

Costantino Cordella

University of Naples Federico II, Italy

costantino.cordella@unina.it

ORCID ID: 0000-0002-3653-5707

Competition and Self-Employed Workers in Europe: Some Critical Reflections

Abstract: This article examines the complex relationship between European competition law and the collective rights of self-employed workers. It focuses on the implications of the *FNV Kunsten* case (C-413/13), which established the limits of applying Article 101 TFEU to collective agreements involving self-employed workers, distinguishing between genuine and bogus self-employment. The author critically analyses the European Commission's 2022 Guidelines on collective bargaining for self-employed persons, assessing their effectiveness in extending protection to economically dependent or vulnerable self-employed individuals. The paper argues that, despite progress, significant gaps remain for certain categories of self-employed workers, who still risk exclusion from collective bargaining rights under EU competition law.

Keywords: self-employment, collective bargaining, EU competition law

Introduction

The definition of employment protections for self-employed workers remains a classic and unresolved issue in labour law. Generally, each Member State of the European Union draws a sharp distinction between employed and self-employed work, affording employees broader and more intensive protection. This asymmetry reflects the structural characteristics of the employment relationship: employees are typically subordinate to their employer's authority, financially dependent on a single source of income and prevented from engaging in competing activities. Self-employed workers, by contrast, retain autonomy over how they perform their work – including

choice of hours and location – and are therefore presumed, often without empirical verification, to have a lesser need for workplace protection (Countouris, 2007; Davidov, 2017, p. 365; Supiot, 2001).

This presumption, however, is not always warranted. In the labour markets of recent decades, many self-employed persons, while formally autonomous in the exercise of their professions, remain economically vulnerable (Colin & Lapeyre, 2017; ILO, 2016; Perulli, 1996; Treu, 2016). Whether collective agreements should extend to them is therefore a question of growing practical and theoretical importance. The relationship between self-employment and collective bargaining protections is deeply controversial and raises at least three fundamental legal questions. First, it is necessary to determine, within the broad and heterogeneous category of self-employment, which workers fall within the scope of collective agreement protections; second, the question arises of who holds the right to negotiate such agreements on their behalf; and third – and perhaps most pressing – it is essential to clarify the relationship between national labour law and European competition law, which has become one of the most intensely debated issues in this field.

This paper devotes particular attention to the third question, on the grounds that recent action by the EU institutions has proved insufficient to extend collective protection to all categories of self-employed workers who genuinely need it. The analysis begins with the *FNV Kunsten* judgment (Judgment of the CJEU, 2014; see Countouris, 2018, p. 192; Daskalova, 2017; Delfino, 2017; Grosheide & ter Haar, 2017; Lamannis, 2023; Risak & Dullinger, 2018), which directly addressed the conflict between Article 101 TFEU and collective agreements concluded on behalf of self-employed workers. It then turns to the Commission's Guidelines on the application of competition law in this area (European Commission, 2022; see Daskalova, 2018, p. 461; Giampà, 2024; Giovannone, 2023; Gramano, 2025, p. 135; Jurkowska-Gomułka et al., 2024; Rainone & Countouris, 2021). The aim is to identify which categories of self-employed workers, not covered by these instruments, may nonetheless engage in collective bargaining without incurring a conflict with competition law.

1. The FNV Kunsten case and its relevance in European law

As noted above, the *FNV Kunsten* case concerned the boundary between competition law and labour law, and more specifically the scope of application of Article 101(1) TFEU. At issue was the compatibility with EU competition law of Dutch rules permitting independent service providers to join a trade union that had concluded a collective agreement on their behalf (Judgment of the CJEU, 2014, points 6–11). The judgment reaffirmed the need to comply with the so-called '*Albany* exemption', a doctrine established in prior European case law (Judgment of the CJEU, 1999), while

also seeking to clarify the specific conditions under which that exemption applies (Barnard, 2003; Broulík, 2024; Cengiz, 2021; Countouris, 2007; Šmejkal, 2015).

The *Albany* exemption, as is well known, rests on the principle that the social policy objectives pursued by collective labour agreements may justify restrictions on competition that would otherwise fall within the prohibition laid down in Article 101(1) TFEU. In *Albany* itself, the Court of Justice held that the obligation imposed on private companies to contribute to a sectoral public pension fund did not infringe competition law, notwithstanding that it precluded those companies from opting out in favour of private insurance arrangements offering more advantageous terms. The compulsory nature of affiliation to the public fund was justified by the pursuit of a social objective of overriding importance: preventing undertakings engaged in low-risk activities and employing younger, healthier workforces from exiting the fund in search of more favourable private coverage. Had such selective exit been permitted, the fund would have been left to insure a disproportionately high-risk pool – namely, employees of small and medium-sized enterprises performing hazardous work, with older staff profiles and elevated actuarial risk – thereby undermining its financial viability and its capacity to provide adequate coverage to those most in need (Judgment of the CJEU, 1999, point 108).

It was thus established that the social objectives pursued by collective agreements, insofar as they impose minimum standards of protection, constitute restrictions on competition that are nonetheless justified under Article 101 TFEU (Judgment of the CJEU, 1999, point 123). Building on this foundation, the subsequent *FNV Kunsten* case examined whether collective agreements could lawfully extend their scope of application to self-employed workers (Judgment of the CJEU, 2014, points 10 and 13).

The Court of Justice answered this question in the negative, for reasons that have since been examined extensively by scholars and national courts across numerous European jurisdictions. In the Court's analysis, the self-employed workers to whom the collective agreement in question referred were, in principle, to be regarded as undertakings within the meaning of Article 101 TFEU on two cumulative grounds: first, they offered their services for remuneration on a specific market; and second, they carried out their activities as independent economic operators in relation to their clients.

On the first point, the Court drew a sharp distinction between self-employed workers and employees. Unlike the latter, who work under conditions determined unilaterally by their employer, self-employed workers participate in the market by establishing the value of their own work – that is, by setting the price at which they choose to sell the product or service they provide. This pricing autonomy was regarded as incompatible with the logic underlying the *Albany* exemption, which was designed to protect parties whose working conditions are not the product of individual market negotiation (Judgment of the CJEU, 2014, point 30). The second point concerned a further structural characteristic of self-employment: the fact that self-employed workers typically provide services to multiple clients simultaneously.

This multi-party engagement was taken to preclude the kind of economic dependence that characterises subordinate employment relationships and that constitutes one of the principal justifications for affording collective bargaining protection (Judgment of the CJEU, 2014, point 33).

The consequence of this reasoning was significant. Where a trade union – in the case at hand, the FNV – negotiates a collective agreement on behalf of self-employed workers, it must be treated as an association of undertakings. Any agreement concluded in that capacity therefore falls within the prohibition laid down in Article 101 TFEU and is, as such, incompatible with European competition law (Judgment of the CJEU, 2014, points 28–30). To this general conclusion, however, the Court appended an important qualification that substantially limits its reach. Incompatibility with Article 101 TFEU may be avoided where the workers concerned are ‘falsely’ self-employed – that is, they are individuals who, despite formally performing work on a self-employed basis, find themselves in a situation comparable to that of employees. This may be the case, for instance, where a worker derives most of their income from services rendered to a single undertaking, thereby exhibiting a degree of economic dependence functionally equivalent to that of an employed person (Judgment of the CJEU, 2014, points 31 ff.).

The reasoning advanced by the Court of Justice in *FNV Kunsten* raises several significant questions and, not coincidentally, continues to divide scholarly opinion. In the space available, I wish to highlight the two issues I consider most fundamental.

2. The concept of bogus self-employment and its impact on today’s labour market

The first issue concerns the new category of workers that the Court’s decision effectively brought into being: bogus self-employed workers. Initially, some scholars took the view that this category was confined to individuals who had obtained a judicial ruling declaring their self-employment contract unlawful and formally establishing the existence of an employment relationship (Countouris, 2018, p. 192–225). This interpretation, however, did not accurately reflect the Court’s intentions. In referring to bogus self-employed workers, the Court sought to extend the *Albany* exemption so as to permit collective agreements to be concluded in favour of genuinely self-employed workers who find themselves in conditions materially comparable to those of employees (Daskalova, 2018, p. 461–508; Giampà, 2024, p. 243–265; Giovannone, 2023, p. 61–77; Gramano, 2025, p. 135–156; Jurkowska-Gomułka et al., 2024, p. 65–82; Monda, 2022).

This interpretation has had a significant impact on the regulatory frameworks of several Member States, including Italy. Its most important implication is that extending to self-employed workers protections typically associated with subordinate

employment – including collective bargaining rights – demonstrates that the link between employment status and legal protection is not a rigid one. As the Italian experience illustrates, most notably through the regime of ‘hetero-organised’ collaborations established by Article 2 of Legislative Decree no. 81/2015, the protective rules governing subordinate employment can be transposed to self-employed workers where the functional conditions so warrant (Zoppoli, 2024).

The practical significance of this development has become especially apparent in the context of the gig economy, driven by the expansion of digital platforms and new forms of work organisation more broadly. Courts and legislatures across several European countries have been called upon to determine the employment status of platform workers, and the prevailing tendency has been to extend to them the protections accorded to subordinate employees (Kajander & Kerikmäe, 2022; Leckey, 2020; Prassl, 2018). This trend has been further reinforced by the transposition at national level of the legal presumption of subordination introduced by the EU Directive on Platform Work.

3. Collective safeguards and incompatibility with EU competition law

The second issue concerns the nature of the protection under examination. The Court’s reasoning focused primarily on the status of self-employed workers who, where they are genuinely self-employed, are treated under competition law as undertakings and therefore fall outside the *Albany* exemption. However, comparatively little attention was devoted to the fact that collective agreements do not invariably produce effects *erga omnes* and that in many European legal systems – Italy being a prominent example – collective agreements operate under civil law, binding only those workers who are members of the signatory trade unions (Cordella, 2021).

The reason why the Court did not examine this dimension is not difficult to identify. Dutch law provides for a specific mechanism enabling collective agreements to be extended so as to apply universally, independently of the individual worker’s freedom to affiliate with a particular trade union. Under this system, a collective agreement may acquire a general binding effect, thereby preventing individual parties from negotiating terms less favourable than those it establishes. Independent service providers are consequently required to set their labour costs at no less than the minimum standard prescribed by the agreement. In practical terms, this mechanism forecloses the possibility of using lower labour costs as a competitive instrument to reduce the price of services on the market. It is precisely this market-distorting effect that led the Court of Justice to hold that collective agreements binding on independent service providers are incompatible with Article 101 TFEU.

The converse situation, however, points towards a different legal outcome. In legal systems that do not provide for the extension of collective agreements to

non-members, independent service providers are under no obligation to comply with the minimum standards established therein. By choosing not to join the signatory trade union, they remain entirely free to negotiate their working conditions and labour costs on an individual basis. In such systems, therefore, collective agreements covering self-employed workers produce no distortion of competition: service providers retain the autonomous choice of whether to accept the collectively agreed standards or to opt out and negotiate individually.

This freedom to determine working conditions – a structural feature of collective agreements in systems lacking general extension mechanisms – renders collective bargaining compatible with the principle of undistorted competition enshrined in Article 101 TFEU. It is important to note, however, that this line of argument is valid exclusively in relation to self-employed workers. The absence of general extension mechanisms constitutes a relevant consideration only for the purpose of assessing the compatibility of collective agreements covering the self-employed with Article 101 TFEU. It does not extend to employees: even where collective agreements applicable to them lack general binding effect, the *Albany* exemption applies to them without qualification, and the compatibility of such agreements with competition law is therefore not in doubt.

4. Limits of the Commission Guidelines on collective bargaining for self-employed workers

As anticipated, the uncertainties generated by the *FNV Kunsten* ruling – and by its treatment of collective bargaining for self-employed workers as incompatible with European competition law and its characterisation of such workers as undertakings – prompted a regulatory response from the European Commission. In September 2022, the Commission published its Guidelines on the application of EU competition law to collective agreements on the working conditions of individual self-employed workers (European Commission, 2022).¹ The Guidelines constitute a detailed, though non-binding, instrument of soft law. Their central contribution is to clarify that a specific category of self-employed workers, referred to as ‘solo self-employed workers’, may negotiate or be included in collective agreements without thereby infringing EU competition law. This position rests on the premise that such workers possess limited market power and that their structural weakness vis-à-vis their clients may more readily deprive them of the ability to determine their own market behaviour freely. The Commission reasonably concludes that competition law should not apply to collective agreements entered into by, or on behalf of, these workers,

1 These Guidelines have received the express support of the European Parliament (2024, point 10), as well as explicit mention, with a view to improving the conditions of self-employed workers, in the ‘recitals’ (no. 30) of the EU Directive on Platform Work.

on the grounds that collective bargaining in this context does not restrict individual market autonomy but rather compensates for an existing imbalance, thereby protecting their working conditions (European Commission, 2022, points 5 and 36).

The Guidelines nonetheless identify two distinct categories of self-employed workers within which collective agreements may be concluded in a way that is compatible with European competition law. The first encompasses workers in a situation like that of employees; the second covers workers who, while not comparable to employees in the way they perform their work, are nonetheless entitled to collective protection on account of their socio-economic vulnerability.

Regarding the first category, the Guidelines provide that collective agreements concluded by or on behalf of self-employed workers fall outside the scope of Article 101 TFEU where those workers are in a situation comparable to employment. This is deemed to be the case where the workers concerned (a) are economically dependent on a single client, receiving at least 50% of their total annual working income from that client (point 24); (b) work 'side by side' with employees within the same organisational context (points 26–27); or (c) provide their services through digital labour platforms – a provision that anticipated the employment presumption subsequently introduced by the EU Directive on Platform Work (points 28–31).

With regard to the second category – workers who, though not comparable to employees, require collective protection for socio-economic reasons – the Commission specifies that competition law does not apply to self-employed workers who (1) find themselves in a situation of clear power imbalance relative to the counterparty with whom they contract, as in the case of negotiations conducted with undertakings of significant size, such as those with high turnover or more than ten employees; or (2) conclude agreements in application of national rules aimed at pursuing recognised social policy objectives.

Conclusions

The Guidelines represent a significant step forward in clarifying the *FNV Kunsten* case law and in creating the conditions under which collective agreements compatible with competition law may extend to broader categories of self-employed workers. Certain issues, however, remain unresolved with respect to those genuinely self-employed workers who, on the analysis developed above, should be entitled to engage in collective bargaining. While the Guidelines permit recourse to collective agreements as a mechanism for rebalancing the structural contractual asymmetry that characterises the position of self-employed workers vis-à-vis their clients, this option appears to be confined to 'individual self-employed workers' – that is, those who, according to paragraph 2 of point 1 of the Guidelines, perform their activity primarily through their own personal work. The Guidelines do not address the position

of self-employed workers who, although in need of protection, perform their services in collaboration with other workers.

The interpretive difficulty turns on the scope of the adverb ‘primarily’ as used in paragraph 2 of point 1. Read carefully, this qualification appears to exclude workers who perform their activity ‘mainly’ through personal work but with the involvement of collaborators – an arrangement expressly contemplated, for instance, by Article 409 of the Italian Code of Civil Procedure. When applied to personal work, ‘primarily’ seems instead to permit the self-employed worker to avail themselves of material means and equipment, while stopping short of authorising recourse to human collaborators. This reading is supported by the subsequent reference in paragraph 18, point 2.2, where assets used in the performance of the service are described as ‘an ancillary means to provide the final service’, and their use is expressly stated not to preclude classification as a solo self-employed person where the activity is carried out personally.

From this perspective, the Guidelines fail to dispel the uncertainty surrounding this category of workers. The risk therefore persists that certain self-employed service providers – those who work predominantly alone but with occasional recourse to collaborators – may be excluded from collective protection, even where the way they organise their activity does not diminish, and may indeed reinforce, their position of socio-economic vulnerability on the market.

REFERENCES

- Barnard, C. (2003). Social dumping and the race to the bottom: Some lessons for the European Union from Delaware? *European Law Journal*, 1, 563–584.
- Broulík, J. (2024). *Harm to workers in EU competition law: A sufficient condition for intervention* [Working paper no. 12]. Amsterdam Center for Law & Economics.
- Cengiz, F. (2021). The conflict between market competition and worker solidarity. *Legal Studies*, 1, 73–90.
- Colin, C., & Lapeyre, W. F. (2017). *Dependent self-employment: Trends, challenges and policy responses in the EU* [Employment working paper no. 228]. International Labour Office.
- Cordella C. (2021). Il lavoro dei rider: fenomenologia, inquadramento giuridico e diritti sindacali. *Biblioteca '20 Maggio'*, 2. https://csdle.lex.unict.it/sites/default/files/Documenti/Articoli/2021-2_Cordella.pdf
- Countouris, N. (2007). *The changing law of the employment relationship: Comparative analyses in the European context*. Ashgate.
- Countouris, N. (2018). The concept of ‘worker’ in European labour law: Fragmentation, autonomy and scope. *Industrial Law Journal*, 2, 192–225.
- Daskalova, V. (2017). *Regulating the new self-employed in the Uber economy: What role for EU competition law?* Tilburg Law & Economics Center (TILEC) Law & Economics Research Paper Se-

- ries. Available at SSRN: <https://ssrn.com/abstract=3009120> or <http://dx.doi.org/10.2139/ssrn.3009120>.
- Daskalova, V. (2018). Regulating the new self-employed in the Uber economy: What role for EU competition law? *German Law Journal*, 3, 461–508.
- Davidov, G. (2017). 'Subordination v. domination: Exploring the differences'. *International Journal of Comparative Labour Law and Industrial Relations*, 3, 365–389.
- Delfino, M. (2017). Statutory minimum wage and subordination: FNV Kunsten Informatie judgment and beyond (CJEU, C-413/13). In M. Łaga, S. Bellomo, N. Gundt, & M. Boto (Eds.), *Labour law and social rights in Europe. The jurisprudence of the international courts: Selected judgments* (pp. 41–48). Gdansk University Press.
- European Commission. (2022). *Communication from the Commission: Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons*, C-374/02.
- European Parliament. (2024, 16 January). Resolution of 16 January 2024 on Competition Policy – Annual Report 2023 (2023/2077(INI) OJ C, C/2024/5705, 17.10.2024.
- Giampà, G. (2024). Collective bargaining for solo self-employed persons in the European Union: Assessing the efficacy of the European Commission's guidelines. *Diritti lavori mercati internazionali*, 1, 243–265.
- Giovannone, M. (2023). Guidelines on collective agreements regarding the solo self-employed persons: Another (controversial) immunity to EU competition rules. *Diritti lavori mercati internazionali*, 2, 61–77.
- Gramano, E. (2025). Collective rights, competition, and self-employed workers in the EU. *International Journal of Comparative Labour Law and Industrial Relations*, 2, 135–156.
- Grosheide, E., & ter Haar, B. (2017). Employee-like worker: Competitive entrepreneur or submissive employee? Reflections on ECJ, C-413/13 (FNV Kunsten Informatie). In M. Łaga, S. Bellomo, N. Gundt, & M. Boto (Eds.), *Labour law and social rights in Europe. The jurisprudence of the international courts: Selected judgments* (pp. 21–41). Gdansk University Press.
- ILO. (2016). *Non-standard employment around the world: Understanding challenges, shaping prospects*. International Labour Office.
- Jurkowska-Gomułka, A., Piszcz, A., & Oliveira Pais, S. (2024). Collective agreements on working conditions of solo self-employed persons: Perspective of EU competition law. *Białostockie Studia Prawnicze*, 2, 65–82.
- Judgment of the Court of Justice of the European Union of 21 September 1999 on the case of *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96.
- Judgment of the Court of Justice of the European Union (First Chamber) of 4 December 2014 on the case of *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, C-413/13.
- Kajander, A., & Kerikmäe, T. (2022). Gig economy workers in the European Union: Towards change in their legal classification. *Revista CIDOB d'Afers Internacionals*, 131, 117–136.
- Lamannis, M. (2023). *Collective bargaining in the platform economy: A mapping exercise of existing initiatives*. Etui.

- Leckey, C. (2020). ECJ clarifies 'worker' status under EU law in gig economy ruling (UK). *European Employment Law Cases*, 3, 210–213.
- Monda, P. (2022). The notion of the worker in EU Labour Law: 'Expansive tendencies' and harmonisation techniques. *Diritti lavori mercati international*, 2, 93–123.
- Perulli, A. (1996). Il lavoro autonomo. Contratto d'opera e professioni intellettuali. In A. Cicu, F. Messineo (Eds.), *Trattato di Diritto Civile e Commerciale* (pp. XII – 786). Giuffrè.
- Prassl, J. (2018). *Humans as a service: The promise and perils of work in the gig economy*. Oxford University Press.
- Rainone, S., & Countouris, N. (2021). *Collective bargaining and self-employed workers: The need for a paradigm shift* [Policy brief no. 11]. European Trade Union Institute.
- Risak, M., & Dullinger, T. (2018). *The concept of 'worker' in EU law*. Etui.
- Šmejkal, V. (2015). Competition law and the social market economy goal of the EU. *International Comparative Jurisprudence*, 1, 33–43.
- Supiot, A. (2001). *Beyond employment: Changes in work and the future of labour law in Europe*. Oxford University Press.
- Treu, T. (2016). *Tipologie contrattuali nell'area del lavoro autonomo*. Libro dell'anno del Diritto Treccani.
- Zoppoli, A. (2024). Collaborazioni coordinate, dipendenza economica e contrattazione collettiva tra ordinamento italiano e diritto eurounitario. *Lavoro diritti europa*, 3, 1–13.