Collective Bargaining for Self-Employed Workers in Europe

Bulletin of Comparative Labour Relations

VOLUME 109

Founding Editor

The series started in 1970 under the dynamic editorship of Professor Roger Blanpain (Belgium), former President of the International Industrial Relations Association. Professor Blanpain, Professor Emeritus of Labour Law, Universities of Leuven and Tilburg, was also General Editor of the International Encyclopedia of Laws (with more than 1,600 collaborators worldwide) and President of the Association of Educative and Scientific Authors Authors. He passed away in October 2016.

General Editor

In 2015 Frank Hendrickx, Professor of labour law at the Faculty of Law of the University of Leuven (Belgium) joined as a co-Editor. Frank Hendrickx has published numerous articles and books and regularly advises governments, international institutions and private organisations in the area of labour law as well as in sports law. He is the Editor-in-Chief of the European Labour Law Journal and General Editor of the International Encyclopaedia of Laws.

Introduction

The Bulletins constitute a unique source of information and thought-provoking discussion, laying the groundwork for studies of employment relations in the 21st century, involving among much else the effects of globalization, new technologies, migration, and the greying of the population.

Contents/Subjects

Amongst other subjects the Bulletins frequently include the proceedings of international or regional conferences; reports from comparative projects devoted to salient issues in industrial relations, human resources management, and/or labour law; and specific issues underlying the multicultural aspects of our industrial societies.

Objective

The Bulletins offer a platform of expression and discussion on labour relations to scholars and practitioners worldwide, often featuring special guest editors.

The titles published in this series are listed at the end of this volume.

BULLETIN OF COMPARATIVE LABOUR RELATIONS – 109

Collective Bargaining for Self-Employed Workers in Europe

Approaches to Reconcile Competition Law and Labour Rights

Edited by

Bernd Waas
Christina Hießl

Contributors

Nicola Countouris
Victoria Daskalova
Valerio De Stefano
Vincent Franquet
Manuel Antonio García-Muñoz Alhambra
Elena Gramano
Anthony Kerr
Francis Kessler
Barbara Kresal
Femke Laagland
Ioannis Lianos
Jean-Benoît Maisin
Leszek Mitrus
Jan Rummel
Annamaria Westregård

Wolters Kluwer

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: international-sales@wolterskluwer.com
Website: lrus.wolterskluwer.com

Sold and distributed by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-94-035-2373-6

e-Book: ISBN 978-94-035-2374-3
web-PDF: ISBN 978-94-035-2375-0

Printed in the United Kingdom.

Note on Contributors

Summary of Contents

Table of Contents

CHAPTER 1

The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively

Nicola Countouris & Valerio De Stefano

1 INTRODUCTION

In this chapter, we would like to share some of our thoughts on the very important, as well as topical, issue of the scope of the right to bargain collectively and the tensions between this right and European Union (EU) competition law, especially when such right applies to self-employed workers. Our own views on the topic have, perhaps inevitably, been shaped by the regulatory rationales and methodological approaches that sustain the main legal discipline in which we happen to specialize, that is to say, Labour Law. Within that discipline, we are both perceived as representatives of a new, less dogmatic, generation of labour scholars. And it would be fair to say that we are also familiar with other disciplines (including EU law and competition law) and their methodologies and policy priorities, and have often sought to offer an interdisciplinary analysis of this issue (*see* our paper with Ioannis Lianos, 'Re-Thinking the Competition Law/Labour Law Interaction Promoting a Fairer Labour Market' (2019) *ELLJ*, 291-333).

In what follows, we will suggest that a labour law approach to the issue is perhaps inevitably characterized by three key principles or ideas. First, the idea that a number of labour rights are identified as being fundamental rights, and as such they are often protected (by national and supranational instruments, including constitutions, conventions, covenants, or other treaties) in a way that typically bestows them a superior ranking vis-à-vis other (non-fundamental) norms, creating – de facto or de jure – a hierarchy of sources. The following section 2 will briefly discuss the extent to

which the right to bargain collectively is conclusively considered as such one such right (at least by labour lawyers).

Second, the labour law approach is shaped by the idea that a number of consequences descend from the recognition of a right as fundamental. For instance, the extent to which exceptions and qualifications to that right can be applied. Or the fact that a certain degree of 'universalism' ought to characterize its scope. Section 3 will exemplify these points by reference to a number of international and regional supervisory bodies, presiding over the interpretation of relevant international and regional treaties protecting collective bargaining.

Third, we will suggest that a labour law approach will typically answer the question of which working persons ought to be covered by particular labour rights in a number of different ways, with three models, in particular, dominating the debate. A first model based on the concept of personal subordination. A second model based on the concept of economic dependence. And a third model based on the idea of somebody providing predominantly 'personal work' or labour.[1] In section 4 we will suggest that this third model provides, in our view, the more effective and more principled way to shape the personal scope of application of the right to bargain collectively, and arguably the way that is better attuned to the important technological changes that are shaping twenty-first-century labour markets, but also to compatible with a broader and emerging notion of the policy priorities and justification underpinning competition law (a point we further explore in section 5).

In concluding this introduction, we would like to address head-on a particular issue that emerges from the Terms of Reference for our participation in this event: the concept of 'vulnerability'. We think we can all agree that this concept is neither a legal concept nor one that attracts a universally accepted definition among socio-legal scholars.[2] Labour law has, of course, been called in shaping its personal scope of application in order to protect some persons in the labour markets while often excluding others. To a certain extent, it could be claimed that these distinctions (for instance, between employed and self-employed) have been based on principle. But most labour lawyers would agree that these distinctions are just as determined by principle as they are by policy and political considerations and that labour law inevitably applies to persons that occupy a very strong position in the labour market (and vice-versa). Thus, we would rather focus our enquiry on the question of which workers should be covered by collective bargaining, and why.

1. *See* M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (OUP, 2011).
2. *See* the different approaches espoused, for instance, in M. Sergeant and M Ori (eds), *Vulnerable Workers and Precarious Work* (Cambridge Scholars Publishing, 2013), or Ch. 2 in L. Rogers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Elgar, 2016).

2 COLLECTIVE BARGAINING AS A FUNDAMENTAL LABOUR RIGHT

Labour lawyers would attach particular importance to the fact that the right to bargain collectively is recognized as a fundamental labour right by a number of supranational and regional sources, including European and EU ones.

Without seeking to offer a detailed or exhaustive list of either international or regional instruments that recognize CB as a fundamental, and times human, right, may we just refer our audience to instruments such as ILO Conventions 87 and 98, the latter expressly covering 'The Right to Organize and Collective Bargaining', both of which are included in the list of eight ILO conventions treated as 'Fundamental' by the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Article 6 of the (Revised) Social Charter protects and seeks to ensure the effective exercise of the right to bargain collectively. And of course, Article 28 of the Charter of Fundamental Rights of the EU recognizes a 'right to negotiate and conclude collective agreements'.

The right to bargain collectively is also recognized by a number of MSs Constitutions, either explicitly, or in connection with a constitutionally protected right to freedom of association. In 2012, the ILO General Survey on the Fundamental Conventions found that 'Specific provisions in relation to collective bargaining are present in 66 constitutions'.[3]

3 THE IMPLICATIONS OF CB AS A FUNDAMENTAL LABOUR RIGHT

It goes without saying that a number of important implications arise from the fundamental nature of the right to bargain collectively. This section will illustrate three such consequences, as relevant to the topic of today's session.

First, broadly speaking, if a right is held to be a fundamental or a constitutional right, then it is typically approached as being the rule, a rule that (unless the right is absolute) can be subject to exceptions as long as the latter is justified and proportionate and does not affect the essential content of the right itself.[4]

Second, rights that are understood to be fundamental usually point to their personal scope being interpreted broadly. In respect of the scope of the right to bargain collectively protected by C-98, the ILO has consistently held that 'The criterion for determining the persons covered by that right … is not based on the existence of an employment relationship, which is often non-existent, for example, in the case of agricultural workers, self-employed workers in general or those who practice liberal

3. Report of the Committee of Experts on the Application of Conventions and Recommendations, 'General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008' (2012). page 4.
4. *See* Article 52 CFREU. Also cf. Case C-73/16, *Puškár* (paragraph 112 – right to private life); pplication No. 34503/97, *Demir and Baykara v. Turkey* (paragraphs 117-119 – freedom of association).

professions, who should nevertheless enjoy the right to organize.'[5] And the ILO Committee of FOA has often requested States (in this case the Republic of Korean government):

> to take the necessary measures to: (i) ensure that 'self-employed' workers, such as heavy goods vehicle drivers, fully enjoy freedom of association rights, in particular the right to join the organizations of their own choosing; (ii) to hold consultations to this end with all the parties involved with the aim of finding a mutually acceptable solution so as to ensure that workers who are self-employed could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, *including by the means of collective bargaining*; and (iii) in consultation with the social partners concerned, to identify the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate[6]

Similarly, in respect of Article 6(2) of the ESC, the Committee of Social Rights, in the recent decision on *Irish Congress of Trade Unions (ICTU) v. Ireland* (Complaint No. 123/2016) affirmed that it 'has constantly held that in principle the provisions of Part II of the Charter apply to the self-employed except where the context requires that they be limited to employed persons. No such context obtains in a generalized way for Article 6§2' (paragraph 35 of the decision) and therefore 'an outright ban on collective bargaining of all self-employed workers would be excessive as it would run counter to the object and purpose of this provision' (paragraph 40).

Third, the fundamental right nature of certain labour standard means that they are often used in other contexts, for instance in the context of trade agreements, in order to ensure that those contexts are regulated and operate in a way that is compliant and compatible with these fundamental labour rights. It is worth noting, for instance, that as recently as July 2019, the EU Commission issued to the Republic of Korea a Request for the establishment of a Panel of Experts on the grounds that its 'restrictive definition and interpretation of the notion of "worker" [is] inconsistent with the above-mentioned principles of freedom of association and, therefore, with Article 13.4 paragraph 3 of the EU-Korea FTA'. The request expressly contested that 'Article 2 paragraph 1 of the Korean Trade Union Act defining a "worker" as a person who lives on wages, salary, or other equivalent form of income earned in pursuit of any type of job … excludes some categories of self-employed persons such as heavy goods vehicle drivers'.[7]

---

5. ILO Committee on Freedom of Association (2001) Report No. 326, Case No. 2013, paragraph 416. *See also* Camilo Rubiano, *Collective Bargaining and Competition Law: A Comparative Study on the Media, Arts and Entertainment Sectors* (International Federation of Musicians, 2013). *See also* the report of the discussion held within the Conference Committee on the Application of Standards (CAS) on the application of C-98 to Irish freelance journalists, held in the 2016 International Labour Conference: ILO, 'Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Ireland (Ratification: 1955)' (ILO, 2016) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101_COMMENT_ID:3082151> accessed 12 January 2020.
6. ILO Committee on Freedom of Association (2012) Report No. 363, Case No. 2602, paragraph 461. *See* further in the same report the recommendations in paragraphs 508 and 1085-1087.
7. European Union, 'Republic of Korea – compliance with obligations under Chapter 13 of the EU – Korea Free Trade Agreement – Request for the establishment of a Panel of Experts by the

We note that when it comes to the relationship between the right to bargain collectively and EU competition law, the CJEU does not seem to embrace any of three implications arising from the fundamental status of the right to bargain collectively. It neither sees the latter as a primary rule that can be subject to justified and proportionate restrictions (in fact, we have argued in our work[8] it tends to see Competition Law, as a rule, granting limited and qualified 'antitrust immunity' to collective agreements concluded by workers or false self-employed). Nor does it grant a particularly broad concept to the notion of 'worker' transcending the worker versus self-employed divide, perhaps beside the acknowledgement that *false* self-employed ought to be treated accordingly.[9] And it does not deploy in the competition law context any particular doctrine of devise expressly acknowledging the fundamental right nature of the right to bargain collectively as recognized and interpreted by other international or regional bodies.

4 COLLECTIVE BARGAINING AND THE CONCEPT OF 'PREDOMINANTLY PERSONAL WORK'

With a certain degree of approximation, it is possible to suggest that, broadly speaking, there are three alternative *systematically coherent* (as opposed to 'ad hoc' and covering particular professions with 'extensions', 'presumptions of status', or 'exceptions') ways of defining who is a worker for the purposes of labour rights. The more traditional and prevalent way is associated with the idea of subordination to, or control from, an employer. By and large, a notion of worker shaped by reference to the idea of subordination remains prevalent in most EU Member States, and the EU concept of 'worker' (as used in both the 'free movement of workers' context and in the 'EU labour law' directives context) remains associated to the concept of subordination or the idea that an activity is carried out 'under the direction or supervision' of an employing entity.[10]

A second idea is associated, directly or indirectly, with the idea of economic dependence from a main employing entity. A prime example of this approach (that tends to expand the concept of worker beyond that of the subordinate worker, often into the conceptual territory of autonomous work) can be found in the Spanish definition of *trabajadores autónomos económicamente dependientes* under Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo, that confers a large number

European Union', Brussels, 4 July 2019, available at https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf accessed 12 January 2020.

8. M. Freedland and N. Kountouris 'Some Reflections on the "Personal Scope" of Collective Labour Law' (2017) ILJ, 52, 62; V. De Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach' (2017) ILJ, 46, 185; V. De Stefano & A. Aloisi, 'Fundamental Labour Rights, Platform Work and Human Rights Protection of Non-standard Workers', in J. Bellace & B. ter Haar (eds) *Research Handbook on Labour, Business and Human Rights Law* (Edward Elgar, 2019).
9. A point already raised in Case C-256/01, *Allonby*, paragraph 71.
10. Case C-232/09, *Ditta Danosa*, paragraph 56.

of labour rights[11] to those self-employed workers earning three-fourths of their income from a single 'client'.[12] The more recent Irish Competition (Amendment) Act 2017 introduced the notion of 'fully dependent self-employed worker', and this notion – we would suggest – is also associated to the idea of economic dependence ('main income in respect of the performance … is derived from not more than 2 persons'[13]).

A third, arguably even broader, concept of worker can be shaped by reference to the concept of 'personal work', which depending on the national definitions one focuses on, can be defined as 'exclusively personal work' or 'predominantly personal work' (the latter resulting in a broader conception of worker than the former). For instance, the UK concept of 'worker' contained in section 230(3)(b) of the Employment Rights Act 1996, or the similarly (but not identically) worded section 296(1)(b) of the Trade Union Labour Relations Consolidation Act 1992, refers to workers who 'do or perform personally any work or services'. When originally introduced in Article 409 of the Italian civil procedure code, the concept of '*lavoratore parasubordinato*', was construed by reference to the idea of a 'prestazione di opera … prevalentemente personale'.

While it is clear that these two definitions cover individuals what would otherwise fall on the self-employed side of the binary divide between subordination and autonomy, it should be noted that legislation often seeks to reduce the reach of these 'personal work' based worker concepts. For instance, section 230(3)(b) excludes from the notion of 'worker' all those who provide personal work but do so for another party that is 'a client or customer of any profession or business undertaking carried on by the individual'. And the Italian definition of 'parasubordinate' worker has been modified by labour law statutes over the years, with a more stringent requirement of 'exclusively personal' work being introduced, for instance, by Article 2 of Legislative Decree No. 81 of 15 June 2015 (aka the 'Jobs Act'). There are, of course, other scope-narrowing devices that can be deployed (for instance, the idea that the performance has to be continuous, or coordinated, or somehow directed by the principal or employer) that can, and indeed often are deployed by statutory definitions.

Similarly, it is worth noting that it is possible to expand further worker definitions based on the idea of 'personal work'. For instance, the recent Italian Law No. 128 of 2019 replaced the term *esclusivamente* used by Article 2 of the Jobs Act, with that of '*prevalentemente*'. In what arguably constitutes an even more generous expansion of the concept, the 'home worker' definition contained in section 35 of the UK National Minimum Wage Act 1998, provides that an individual is a worker as long as she undertakes to perform work or services, 'whether personally or otherwise'. Further expansions can also be achieved by removing a requirement for an individual to perform personal work in a particular workplace or at a particular time (and both statutory provisions referred to in this paragraph actually do so).

So, by and large, it is possible to expand the reach of the concept of the subordinate worker by reference to the notion of economic dependence or by reference

11. Including the possibility of concluding 'Acuerdos de interés profesional'.
12. Article 11(1).
13. S. 15D (b).

to the notion of personal, or *predominantly personal*, work. We should note two points. First, empirical research on the precise reach of each concept is scant, but the little data we have suggest that the idea of personal work generates a broader personal scope than that of economic dependence.[14] Both are, of course, broader than a worker definition based on subordination, and clearly, span across the concept of autonomy or self-employment. Second, it should be noted that the notion of 'personal' work (or more precisely the term 'personal') can refer to two separate concepts. It can refer to the work or service being performed by a person without the use of substitutes (in the opposite case the person could be seen as an employer, especially if the substitutes are his employees). But it can also refer to the work or service being performed without recourse to a particular tool or other assets owned by the worker (in which case the worker would be seen as being an entrepreneur running a business undertaking, especially if the assets are substantial, let alone prevalent).

For the sake of a more complete and exhaustive analysis, we would like to add that it is also technically possible to extend the reach of particular labour rights by ad hoc mechanisms (as opposed to more systematic reforms of the 'worker' definition) that seek to attribute particular rights to either particular typologies of work or sectors of the labour market, either by means of specific presumptions of status (the French Labour Code offers several examples of this approach, e.g., Article L7112-1) or by means of specific legal instruments attributing particular rights to particular professions (e.g., the aforementioned Italian Law No. 128 of 2019 providing specific rights to riders in the delivery sector). A further example of ad hoc extensions of rights can be found in the already mentioned Irish Competition (Amendment) Act 2017, providing exemptions for 'relevant categories of self-employed' defined by Schedule 4 as 'voice-over actors', 'session musicians', and 'freelance journalists'. While this approach may provide a possible way of addressing some of the concerns raised in the TOR, it would be less coherent and more dispersive than the more comprehensive a principled approach provided by a worker definition based on the idea of 'personal work, our preferred solution'.

Our solution would be that any attempt to expand the reach of collective bargaining beyond the narrow confines of subordinate employment, might want to engage with the idea of personality in work.[15] A tentative definition could be based on the following wording:

> This Guidance/Instrument lays down rights to collective bargaining that apply to every worker in the European Union that provides work or services in a predominantly personal capacity and is not genuinely operating a business undertaking on his or her own account.

14. S. Engblom, 'Measuring the Relationship between Self-employed Workers and their Clients – A Statistical Survey of Labour Law Categories' Paper presented at the conference Professionality, Employment Contracts and Collective Bargaining in the Context of Social Innovation organized by the PhD in Human Capital Formation and Labour Relations, Università degli Studi di Bergamo, ADAPT. 30 November-1 December 2018.
15. *See* our broader suggestions and analysis contained in N. Countouris & V. De Stefano, *New Trade Union Strategies for New Forms of Employment* (ETUC, 2019).

Further guidance could be offered in respect of the term 'predominantly', for instance, by stressing that self-employed people that employee other staff would be deemed to fail that test, or that a substantial amount of assets, tangible or intangible (which could include capital, equipment, IP rights, etc.) would presumptively suggest an entrepreneurial activity even in the absence of employed staff. This would, in effect, assist with defining the 'business undertaking' domain.

We are of the view that such a definition would expand the current 'worker' definition deployed by the CJEU (and even the arguably broader definition that could emerge through a possible purposive interpretation of, for instance, Article 1(2) of the new Directive 2019/1152 on transparent and predictable working conditions in the EU). We are also satisfied that it would be compatible with the EU responsibilities and Member States' international and European human rights obligations reported in the previous section. Finally, in the following section, we go on to suggest that it would be compatible with EU Competition law.

5 A TENTATIVE COMPROMISE BETWEEN LABOUR LAW AND COMPETITION LAW

In work jointly authored with Professor Lianos ('Re-Thinking the Competition Law/Labour Law Interaction Promoting a Fairer Labour Market' (2019) *ELLJ*, 291-333), we suggested that a broader concept of the worker, and – in particular – one based on the idea of personal work, could be seen as compatible with the fundamental principles and rules underpinning EU competition law. In that work, we reached those conclusions both by analysing the principles of labour law and competition law and by analysing the jurisprudence of the CJEU and the Opinions of AGs.

As far as the underlying principles of the two disciplines, it is easy to see how an extension of collective bargaining to all those providing predominantly personal work is justifiable (and indeed arguably necessary). Generally speaking, when it comes to collective bargaining, labour law systems provide strong justifications for allowing workers to combine with each other and agree with employers basic terms and conditions of employment, including pay and working time. These justifications typically revert around the inability of workers to extract a fair price for their labour on an individual bargaining basis: by the very fact of being labourers, and in consideration of their need to constantly sell their labour in order to make a living, workers are ultimately not in a position truly to negotiate terms of employment, that are, therefore, typically imposed on them. (In this sense, it is possible to say that workers are 'vulnerable' or weakly positioned in the labour market, by the mere fact that they live off their labour). By protecting the right to collective bargaining, labour law seeks to redress this imbalance of power and achieve fair outcomes for workers.

Some self-employed persons (and in particular those earning their living through their personal work) can benefit from the same rationale: by virtue of not being able to rely on any substantial capital assets, and by selling labour or labour intensive services that could easily act as cheap substitutes for the personal labour offered by standard workers, their inclusion in collective bargaining outcomes ensure both fairness (for

themselves) and a level playing field (between them and the other workers). As we have suggested in our work, self-employment has become a very heterogeneous category, partly due to various technological and human resource management changes, partly due to the legal strictures of the 'subordinate employee' category. One cannot take a formalistic approach to the self-employed definition.

A similar point – and moving on to the competition law side of the analysis – is raised by AG Wahl in *FNV Kunsten*, when he notes that 'in today's economy, the distinction between the traditional categories of worker and self-employed person is at times somewhat blurred' and 'the self-employed are a notoriously vast and heterogeneous group'.[16] AG Wahl's opinion aptly highlights an increasingly visible feature of twenty-first-century labour markets, namely the emergence of a wide (and heterogeneous) group of workers who are classified as self-employed but do not enjoy the organizational autonomy or the economic independence that legal systems have traditionally assumed to be the intrinsic feature of the self-employed, one that justified their traditional exclusion from labour protections at the national level.

The European Committee of Social Rights, in its decision concerning the right to collective bargaining of self-employed workers against the background of competition law, observed: 'the world of work is changing rapidly and fundamentally with a proliferation of contractual arrangements, often with the express aim of avoiding contracts of employment under labour law, of shifting risk from the labour engager to the labour provider'. This, according to the Committee 'has resulted in an increasing number of workers falling outside the definition of a dependent employee, including low-paid workers or service providers who are de facto "dependent" on one or more labour engagers'. It is the opinion of the Committee that '[t]hese developments must be taken into account when determining the scope of [the right to bargain collectively under the ESC] in respect of self-employed workers'.[17]

It is not easy to provide statistics about the number of people that belong to this group of workers nominally classified as self-employed under existing national laws. The International Labour Office points out that this is a non-negligible phenomenon, with labour statistics just about trying to come to grips with, and that tends to be under-represented in surveys as a result of difficulties in collecting relevant data.[18] The OECD raised similar concerns.[19]

This makes all the more convenient to adopt a notion of worker, relevant under EU and competition law, which is substance-oriented and non-formalistic. The scope of this notion cannot be influenced by the labels attached to work arranged either by the parties or by national legislations, often for aims that have nothing or little to do with

16. Opinion of AG N. Wahl in Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI: EU: C:2014:2215, paragraphs 51 and 55.
17. European Committee of Social Rights, *Irish Congress of Trade Unions (ICTU) v. Ireland* (Complaint No. 123/2016), paragraph 37.
18. International Labour Office, *Non-standard Employment Around the World. Understanding Challenges, Shaping Prospects* (ILO, 2016), pp. 98-99.
19. OECD (OECD (Organisation for Economic Co-operation and Development), *OECD Employment Outlook*, p. 169.

the reality of the working activity to be performed, such as tax or social-security reasons.

We believe that a careful reading of the case law of the CJEU also justifies this approach. In *FNV Kunsten* the Court reiterated: 'From that point of view, the Court has previously held that the classification of a "self-employed person" under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional.'[20] This is a statement completely in line with settled precedents such as *Allonby*.[21] Crucially, the Court restated this principle when assessing the notion of workers that do not bear relevance for competition law and after considering – echoing the opinion of AG Wahl – 'in today's economy it is not always easy to establish the status of some self-employed contractors as "undertakings"'.[22]

We believe these considerations to be paramount, together with the observation 'that, according to settled case-law, on the one hand, a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking'.[23]

In our joint paper with Professor Lianos, we noted that the reliance on the concept of economic dependence to exclude some self-employed workers from the EU concept of the undertaking is entirely compatible with the idea in competition law that undertakings should behave as autonomous economic entities. In this respect, a note of caution concerning the bearing of financial and commercial risk is also essential. Researchers Dagmar Schiek and Andrea Gideon argued convincingly that in several sectors of the labour market 'multinational companies and other employers endeavour to shift the commercial risk onto the economically dependent self-employed persons', and they 'suggest that a truly economic approach to the notion of worker would recognize that this shifting of risk is an expression of economic dependency on the part of the worker or micro-entrepreneur'. This consideration requires 'the Albany exclusion [to] be rephrased through a functional interpretation of the notion of undertaking in EU competition law'. Such an approach 'would support an exclusion for all collective bargaining processes aimed at overcoming economic dependency of economically dependent service providers, irrespective from whether they are self-employed or not'.[24]

Excluding workers that are dependent on their counterpart from the notion of 'undertaking' relevant under Article 101 TFUE regardless of their classification as employees or self-employed persons would, therefore, be in line with the broader

20. Case C-413/13, FNV Kunsten, paragraph 35.
21. Case C-256/01, *Allonby*, paragraph 71.
22. Case C-413/13, *FNV Kunsten*, paragraph 32.
23. *Ibid.*, paragraph 33.
24. D. Schiek & A. Gideon, *Outsmarting the Gig-Economy Through Collective Bargaining – EU Competition Law as a Barrier?* (2 ed.) 2018 CETLS Working Paper Series. DOI: http://www.qub.ac.uk/schools/SchoolofLaw/Research/European/FileStore/Filetoupload,815527,en.pdf, pp. 13-14.

policy rationales underpinning the relevant case law of the CJEU and would be entirely consistent with the aims of competition law.

In light of the above, we argue that the notion of 'false self-employed' workers whose collective bargaining should be excluded from the scope of EU competition law does not only cover the persons who are entirely misclassified as self-employed under national laws, and should, therefore, fall under the scope of all employment and labour protection relevant in national regimes. The exclusion should also concern all those workers who, despite not meeting all the requirements to be classified as 'employees' under those regimes, are not 'undertakings' under Article 101 TFUE because they are not truly independent from their principals, but are fully dependent on their personal work.

This distinction is arguably reflected in the recently approved Irish Competition (Amendment) Act 2017. This legislation, as we stated above, aimed at reconciling the right to collective bargaining with antitrust principles, distinguished between the 'false self-employed workers' and the 'fully dependent self-employed' workers, under the premise that both these categories are relevant for collective bargaining. Importantly, the European Committee of Social Rights considered this Act a successful step considered forward towards compliance of antitrust standards with the fundamental right to collective bargaining under Article 6(2) of the European Social Charter.

An additional thought is needed, at this point, to conclude our reasoning. Identifying the scope of the exemptions from competition law in this area cannot neglect one of the fundamental aims of collective agreements, namely the prevention of what is often termed '*social dumping*' against or between different typologies of workers. Similar observations have been expressed both by AG Wahl in his opinion in *FNV Kunsten* and the Committee of Social Rights in its decision in *ICTU v. Ireland*.

AG Wahl, in particular, observed that one of the very reasons collective agreements are stipulated is 'the elimination of wage competition between workers [which] implies that an employer can under no circumstances hire other workers for a salary below that set out in the collective agreement'. He also remarked that if employers could replace workers with other individuals to whom they do not have to apply the remuneration established in the collective agreement, the position of workers would be significantly weakened. In this respect, he pointed out that it would make no difference for the relevant workers to be replaced by less costly employees or by less costly self-employed persons. The aims and effects of the collective agreement would be, in both cases, irremediably jeopardized. He thus concluded that when the risks of social dumping are concrete, preventing them would be 'an objective that can be legitimately pursued by a collective agreement containing rules affecting self-employed persons and that it may also constitute one of the core subjects of negotiation'.[25] We find this justification for a competition law exception eminently sensible and compatible with the similar and functionally equivalent labour law justification outlined above in the first three paragraphs of this section.

25. Opinion of AG N. Wahl in Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI: EU: C:2014:2215, paragraphs 76-94.

Following similar reasoning, the Committee on Social Rights, in the aforementioned decision in Complaint No. 123/2016, opined that 'collective mechanisms in the field of work are justified by the comparably weak position of an individual supplier of labour in establishing the terms and conditions of their contract'. This contrasts with competition law 'where the grouping of interests of suppliers endanger fair prices for consumers'. In determining who should enjoy the right to collective bargaining, 'it is not sufficient to rely on distinctions between worker and self-employed, the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour'; what matters, instead, is whether '*providers of labour*' have 'substantial influence on the content of [their] contractual conditions'. If this were not the case, considering them 'undertakings' under antitrust law would be 'over-inclusive', and depriving them of their right to bargain collectively would be incompatible with the European Social Charter.[26]

This had been the case in Ireland before the introduction of the Irish Competition (Amendment) Act 2017. The Committed found a breach of Article 6(2) ESC in that case also because it was not clear 'that permitting the self-employed workers in question to bargain collectively and conclude collective agreements, including in respect of remuneration, would have an impact on competition in a trade that would be significantly different from the impact on such competition of collective agreements concluded solely in respect of dependent workers (employees)'. This finding reinforces the argument that the need to eliminate the risk of social dumping is a valid reason to include self-employed workers in collective agreements.[27]

Taking into account what we argued so far, we suggest that beyond the 'false self-employed' and the 'economically dependent' categories mentioned above a further exemption from antitrust restrictions should be granted to those self-employed persons providing predominantly personal work in sectors and industries where the absence of a collective agreement covering their terms and conditions of employment may significantly weaken the negotiating position of workers in the industry by raising the risk of social dumping or substitution. In line with the arguments presented by AG Wahl, we believe that also this exemption would be entirely compatible with EU competition law.

After having outlined the categories of workers beyond employees *strictu sensu* whose right to bargaining collectively should be granted by providing an exemption from competition-law restrictions, the next section concludes this paper, by arguing that the idea of predominantly 'personal work' is a notion that can be validly used to capture all these cases without contravening existing antitrust standards. The definition mentioned in paragraph 22 could act as the central device for defining the personal scope of application of the instrument or guidance, and additional provisions could clarify that that definition includes, *a fortiori*, the more circumscribed and context-specific notions of 'false self-employed', 'economically dependent' workers, and 'self-employed persons providing personal work in sectors and industries where the

26. *ICTU v. Ireland*, Complaint No. 123/2016, paragraph 38. Emphasis added.
27. European Committee of Social Rights, *Irish Congress of Trade Unions (ICTU) v. Ireland* (Complaint No. 123/2016), paragraphs 38 and 96-101.

absence of a collective agreement covering their terms and conditions of employment may significantly weaken the negotiating position of workers in the industry by raising a risk of social dumping or substitution'.

6 CONCLUSIONS: REGULATING THE WORK OF HAIRDRESSERS BUT NOT THE PRICE OF A HAIRCUT

We understand that it is increasingly being suggested, in some quarters, that exemptions from competition law could be granted, in principle, on an ad hoc basis when a collective agreement is reached in respect of some categories of self-employed persons (for instance categories such as the three described in section 5 subject to the parties to those agreements submitting them to designated bodies or authorities for approval. We maintain that this approach would be excessively burdensome for both the social partners and antitrust authorities.

For social partners, this approach would imply entering into negotiations and stipulating a collective agreement with the idea that this could later be nullified – it would materially disincentivize collective bargaining in this respect, something that would be entirely at odds with both the recognition of collective bargaining as a fundamental right and with international standards including ILO Convention 98 and the European Social Charter that mandate the promotion of collective bargaining mechanisms. We note that the ILO both discourages and regulates requirements tightly so that prior approval be obtained before a collective agreement can come into force.[28]

Such an approach could also literally swamp antitrust authorities with an unforeseeable number of applications, something that could paralyse the authorities and materially defer the possibility to apply the content of the agreements. Working conditions and the need for certainty of workers and businesses would materially suffer.

We also maintain that such an approach would substantially restrict the ability of trade unions to reach out to self-employed workers and to organize them. One of the essential aims of collective organization is the possibility to conclude collective agreements. This is why the right to collective bargaining is considered to be an essential element of freedom of association into trade unions under ILO Fundamental Conventions, the European Convention of Human Rights and the Council of Europe. If trade unions were to be discouraged from reaching out to self-employed workers, knowing that after spending significant time and resources to organize them and concluding collective agreements on their behalf, these agreements could be nullified under antitrust regulations, it would impair not only the right to bargain collectively but also freedom of association.

It is impossible to determine precisely how many trade union campaigns to organize self-employed workers have been prevented or discouraged in the wake of the activism of national competition authorities in the field of collective bargaining that has

28. *See* CFA, 'Compilation of decisions of the Committee on Freedom of Association' (6th ed., 2018) paragraphs 1420-1470 available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf.

occurred in some countries in recent years. In this respect, the material number of initiatives, including meetings, conferences, and seminars organized by trade union movements around Europe on these matters shows a significant and non-negligible concern from unions.

It would, therefore, be essential to adopt a standard that would dissipate doubts of workers, trade unions, employers, principals and their organizations on these matters. To this aim, we think that reversing the existing approach that considers collective bargaining an exception to competition law principles is essential. As we argued above, we believe this objective could be fulfilled by adopting an instrument based on the idea that:

> rights to collective bargaining […] apply to every worker in the European Union that provides work or services in a predominantly personal capacity and is not genuinely operating a business undertaking on his or her own account.

We suggest that this notion would adequately encompass all the three categories of persons that should be covered by collective bargaining rights beyond people who are already classified as 'employees' *strictu sensu*.

Importantly, we maintain that this notion is limited and sufficiently precise to comply with the existing functional understanding of 'undertaking' under present competition law standards and case law. We have argued that excluding persons that do not provide work or services in a 'predominantly personal capacity' and are genuinely operating a business undertaking on their own account would comply with this functional understanding and would not require revising the notion of undertaking at the substantial level. At the same time, this approach would acknowledge that the current notion of 'self-employment' cannot serve as a functional equivalent of 'undertaking', in line with the findings of AG Wahl and the CJEU that accepted that in today's world of work the formalistic distinction between employees and self-employed workers became too blurred to act as a decisive criterion.

We are conscious that a similar expansion of the personal scope of application of the right to bargain collectively may raise some concerns in terms of the exercise *ratione materiae* of this right. We can see an anxiety mounting, in particular, in respect of whether allowing the social partners to agree terms and conditions of work for some self-employed persons could have negative effects on the products and services markets in which these self-employed operate.

To engage with these anxieties, we would suggest that, as a general principle, 'it is for the parties concerned to decide on the subjects for negotiation'.[29] Limiting collective bargaining to 'price negotiations' (as suggested in the briefing paper that was sent to us) would be an undue restriction. The ILO CFA has typically asked Governments 'to identify, in consultation with the social partners concerned, the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers,

29. *See* CFA, 'Compilation of decisions of the Committee on Freedom of Association' (6th ed., 2018) paragraph 1289, available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf.

if appropriate'.[30] But it is clear that these mechanisms and their outcomes cannot be unduly restrictive. We do anticipate matters such as 'social benefits, health and safety, information and consultation, etc.' (also referred in the briefing we received) to be covered by collective bargaining.

We would also like to point out that neither this important clarification nor our proposals, would necessarily have the effect of expanding the scope of collective bargaining beyond its traditional material scope. Collective bargaining is, by definition, (at least) a bilateral exercise. Collective agreements are reached by workers, broadly understood, and their employers or principals. These employers and principals are the ones who have access to the relevant market and act independently on it. Collective bargaining, therefore, does not determine the final price of a good or service on the market. It is employers and principals that make these prices, also taking into account labour costs that are directly affected by applicable collective agreements. The fact that these labour costs affect prices as a cost or factor of production is independent of the employment status of the labour providers that contribute to the production process.

It is essential to bear in mind this distinction – collective bargaining regulates the pay of hairdressers, not the price of a haircut. The latter depends on many elements and decisions that concern the owner of a hair salon (e.g., the costs of bills, renting the shop etc.). Recognising the right to bargain collectively to all providers of personal work, as defined in this paper, would go in the same direction. It would uphold and sustain fundamental labour rights; it would provide clarity; it would protect workers who do not have a substantial influence on their working conditions; it would prevent social dumping against employees – it would not, however, fix the final price of a good or service in the market (certainly no more so than collective agreements applicable to workers employed under traditional contracts of employment). Therefore, it is entirely compatible with competition law standards, and any provisions that sought to clarify that point would be equally compatible with labour law principles.

30. *Ibid.*, paragraph 1285.