessarily conceived in opposition terms. If developing the argument of social dumping hinted at by Advocate General Wahl in *FNV Kunsten,* it can be stated that collective bargaining prevents downward competition on labour costs and that, since in today's labour market the self-employed participate in increasing numbers, it is necessary to extend collective agreements to them in order to fight downward pressures on remuneration and working conditions.

I see all these approaches as valuable and not contradictory, but complementary. The criterion of market power seems to me a particularly promising path to realign competition law and labour law towards common shared social policy objectives. The Guidelines fall short of offering a systematic solution, although they deserve to be welcomed as a step forward in clarifying *FNV Kunsten* case law on when a self-employed is in a similar position to that of employees, as well as because they put on the table the idea of market power as a deciding criterion for the application of competition law.

On the other hand, I can hardly imagine a general approach that sets the boundaries between disciplines. It seems to me that the building of complementarity will proceed from a refining process to be developed on a case by case basis, which may of course cause some legal uncertainty (and anxiety).

The dialogue between Courts at national and EU is key in further defining the boundaries of competition and labour law at the crossroads of self-employment. So is a proactive approach by the Commission and other actors, such as social partners and self-employed persons and their associations. Innovative practices in collective bargaining need to be closely monitored, since they will potentially open new ways to organize and protect self-employed workers (but also, potentially, new conflicts). Last but not least, competition lawyers and labour lawyers are forced to understand each other in this field and learn

[7] See for instance ILO Convention C-98, where the personal scope is not based on employment status.
[8] I. Lianos, N. Countouris, V. De Stefano, *Re-thinking the competition law/labour law interaction et al.*, 331.

from one another, in particular those working at DG Employment and DG competition in Brussels, to further refine and develop a common approach to the issue at stake.