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The notion of the worker in EU Labour Law: "expansive tendencies" and harmonisation techniques*

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1. *Why an "age-old" debate turns "up to date"*

As many considerations highlight, the digital revolution is changing "social and economic structures" in such a deep and disruptive way as to trigger – as we often read – a "context shock"[1]: a "shock" that is gradually disclosing "a new horizon, if not even a well-defined paradigm". It is thus not a surprise, that also Labour Law is being exposed to huge changes: the digital reality is transforming the way work is organized and even conceived,

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[1] Treu, *La digitalizzazione del lavoro: proposte europee e piste di ricerca*, in *Federalismi.it*, 2022, n. 9, p. 194.

while "meaningful reviews of traditional techniques of labour regulation"[2] are required. The discussion on these reviews is still open and marked by age-old never solved questions: rather emblematic are those concerning the relationship between national and EU law, that are now bursting in.

Let's try to explain it more carefully.

Once more, platform-based work ends up sitting in the dock. Despite the unquestionable opportunities it offers, it is also fuelling some severe gaslighting[3]. The autonomous way the task is performed makes the qualification of the platform worker undefined, though no one is questioning that his/her weak condition mirrors that of subordinated employment. Similarly, to this latter, also platform workers are depending on an employer's organisation, thus missing the chance of developing a mature and independent economic subjectivity: the traditional identity profile of a self-employed.

The awareness of these issues is quite widespread, particularly following the massive disputes of recent years, which pushes national legislation to search for solutions "adjusted to this newly changed reality". Multiple are the legal pathways covered, though they mainly converge in expanding some, or, at times, all the subordinated employment rights: it is enough to consider the Italian experience, mainly focused on the construction of "external cases" bordering with subordinated employment and the Spanish experience basing on the use of the presumption of subordination. The platform economy is, thus, forcing the limits of labour rights; a phenomenon that had already started a while ago, according to some authors[4]: the problems of compatibility with EU law – featuring an age-old soul, as mentioned earlier – acquire, as such, a new shape.

There has long been a mature awareness that, differently from national law, EU law has not been developed around a positive notion of workers, who should be given the role of systemic centre of gravity of social protec-

[2] ZOPPOLI L, *Valori, diritti e lavori flessibili: storicità, bilanciamento, declinabilità, negoziabilità*, in *WP CSDLE "Massimo D'Antona".IT - 400/2019.*

[3] Literature on the matter is now rich, for a recent reconstruction of the discussion see also the proceedings of the Meeting held in Venice at the University Ca' Foscari on January 13th and 14th 2022 on "Lavoro e Diritti nella Rivoluzione di Internet" and published in n. 1/2022 of the journal *Lavoro Diritti Europa*. On the development of platform work in Europe see HAUBEN (ed.), LENAERTS, WAEYAERT, *The platform economy and precarious work*, Publication for the committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020.

[4] PERULLI, *Oltre la subordinazione. La nuova tendenza espansiva del diritto*, Giappichelli, 2021.

tions[5]. The subjective scope of these protections was instructed by the Court of Justice, whose lavish production has been influencing, possibly not by little, the discretion power of national legislations. Hence, the urgency to start over by reflecting on the terms of such an influence, with a view to clarifying the extent to which the ongoing expansive tendencies in national legislations are consistent with EU law.

The above would already be a relevant profile per se, but this is not over.

Among the most meaningful effects of the mentioned expansive tendencies, there is the wide use of collective bargaining agreement: a full of potential dynamic, as demonstrated by the growing initiatives taken by platform workers that risks to conflict with the European competition law, thus making an issue, which appeared to be pushed aside among and in the end having a very limited practical relevance, resurface[6].

The framework is the balance between collective bargaining agreement, as an instrument to meet the objectives of social policy, and competition. A balance at the heart of the well-known *Albany*[7] doctrine which starts from a double assumption when dealing with it: a restriction of competition is among the inherent effects of collective bargaining; the social policy objectives would be "seriously undermined if, when seeking jointly to adopt measures to improve the conditions of work and employment", collective bargaining agreements would always be subject to art. 85 TEC (now 101 TFEU). Based on this preamble, the Court derives that "the agreements concluded in the context of collective negotiations among social partners" are exempt from the law on competition when "they have to be considered by virtue of their nature and purpose, falling outside the scope of art. 85, n. 1 of the Treaty".

Such an approach has been extensively challenged, both because it

[5] The point is dealt with extensively in literature, among the others see AIMO, *Subordinazione e autonomia: che cosa ha da dire l'Unione europea?*, in AIMO, FENOGLIO, IZZI (edited by), *Studi in memoria di Massimo Roccella*, 2021, p. 655; COUNTOURIS, *The concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope*, in *ILJ*, 2017, 47, p. 202; DAVIDOV, FREEDLAND, COUNTOURIS, *The Subjects of Labor law: "Employees" and Other Workers*, in FINKIN, MUNDLAK (edited by) *Comparative Labor Law*, Edward Elgar, 2015; GIUBBONI, *Being a worker*, in *ELLJ*, 2018, p. 1; MENEGATTI, *The Evolving Concept of "worker" in EU law*, in *ILLEJ*, 2019, p. 71.

[6] PALLINI, *Libertà di contrattazione collettiva dei lavoratori autonomi e tutela della concorrenza: apologia della giurisprudenza della Corte di giustizia dell'UE*, in AIMO, FENOGLIO, IZZI, *cit.*, p. 858.

[7] Court of Justice, September 21st 999, *Albany International BV e Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/97.

would facilitate a review of the same scope and purposes of a collective agreement, which remains unknown in many national legal systems, and – this being the most relevant point here – because of the incertitude on its operation[8]. The *Albany* judgement only considers the "employed workers" and does not even mention the autonomous ones: above all, it does not specify how to expand further these notions regarding competition, and in what way they interact with each other. Not even the subsequent European case law provides any clarification on the matter, thus giving birth to not a few problems arising in the national legislation. The same *FNV*[9] decision from 2014, when affirming that "the collective work agreement … falls outside the scope of article 101, par. 1, TFEU, even when the "workers are false self-employed", introduces a still debated phrasing that leads to an even more uncertain scenario.

2. *Notion of the worker and free movement*

After having clarified the reasons that require us to go back to "age-old debates", our analysis cannot but take the first steps from the case law on the free movement of workers: a complete notion of worker can be, in fact, derived from this case law we will often have to confront with.

It all started back in the '60s: with the famous *Unger* case[10]. The provision stresses the need to provide the notion of worker given in art. 48 of the Treaty with a "community meaning", as to prevent the Member States to "rule out at their discretion specific groups of people from warranties provided by the Treaty"[11]: only the European notion of worker – as emerges

[8] Latest and for all see Biasi, *Ripensando il rapporto tra il diritto della concorrenza e la contrattazione collettiva relativa al lavoro autonomo all'indomani della l. n. 81 del 2017*, in *ADL*, 2018, p. 472 ff.; Countouris, De Stefano, *New Trade Unions strategies for new forms of employment*, Brussels 2019; Countouris, De Stefano, *The Labour Law Framework: Self-Employed and Their Right to Bargain*, in Waas, Hiessl (edited by), *Collective bargaining for self-employed workers in Europe*, The Netherlands 2021, pp. 3-17; Pallini, *cit.*, pp. 857-862; Razzolini, *Collective action for self-employed workers: a necessary response to increasing income inequality*, in *WP CSDLE "Massimo D'Antona".INT - 155/2021*.

[9] Court of Justice, December 4th 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, Case C-413/13.

[10] Court of Justice March 19th 1964, *M.K.H. Unger in Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, Case C-75/63.

[11] Case C-75/63, *Ungher*.

from the *Unger* case – grants an effective and even functioning of rules making up one of the four fundamental freedoms. As the outcome of a rich evolution of case law[12], a similar need is exalted by the likewise famous judgment *Lawrie-Blum*[13]: a true leading case marking a turning point in the creation of a European notion of employed worker. The judgement identifies it for the first time in a "natural person who, for a specific period of time, performs services for and under the direction of another person in return for which he receives remuneration": a notion – it reads further – to be verified "on the basis of objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned".

When discussing the content of the "*Lawrie-Blum* formula" more in-depth, the Court has long dwelt on its "onerous nature", considering such a requirement as met in presence of any form of remuneration, irrespective of: the amount; possible integrations with incomes deriving from other goods or work activity of a member of the family; it being disbursed in indirect form[14]. Indeed, though being interpreted with an extensive meaning, the onerousness of the performance remains an indispensable requirement, right like the "real and effective" nature of the work activity: with regard to free movement, cannot be a worker a person, who performs a work that is so limited as to become "marginal and ancillary"[15].

The reference to the concept of "direction" deserves some additional remarks.

The Court assigns to it EU-relevant content and functional to the mentioned needs for an effective and even operation of the rules under examination. Full awareness is required here, so to avoid transposing at the

[12] Reconstructed lately in Vincieri, *Libera circolazione dei lavoratori e nozione eurounitaria di subordinazione*, in *MGL*, 2020, p. 195.

[13] Court of Justice July 3rd 1986, *Deborah Lawrie-Blum e Land Baden-Württemberg*, Case C-66/85.

[14] Remarkable on the matter Court of Justice October 5th 1988, *Udo Steymann v. Staatssecretaris van Justitie*, Case 196-87; Court of Justice June 3rd 1986, *R. H. Kempf v. Staatssecretaris van Justitie*, Case C-139/85.

[15] Large production is available on this requirement: the Court, for instance, specifies that the activities functional to re-skilling or reinsertion of the interested shall not be considered as real and effective, since in this case the subordinated employment "has as a goal the recovery, in a more or less short period of time, of the ability to occupy an ordinary employment or the access to a normal life as much as possible" (Court of Justice, May 31st 1989, *Bettray v. Staatssecretaris Van Justitie*, Case C-344/87). For a reconstruction of EU case law, see Giubboni, Orlandini, *La libera circolazione dei lavoratori nell'Unione europea*, il Mulino, 2017.

European level the categories typical of national laws: an activity of interpretation – it is observed – that is not uncommon, but which misrepresents the reconstructions made by the Court of Justice[16]. Reconstructions that attach the concept of direction a meaning anything but coincidental with an external direction: revealing is the *Agegate*[17] judgment that places an emphasis on the limitation of the freedom for a person to choose his/her working hours, the place or the work content and the limitation of the freedom to engage his/her own assistants. These clarifications do not represent indicators of a broader and more pervasive power: they are not, to use a typical wording of some national legislations, "symptomatic" indicators of the power to modify the *quid* and *quomodo* of a performance. The elements used by the Court express, vice versa, a more general limitation of the freedom to organize the performance: that's the content the Court aims at attaching to the concept of direction.

The above is confirmed by case law that distinguishes a subjective scope of free movement and of freedom of establishment. According to the Court[18], the essential feature of the "working relationship pursuant to art. 48 of the EC Treaty (successively art. 39 EC)" lies in the circumstance that "a person provides a service, for a specific period, for and under the direction of another person", the *proprium* of self-employment, pursuant to art. 52 of the Treaty, is an activity performed "outside a relationship of subordination". Hence, the Court highlights a very clear contrast, and, in very terse terms, it adds that subordination is missing, and leaves room for autonomy when the person who performs "the activity is free to organize his/her working conditions".

3. *The scope of the European notion of the worker: from "restrictive thesis" to "expansive thesis"*

Based on the examined judgments, what surfaces is a notion of worker totally lacking any regulatory basis and, yet, considering the effectiveness of

[16] Similarly GIUBBONI, *Per una voce sullo status di lavoratore subordinato nel diritto dell'Unione europea*, in *RDSS*, 2018, p. 207 ff.; NOGLER, *The Concept of "subordination" in European and comparative law*, 2009, p. 13 ff.; PALLINI, *cit.*, p. 863.

[17] Court of Justice, December 14th 1989, *The Queen v. Ministry of Agriculture, Fisheries and Food*, Case C-3/87.

[18] See judgment June 27th 1996, *P. H. Asscher v. Staatssecretaris van Financiën*, Case C-107/94.

the preliminary ruling on interpretation, equally relevant: it represents the necessary subjective reference of the rules on free movement. With a view to their operation, all elements employed by the Court to give shape to the said notion shall recur starting from the already judged cases, we should go back to this latter which becomes a common decision-making scheme where facts are conducted following the typical rationale of the judgement of subsumption.

The legislation on free movement becomes, thus, independent from national systems which are deprived of a discretional choice in the selection of beneficiaries: basically, EU law has primacy over national law. That's why this notion has long been at the heart of a plentiful debate, challenging its traditionally limited scope and seeking to expand it to the entire European social law. A debate that, as said, was reinforced by the fourth industrial revolution and – it shall be added – by very uncertain rulings by the Court of Justice: the outcome is a plethora of solutions, ranging from a general reconstruction of the notion of the worker to a more traditional limited scope.

Some authors affirm the European case law on the notion of worker does not meet any of the typical purposes and ambitions of national legislations and, instead, it meets the need to define the cases governed by EU law on the matters it is competent for[19]. It would be more accurate to use the plural form for the notion of subordination and the specular one of self-employment, since the Court confirmed one notion for each "subject-matter" for which the EU is competent, and depending on the different legal objects subjected to protection within each legislation area: for example – the author writes – competition right, free movement of people and services, anti-discrimination right, mental and physical health protection of the worker[20].

A different thesis argues that starting from the *Betriebsrat der Ruhrlandklinik* judgment, some of the obstacles to the common application of the notion of the worker related to free movement would falter. A new phase of EU case law is inaugurated since the Court modifies its precedents on the referral to national legislation as for the scope *ratione personae*: a technique broadly employed for the directives based on the current art. 153 TFEU. According to the mentioned judgment, the referral shall not be "interpreted as a waiver by the EU legislator to its power to establish the extent of this notion within directive

[19] Pallini, *cit.*, p. 864.
[20] Pallini, *cit.*, p. 864.

2008/104": therefore, also existing this, the notion of worker shall be derived from EU law and identified in any individual having a working relationship in the meaning attached by the same Court in its case law[21].

Still different is the opinion of those who distinguish three relevant notions of employee in EU law: the first (the only *stricto sensu* euro-unitary) is instrumental to the functioning of free movement and basically it projects outside its original area; the second having relevance for the coordination of national judicial schemes of social security; the third is deferred to national laws, and aims at defining the scope of a significant part of the directives on labour matters. For this latter case – it reads further – EU law restricts the freedom of national legislation by setting external limitations that, though not falling fully under the control of EU law, delimit the discretion left to the Member States when transposing the directives. But then, it adds that also in this field the Court of Justice tends at times to refer to an EU notion of subordination which confirms and also reinforces its expansive tendency[22].

4. *The case law on non-discrimination and safety at workplaces*

Dealing with such a structured framework crucially requires an analysis of case law and, above all, of the rulings addressing the topic of the notion of the worker as related to directives on non-discrimination along with those on the protection of health and safety at workplaces[23]. By adopting them – it is believed – EU law aimed at implementing a cohesive harmonisation that is directed towards an alignment of national systems to European social standards and a promotion of the identification of common social values[24].

[21] In this sense see MENEGATTI, *cit.*, p. 36.

[22] GIUBBONI, *Per una voce sullo status*, *cit.*, p. 211. See also TOSI, LUNARDON, *Introduzione al diritto del lavoro. 2. L'ordinamento europeo*, Editori Laterza, 2005, pp. 93-94, the same GIUBBONI refers to.

[23] Among the many, see Court of Justice September 20th 2007, *Sari Kiiski v. Tampereen kaupunki*, Case C-116/06; Court of Justice December 14th 1995, *Inge Nolte v. Landesversicherungsanstalt Hannover*, Case C-317/93; Court of Justice January 13th 2004, *Debra Allonby v. Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional e Secretary of State for Education and Employment*, Case C-256/01; Court of Justice April 7th 2011, *Dieter May v. AOK Rheinland/Hamburg - Die Gesundheitskasse*, Case C-519/09.

[24] D'ANTONA, *Armonizzazione del diritto del lavoro e federalismo nell'Unione europea*, in *RTDPC*, 1994, p. 700 ff. and ID., *Sistema giuridico comunitario*, in BAYLOS GRAU, CARUSO, D'ANTONA, SCIARRA, *Dizionario di diritto del lavoro comunitario*, Monduzzi Editore, 1996, p. 22.

Hence, since this regulatory harmonisation has also gone through the notion of worker, a reconstruction of the said and, above all, the unsaid of such a similar case law represents the first step towards a reflection on the previously identified thesis and on the doubts sometimes fed by the same European case law when confronted with functional directives[25].

Once specified the above, it is worth clarifying from the outset that the Court extended the "notion *Lawrie-Blum*" to the directives on non-discrimination and safety. Coming to the arguments, they are first based on the *effet utile*. Plenty is the publications on the subject[26], it is basically a technique aiming at preserving the effectiveness of EU law, both primary and secondary. Essentially, two interpretations were identified of it: a weak one, having to do with the construction of the rule which needs to be instrumental to the goal; and a strong one that goes beyond the formulation of the rule and involves its interpretation with a view to fully achieving its function. In the second interpretation, the argument of the *effet utile* governs the application phase of EU law, outweighing the other interpretation canons and sticking to these judgements, enabling the Court to empty the national systems of any competence in the definition of the *ratione personae* aspect of the said directives.

Starting from the last explanation, the Court affirms that the notion of worker, though lacking or being generic, "cannot be defined by recurring to … [the] legislation of Member States, instead, it needs to find an autonomous and an even interpretation in the EU judicial system: differently – it is added – the power to modify the scope of directives would be referred to the discretion of Member States, thus depriving them of their full effectiveness"[27]. It is, indeed, the full achievement of the purposes inherent to the

[25] D'Antona, *cit.,* p. 700 ff., uses this expression to refer to the non-cohesive directives that are intended to remove the barriers and distortions to "Community freedoms", including those generated by differences in protections and cost of labour.

[26] Ingravallo, *L'effetto utile nell'interpretazione del diritto dell'Unione europea*, Cacucci, 2017; Ratti, *L'argomento dell'effet utile nell'espansione del diritto del lavoro europeo*, in *DLRI*, 2017. But, see also Cruz Villaça, *Le principe de l'effet utile du droit de l'Union dans la jurisprudence de la Cour*, in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Springer, 2013, p. 279 ff; De Simone, *L'effettività del diritto come obiettivo e come argomento. La giurisprudenza della Corte di Giustizia Europea, tra interventismo e* self restraint, in *LD*, 2014, p. 489 ff.; Tichy, Potacs, Dumbrovsky (edited by), *Effet Utile*, Charles University, 2014.

[27] Revealing is the case *Nolte*, though its approach can also be found in other judgments mentioned under footnote 23.

said directives that justifies a European notion of worker: it represents an extremely relevant interpretation and, considering the outcomes it obtains, some further clarifications are needed. In its stronger meaning, actually, the *effet utile* contributes to making the EU law effective, whereas, as an interpretation technique, it remains bound to its legal basis: foundation – as it reads – of an "attribution of jurisdiction"[28] that detects the regulatory competence and, simultaneously, regulates its exercise. It becomes, thus, crucial to assess, whether the results obtained by the Court are then permitted by the legal basis of these directives. In other words – this is the "non-said" of the case law under examination – it shall be assessed whether the legal basis allows for the enforcement of a European notion of worker based on the recourse to *effet utile* in the meanings described above.

5. Follows. *The legal basis and the "non-said" of EU case law on the notion of the worker*

The legal basis of directives on non-discrimination and safety is neither evident under art. 115 nor art. 153, lett. b), TFEU – which, as we are about to see below, governs a partial and minimum harmonisation – instead, it can be found under art. 141 TEC (currently art. 157 TFEU) as for directives on non-discrimination and under art. 118A of the Single European Act as for directives on safety: provisions that have so far formed the subject of an intense and "creative" interpretation by the Court.

As for art. 141 TEC, we can be very brief, having the rule undergone a well-known evolution and, in many cases, symmetric to free movement[29]: similarly, to this latter, indeed, also for the equal pay, a principle of non-discrimination was introduced featuring a marked economic nature, since its aim was to prevent distortions of competition and, ultimately, grant a proper functioning of the market. This similarity – though not also neglecting the social soul of the rule – enabled the Court, already back in the '70s, to consider art. 141 TEC as an expression of a "fundamental principle of EU law"

[28] TIZZANO, ROBERTI, *La giurisprudenza della Corte di giustizia sulla «base giuridica» degli atti comunitari*, in *FI*, Vol. 114, 1991, p. 101.

[29] A large literature is available on the matter, for a recent reconstruction see SANTAGATA, *Le discriminazioni su lavoro nel «diritto vivente». Nozione, giustificazione, prova*, Edizioni Scientifiche Italiane, 2019, particularly chapters 1 and 2.

which shall be provided with the "broadest possible application", "irrespective of any national legislation"[30]. Such a preamble makes it evident that the provision under examination, not only allows but even urges a European notion of worker: by introducing a constitutive principle of EU law that every national law is required to enforce, the notion of the worker becomes a "mean" for its "broadest application possible", thus allowing to invoke the *effet utile* and to deprive the Member States of any power to identify its beneficiaries. This rationale does not get weaker when from art. 141 TEC, it comes to the directives based on the same rule, since these latter envisaged to set out the principle of non-discrimination: hence if the principle needs the "broadest application possible", the same shall also be true for the provisions directly developed from it.

Getting to art. 118A, the issue becomes more complicated, since the provision limits European intervention to the sole "minimum requirements". On the matter, though, the Court has taken major steps[31]: since the provision aims at "improving with a view to progress" the protection of worker's health and safety matters – it shall be clarified – the reference to the "minimum requirements do not prohibit to adjust the intensity of the action if necessary" to achieve the purpose. But there's more, considering that the Court also strays into the judgement on the necessity: if a European intervention "shall be intended to achieve the purpose" and shall not "go beyond what is needed to achieve the said purpose" – the Court clarifies – the requirement of necessity is only met, so far European action "contributes to improving the protection" of safety. The Court, in other words, is reinterpreting the principle of necessity according to the purposes of the rule, to finally acknowledge – notwithstanding the manifest error and the misuse of power – a pervasive advance of EU law over a consequent retreat of national laws. Ultimately, a model of harmonisation is surfacing; one adjusted on progress, whose features are peculiar: so far, the protection of health in the workplace is improved – the Court seems to affirm – a European intervention shall not be ruled out and it represents a binding, along with necessary "minimum requirement".

Such an interpretation, at times under criticism, cannot be dealt with

[30] Court of Justice April 8th 1976, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, Case C-43/75.

[31] On that, see the major judgment by the Court of Justice November 12th 1996, *United Kingdom of Great Britain and Ireland vs Council of the EU*, Case C-84/94.

any further. And yet, it is hard to deny that the same allows for a prevalence of EU law over national law that is also reached by the same Court when imposing a European notion of worker for the directives on matters of safety. The reconstruction of its subjective scope allows the Court to rule out any competence of the national legislation not just and not so much based on unambiguous formal data – the reference here shall be to the lack of a referral to national laws – but because this reconstruction shall be conducted in line with a precise model of harmonisation. A model, where the European notion of worker, by contributing to an "improvement of protection" of health, satisfies the principle of proportionality, while making a valorisation of the purpose of the directives by means of the *effet utile*, so far as to nullify any room for national legislations in the scope of *ratione personae*. It does not surprise that some manifest traces of this harmonisation model can be found in the directives based on art. 118A: revealing is the so-called mother directive, where, in a prospect of "improvement", the worker is identified with a formula that is only apparently generic and which, indeed, conveys a clearly expansive approach.

6. Follows. *From a necessary European notion of the worker to its contents: the role of analogy*

After reconstructing the grounds that justify a European notion of worker, what is left to be clarified is the way the Court defines its content. A separate issue from the first one that cannot be dealt with by recurring to the *effet utile*: the point is no longer the prevalence of EU law over national law.

This is the reason why the Court makes recourse to the analogy: as an interpretation principle generally used in national legislations, it enables to make use of principles developed for free movement and gives shape to a European notion of worker that is considered relevant to attain its regulatory purposes. The Court makes recourse, thus, to the analogy to solve the issues deriving from a gap or a "doubtful case" by resorting to one or more positive existing rules, whose *ratio* is such as to understand even the judicial case or a totally unregulated case[32]. This option shall not be considered unavailable,

[32] CAIANI, *Analogia*, in *ED*, Vol. II, 1958, p. 350.

when the identity of the *ratio* between the legislation on free movement and that on non-discrimination, along with the one on health protection, is missing. In both cases, in fact, a fundamental right applies that is equal to that of non-discrimination inherent to free movement. Precisely this analogy satisfies the identity of *ratio.* With a view to a better understanding, a few more clarifications, though very brief since these topics were extensively dealt with, might be of help.

As for non-discrimination, it has already been affirmed that it represents a "constitutive principle" of EU law, similarly to free movement: ultimately, right because of this, the directives under object are deemed to embrace a broader notion of work, by tracing a meaningful area of protection around the person, above all thanks to new generation law[33].

Getting to the issue of health in work relationships and workplaces, many authors state that EU law considers this as a core of a fundamental social right[34]: a right whose "constitutionalisation"[35] shall be deemed achieved.

7. *European notion of the worker and directive on collective redundancy: the core of partial harmonisation*

At this point, we shall verify whether the line of argument reconstructed, and its results can be extended beyond the borders of non-discrimination and safety. The first doubts, not always expressed, come from the directive on collective redundancy: it does not contain anything on its subjective scope and, yet, is this sufficient – by invoking the *effet utile* – to impose a European notion of worker?

To answer this question – as demonstrated with the above – we shall clarify whether this is permitted by the directive's legal basis. Starting from this assumption it is not of secondary importance that the directive on collective redundancy, similarly to the others on company crisis, finds its judicial basis in art. 115 TFEU: a provision – this is no minor aspect – enabling only

[33] On the point, also referred to successively, literature available is quite abundant: latest and for all, see Barbera, Borelli, *Principio di eguaglianza e divieti di discriminazione*, in *WP CSDLE "Massimo D'Antona".IT - 451/2022*.

[34] Ales, *Diritti sociali e discrezionalità del legislatore nell'ordinamento multilivello: una prospettiva giuslavoristica*, in *DLRI*, 2015, p. 473.

[35] Ales, *cit.*, p. 474.

a partial harmonisation. The same Court of Justice restates this[36]: according to it and based on the mentioned provision, the directive shall be interpreted in the sense that national law can intervene in all the areas "non-occupied by EU law". The consequences of such an approach were only analysed for the procedures of dismissal, whereas, if art 115 TFEU admits only partial harmonisation, it is honestly hard to fill up the "void" on the notion of the worker when nullifying the national intervention. If, "anything not regulated by the directive shall not fall under its scope and shall remain the competence of Member States"[37], that void should be read as an implicit referral to the notions of Member States. Hence, the recourse to the *effet utile* becomes unviable under the same terms observed for the directives on non-discrimination and protection of safety, because we would end up readjusting the same meaning of partial harmonisation: an outcome that the Court does not admit to pursuing and anyway not permitted by art. 115 TFEU. Beyond its formal aspect, the directive on collective redundancy does not differ so much from the directives which, when implementing a minimum harmonisation, are referring to the Member States for the notion of worker: hence, as for this latter, the *effet utile* could only facilitate control over the reasonableness of the choices made in the moment of enforcement.

Doubts are far from being dispelled.

Also, the recourse to the analogy to justify the extension of the *Lawrie-Blum* formula would be troublesome: with a view to mitigating social dumping, directive 98/59 envisages facilitating the functioning of the market by intervening only in the dismissal procedure, while refraining from regulating a fundamental right. The consequence is a difficulty in meeting the requirement of the identity of *ratio* that – its reasons were already explained – represents a crucial prerequisite to use an analogy between case law and free movement.

8. *Notion of the worker and "minimum harmonisation": the "expansive tendencies" and their limits*

The general picture is made even more complex when getting to directives based on art. 153 TFEU.

[36] Court of Justice March 17th 2021, *KO vs Consulmarketing SpA*, Case C-652/19.

[37] This is how judgment *KO* deals with the issue.

Starting from the Treaty of Maastricht, EU integration on social matters was broadened and, at the same time, provided with a form of harmonisation: no longer that of current articles 114 and 115 TFEU and neither that of art. 118A, instead the one contained in the current art. 153 TFEU. It is basically a model of harmonisation, neither partial nor oriented towards progress: this is confirmed by letter b) under its paragraph 2 and paragraph 4, containing a clear option towards the technique of the minimum level of rights, the so-called floor of rights[38]. For clarity purposes, the precise meaning of this model of harmonisation is still debated, but, for sure, it does not intend to level out*,* even only potentially, the levels of protection deriving from EU law: instead, the harmonisation envisaged by the provision allows the national legislations to adjust the EU protections to their domestic systems including – no instruction to the contrary applies – also those on the notion of the worker.

This is how the doubts part of the reconstructions connecting the extension of the notion of worker and the fundamental rights – and mainly the Charter of Fundamental rights – raise[39]: each time a fundamental right has come into play – it reads – the *Lawrie-Blum* formula got expanded[40]. The case law on health and non-discrimination clearly shows – as already said – that the extension of case law on free movement goes through two different moments: the possibility for a European notion of the worker to be assessed according to the legal basis of the directive; the reconstruction of its content that requires to assess the "identity of the *ratio*" by focusing on the analogical extension of the "*Lawrie-Blum* formula". Keeping in mind these two different levels is crucial; the relevance of the fundamental right, in fact, is limited to the second and does not influence the enquiry on the possibility for a notion to be carried out only starting from art. 153 TFEU. A provision that – it is not of secondary importance stressing it again – grounds the European social policy on only minimum harmonisation. Not either the judicial value of the Charter is able to change this approach, both because art. 153 TFEU represents a provision of primary law and because the Charter entails an inherent operation limit: it applies to the Member States only in the enforcement of EU law.

[38] Ratti, *L'argomento dell'*effet utile *nell'espansione del diritto del lavoro europeo*, in *DLRI*, 2017, p. 516. But see also Hepple, *Harmonisation of labour law: Level playing field or minimum? De Jure - University of Pretoria*, 2009, p. 7.

[39] Menegatti, *cit*.

[40] Aimo, *cit*., pp. 661-662.

And there is more since similar arguments also trigger serious doubts on the extension of the European notion of the worker to directive 2003/88. The legal basis of this directive is no longer art. 118A, as for directive 93/104, but art. 137 TEC (currently 153 TFEU). Hence, if the *ratione personae* scope of directive 93/104 had to be reconstructed according to a rationale of progressive harmonisation, that of directive 2003/88 shall be defined in the prospect of a minimum harmonisation: it is not by chance that – as observed also by the Court – the latter lacks any reference to the notion of worker contained in directive 89/391. Directive 2003/88 does not either refer to national legislation. But, yet, the "void" that is generated – having to interpret it in the light of art. 153 TFEU – would not allow transferring the notion of the worker to EU law, without paying the price of altering the meaning of minimum harmonisation: an outcome, indeed, attained by the Court without even having to make recourse to the *effet utile*, as in other precedents; instead only by reconstructing *sic et simpliciter* the "silence of legislation" in terms of a tacit default referral to EU law[41]. Problems are not either solved by resorting to the analogy that is, instead, employed by the Court: it is indisputable that the legislation on working hours crosses a fundamental right[42], but the point is upstream, and it concerns the possibility for a European notion. Precisely there the Court's argument appears weak since any comparison with the legal basis of the directive and with the deriving constraints is missing[43].

No doubt the minimum harmonisation is prone to risky degenerations,

[41] Revealing expression of this approach is Court of Justice October 14th 2010, *Union syndicale Solidaires Isère v. Premier ministre, Ministère du Travail, des Relations sociales, de la Famille, de la Solidarité et de la Ville, Ministère de la Santé et des Sports*, Case C-428/09.

[42] Purpose of the directive is protecting the health of workers, that, intended as mental and physical wellbeing, also involves the organisation of the working hours, and, more specifically, the minimum rest periods, the appropriate break periods and the maximum threshold for the duration of a working week. (Court of Justice May 14th 2019, *Federación de Servicios de Comisiones Obreras (CCOO) vs Deutsche Bank SAE*, Case C-55/18). Therefore introducing limitations to the maximum work duration and scheduling daily and weekly rest periods means "*specifying* a fundamental right to health, expressly enshrined article 31 of the EU Charter of fundamental rights". Also with regards to the legislation on working hours – the Court concludes – "independent social values, every worker should enjoy" shall find a place (Court of Justice September 10th 2015, *Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) vs Tyco Integrated Security SL* and *Tyco Integrated Fire & Security Corporation Servicios SA*, Case C-266/14).

[43] Our analysis does not dwell too long on the controversial order *Yodel* from 2020, getting closer to gig economy, since the Court declares in it not to be willing to modify the principles developed in its precedents and object of this analysis.

tending to make EU law ineffective and also the Bill of rights that aims at changing the economic soul of the EU. And yet, the path EU law envisages to follow for the achievement of integration on social matters, is the following[44]: a path, by the way, that the Court of Justice has not passed up the opportunity to make "safer". We are referring to the firm step forward as regards the stiffness of the so-called *Danmols*[45] orthodoxy: the interpretation that, when facing a national level-based notion of worker, would rule out any "European control", thus laying the foundations for dealing with "identical circumstances in different ways, uniquely by reason of the qualification of the working relationship" conducted by national law.

This case law is developed from the directives that refer to the notion of the worker to national legislation. The Court still makes recourse to the *effet utile*, but not to transfer the responsibility of the notion of the worker to EU law: what prevents this – as the judges clarify – is the referral to national systems[46]. Though in its strong meaning, the *effet utile* allows introducing a limitation to the discretion of Member States which, when identifying the beneficiaries of EU protections, are making discretionary assessments without sacrificing its purpose. A circumstance that occurs when internal choices go beyond the boundary of reasonableness and do not include among the beneficiaries of EU protections those individuals that are considered workers under national law. A distortion that tends to sacrifice the purposes of the directives: that is, protecting *all* those qualified as workers under national legislation. This is what the Court intends when affirming that the referral to national legislation is not unconditional, instead it is limited "by the arbitrary exclusion of individuals from the benefit of protection offered by the directive"[47].

[44] Cf. COUNTOURIS, *cit.*, p. 200.

[45] Court of Justice July 11th 1985, *Foreningen af Arbejdsledere i Danmark v. Fallimento A/S Danmols Inventar*, Case C-105/84.

[46] Court of Justice July November 5th 2014, *O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, Case C-311/13.

[47] Such an approach finds a rich ground in the directives on the so-called non-standard work that is "facilitated" in view of removing discriminations based on its employment. Highlighted that "the discretion power of Member States to set the implementation conditions of the directive is not unlimited" and that the "terms used shall be defined based on national law, insofar the *effet utile* of the directive is satisfied", the Court thinks the "choice of ruling out from the scope of directive those work relationships lacking a substantial difference from that relating employees to their employers, who, based on national legislations, fall under the category of workers" is prejudicial to the "*effet utile* of the principle of equal treatment": only the differ-

The path drawn by case law shall not be neglected and offers possibilities that deserve great attention. If art. 153 TFEU makes it troublesome to impose a European notion of worker, it is not unusual to deem it applicable also for the directives which, though not referring the notion of the worker to national legislations, are anyway the expression of a minimum harmonisation of social policies: also, in this case, the *effet utile* can be pleaded, but only within the limit of reasonableness.

9. *Case law on the referral to national laws of the notion of the worker: the* Sibilio *case*

Before moving any further in the analysis, we shall deal with two judgments that are considered expanding the European notion of worker also to the directives referring their scope *ratione personae* to national laws: here the reference is to the *Sibilio*[48] cases and *Betriebsrat der Ruhrlandklinik* that, by depriving the Member States of any margin of movement, would overturn the literary phrasing of legal texts and would make the proposed considerations falter.

In the first judgment – as it reads[49] – the Court acknowledges a supposed "objective" notion of subordination leading to consequences on the discretion margin left to the Member States: this outcome is justified based on the purposes of the framework agreement on fixed-term employment contracts requiring an EU notion of work relationship "in its minimum meaning", as defined in *Lawrie-Blum* case law. Under these terms, the judgment should have a disruptive effect, since it excludes that the application of the general principle of equal treatment can be denied to the "objectively" subordinated work relationships, under penalty of a significant loss of the same sense of the directive. According to this reconstruction[50], the *Sibilio* case

entiations the directives intend to prevent would be allowed. See Court of Justice March 1st 2012, *Dermod Patrick O'Brien v Ministry of Justice, formerly Department for Constitutional Affairs*, Case C-393/10; Court of Justice October 12th 2004, *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG*, Case C-313/02; Court of Justice 16th July 2020, *UX v Governo della Repubblica italiana*, Case C-358/18; Court of Justice September 13th 2007, *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud*, Case C-307/05.

[48] Court of Justice March 15th 2012, *Giuseppe Sibilio v. Comune di Afragola*, Case C-157/11.

[49] Ratti, *cit.*, p. 514.

[50] Proposed by A. with a heavily critical note: Ratti, *cit.*, pp. 515-516.

would reinforce the tendency to turn the so-called floor of rights into a ceiling[51].

The issue, as the mentioned doctrine does not fail to observe, is unquestionably real, and yet it does not seem to recur in the judgment *Sibilio*. As proof of this is point 43, which specifies that "where the EU legislator expressly refers to the legislation, to collective agreements or to the practices in force in the Member States, it is not up to the Court to give the used terminology an autonomous and even definition of this notion, pursuant to EU law". Similar is the content of point 48, where it is specified that pursuant to "Italian law the performances carried out within the context of works of social utility can report the typical features of a subordinated work performance. If this is the case, the Italian legislator cannot deny the legal qualification of the subordinated working relationship to those relationships objectively taking on such a nature".

Ultimately, the *Sibilio* case stands in continuity with the Court's precedents when deriving the power of Member States to make discretionary, though reasonable choices from the referral to national legislations of the notion of worker: basically, these shall refer to their internal systems, without sacrificing the one, who – according to national law – is deemed a worker. Hence, the Court continues making recourse to the *effet utile* to set an "external limitation" to the implementation of the directive. The notion of "objective subordination" is used for this purpose: when referred to as national law instead of EU law, it prevents the fixed-time workers from being applied to less favourable work conditions than permanent contract workers. The two are comparable to each other only for the fact of having a contract or a fixed-term work relationship.

10. Follows. *The* Betriebsrat der Ruhrlandklinik *case*

More structured is the *Betriebsrat der Ruhrlandklinik* case, since the Court when judging on the scope of the directive no. 2008/104/CE, really seems going beyond its same precedents[52].

[51] See on that *amplius* RATTI, *cit.*, p. 516, going back to the critical enquiry of COUNTOURIS, KOUKIADAKI, *The Purpose Of European Labour Law: Floor Of Rights - Or Ceiling? Social Europe*, 2016, in *https://socialeurope.eu*.

[52] MENEGATTI, *cit.*, p. 36.

The directive – as specified by the Court – preserves "the power of Member States to decide which individuals are falling under the notion of 'worker', pursuant to National law and are beneficiaries of a protection within their internal legislation". But – it adds – that this does not imply "a waiver by the EU legislator to define the scope of this notion pursuant to directive 2008/104 and, consequently, the scope *ratione personae* of the latter". Vice versa – the Court continues – it shall not be referred to national legislation for "the task to define this notion unilaterally, instead only the boundaries of article 3, paragraph 1, letter a) of the same directive are outlined, as indeed it has been done also for the definition of 'temporary agency worker' under paragraph 1, letter c), of the same article". The notion of worker endorsed by directive 2008/104 – the Court concludes – "includes any person having a working relationship in the meaning mentioned *supra,* under point 27 [reference to *Lawrie-Blum* formula] and enjoying of a protection in the concerned Member State in exchange of a work performance".

Differently from *Sibilio* case, in the *Betriebsrat der Ruhrlandklinik* case, the Court seems to impose a European notion of the worker on National laws, whose discretion is limited and almost cancelled. Behind this argument, there is again the *effet utile* of the directive: narrowing the notion of worker "to the individuals falling under this notion pursuant to national law" – it reads in the provision – would distort the purpose of the directive by admitting unjustified restrictions to its scope. Nevertheless, beyond the "appearances", a clear break from the precedents can hardly be found in this judgment: not only do they find application in the case law successive to *Betriebsrat der Ruhrlandklinik*, but the solutions proposed here are indeed referring to those precedents, at a closer look.

The intention, clearly expressed in the provision, to "reserve" to EU law the scope *ratione personae* of directive 2008/104, does not reach its extreme consequences, since the Court specifies that the European legislation of agency work contract shall be applied if the performance is "protected as such" by national law. The principles set out by the Court appeared unprecedented and not coherent, since a clear return to national legislation is combined with an element derived from EU law – the notion of worker: the "protection in the concerned Member State in exchange of the work performance offered". And more than an inconsistency, this return conveys the awareness of not being able to go beyond the key role played by national laws, where directives are reserving the scope *ratione personae* to them. The

stress over the European notion of worker gets, thus, heavily downsized and acquires more the value of an aspiration which, *de jure condito*, shall be compared with the regulatory structure of the directive and the institutional one of its legal bases, up to the point of losing its consistency.

11. *Subordinated-employment and self-employment: sector-based approach and the* Danosa *case*

Times are mature to draw the first conclusions.

Although not all doubts were dispelled, – the reference is here to the working hours and the collective redundancy – EU case law, after developing a full notion of workers regarding free movement, extends it to a set number of directives. Once exceeded this limited number, it does not expand any longer and stops at the referrals to national laws and the institutional systems contained in the same referrals.

The conclusion is remarkable since against it, both the thesis supporting the existence of a notion of worker for every matter under European competence and the interpretations tending to an expansion of the "*Lawrie-Blum* formula", crash. And yet – as said before – it is only a first conclusion, not sufficient to conclude our analysis: EU case law, in fact, did not just broaden the scope of *Lawrie-Blum* notion, it went much further. Starting from the *Danosa* case[53], the Court changes its position on this notion; a change was introduced on the occasion of the directive on "health and safety of pregnant workers" and then extended to the directives collective redundancy[54] and the same free movement[55].

More specifically, after identifying the factual elements of the considered relationship – the tasks assigned, the environment where they are carried out, the extent of powers enjoyed by the concerned subject and the super-

[53] Court of Justice November 11th 2010, *Dita Danosa v. LKB L zings SIA*, Case C-232/09.

[54] Court of Justice July 9th 2015, *Ender Balkaya v. Kiesel Abbruch - und Recycling Technik GmbH*, Case C-229/14, Court of Justice February 13th 2014, *European Commission vs Italian Republik*, Case C-596/12.

[55] Court of Justice September 10th 2014, *Iraklis Haralambidis vs Calogero Casilli, against: Brindisi Port Authority, Italian Ministry of Infrastructures and Transportation, Regione Puglia, Province of Brindisi, Municipality of Brindisi, Brindisi Chamber of Commerce, Industry, Craftsmanship and Agriculture*, Case C-270/13.

vision he/she undergoes and the circumstances, occurring in which his/her contract can be terminated – the *Danosa* judgment specifies that the author of a performance "under the direction or supervision … and who can be revoked from his tasks at any time without limitations, satisfies, at a glance, the conditions to be qualified as a worker". The Court beside the notion of direction in its EU meaning places also the supervision and the revocation of tasks, but, of course, the two are considered as alternatives to the direction itself: lacking this latter – it reads in *Danosa* – supervision and unilateral revocation are sufficient to "be qualified as worker". This, indeed, is the same as turning the direction into a non-necessary element of the notion of worker, being it replaceable by generic supervision and an even more generic unilateral revocation of tasks. The *Danosa* case, ultimately, ends up including the notion of workers also those individuals, who carry out performance under a condition of freedom to organize urges us to wonder, whether this approach may influence the opposition between subordinated employment and self-employment taken over – according to some authors – by EU law.

Before answering this question, it is useful to highlight an aspect which already partly came to the fore of the analysis and which will be to the benefit of clarity, in view of the successive considerations. EU law has, on several occasions, "established a comparison" between subordinated employment and self-employment, urging case law to regard the direction as a distinction criterion: the case law on the right to settlement speaks for itself. This "establishment of a comparison", though, did never land in the construction of a dichotomous legal model equivalent to that of many national systems. When even this was the case, it was used to delimit the scope of specific legislation. Hence, neither subordinated employment nor self-employment was placed at the centre of an organic system of protections: similar "system-based" approaches shall leave room for "sector-based" approaches in EU law.

Having said that, a sub-area can be observed within the perimeter of the directives for which the "traditional" notion of employee is applied, where the social protections – it is hard to deny that – follow a marked cross-cutting vocation and overstep the boundaries of the said notion, by working also for the executed autonomous job, that is under conditions of freedom of organisation. Let's consider the directives on non-discrimination rights and on safety in the workplace. And other sub-areas can be observed where the contrast – in the specified meaning – between subordinated employment and self-employment is set out in primary law – it is useful to consider once

more the free movement and the right to settlement – as well as in secondary law: extremely telling is the directive on working hours[56], despite the doubts mentioned several times.

Only in the case of the first sub-area, a notion of worker where the EU concept of direction is no longer decisive is not unreasonable: it is not by chance that a move towards its use comes from one of the so-called "daughter" directives on health and safety at the workplace. The whole changes when it comes to the second sub-area: in this case, the *Danosa* approach becomes troublesome since the current regulatory framework makes it difficult to disregard a notion of self-employment or if you prefer, non-direct.

The sector-based approach of the European social right, ultimately, would not exclude a "double speed" notion of worker, as far as the reference legislation allows it: difficulties would not still be missing, and yet, making a crosscutting recourse to a "broad notion" of worker, as apparently, the Court of Justice is doing, is even more complicated.

12. *Law on competitiveness and notion of the worker*

An additional and likewise revealing consequence of the sector-based approach surfaces from the case law on competitiveness and collective bargaining and it is worth dealing with it also for the reasons expressed in the opening.

It was already mentioned that the legislation of social policy - collective bargaining is a major instrument - shall be reconciled with the rules on competition. This balance is impacted also by the broad notion of the company developed by the Court that increases further its complexity: in the context of competition law, the qualification of the company shall be applied to any organisation carrying out an economic activity, irrespective of its legal status and its funding modalities and any activity, which is directed to the supply of goods and services on a specific market, can be deemed an economic activity[57]. The said notion, by restricting the area of articles 101 and following,

[56] Cf. Ferrante, *La nozione di lavoro subordinato nella dir. 2019/1152 e nella proposta di direttiva europea rivolta a tutelare i lavoratori "delle piattaforme"*, in *WP C.S.D.L.E. "Massimo D'Antona".INT - 158/2022*.

[57] Pallini, *cit.*, p. 866.

contributes to specifying the cases when the rules on social policy are prevailing over the competition rules, thus making collective bargaining possible. And here comes the problem, since the *Albany* judgment, holding collective bargaining as legitimate when its nature and object exempt it from the law on competition, does not specify how these principles apply: it just – as we mentioned in the first pages – admits collective bargaining for subordinated employment in the meaning set forth in *Lawrie-Blum*, but does not even mention self-employment, that is, the employment lacking any direction.

Apart from the already risen criticism, a bright juxtaposition is engendered: within the area of subordinated employment, that is, unilaterally organized, rules prevail over social policy and bargaining is made possible. Whereas, within the area of self-employment, where the unilateral organisation is missing, the rules prevail over the competition, because the notion of the company is expanded. But everything changed after the FNV judgement from 2014 that redraws the perimeter of the so-called labour exemption[58].

The Court once again mentions the *Albany* doctrine and defines the subjective scope, where rules on social policy prevail over articles 101 and successive "negatively", thus leaving free room for collective bargaining. The Judgment, ultimately, specifies when the "nature" of a contract prevents – this is why negatively – to deprive the "rules on competition of collective bargaining": a circumstance that occurs when the contract refers to someone, who carries out an economic activity entrepreneurial[59].

Such an approach, it is more than evident, requires us to specify when we are falling out of the notion of company. With a view to this, the Court equates the employee to a service provider lacking any independence in the market: in both cases collective bargaining is permitted by European law, not being targeted to individuals involved in economic activities that make them a company[60]. This is the point of the comparison the Court dwells upon, by

[58] To be considered as an exception to the competition rules, among the others those ruling out the recourse to collective agreement: ARENA, *La labor antitrust exemption al vaglio della Corte di giustizia: quale contrattazione collettiva per i lavoratori c.d. falsi autonomi?*, in *DLM*, 2016, p. 144.

[59] See points 28 and 29 of *FNV* judgment.

[60] See also DELFINO, *Statutory minimum wage and subordination. FNV Kunsten Informatie Judgmet and Beyond*, in ŁAGA, BELLOMO, GUNDT, MIRANDA BOTO (edited by), *Labour law and social rights in Europe: the jurisprudence of international courts, selected judgements*, Gda sk University Press, 2017.

equalling to "someone who for a specific period executes a performance in favour of someone and under his/her direction in exchange of an economic compensation" a service provider, who loses "the quality of independent economic operator and of a company when he/she does not fix autonomously his/her own behaviour on the market"[61]. Basically, more than a dichotomy between subordination – autonomy, what comes out of the *FNV* judgment is a dichotomy of work-business.

13. Follows. *The Court's reasons in the* FNV *case*

Full comprehension of the path followed by the Court requires attention to its key steps.

The judgment originates from the *Allonby* case, where, based on a traditional approach, the employee is identified as someone, who lacks the "freedom to set his/her working hours, place and object"[62]. This level is, though, juxtaposed to another one: to have the mentioned "negative" approach, the centre of gravity of the analysis moves towards the market side by engendering the said work-business dichotomy.

More specifically, the Court concentrates its attention on a service provider, who is not free to set his/her own behaviour on the market, since, by establishing "a relationship based on an economic unit with the principal", this one falls out the notion of the company: this assumption gives birth to the concept of "false self-employed". Differently from what also written before[63], it does not identify someone who performs employment in a direct form, nor either this formula is used to deal with the cases of wrong qualification or simulated work: a non-negligible need which is, though, dealt with using the principle of the primacy of facts. When talking about "false self-employed", the Court refers to a worker, who, irrespective of the direction, is exempt from the rules on the competition: a circumstance that allows to include, on a residual basis, anything that is not "a company". This approach is by far different from the one observed in *Danosa*: the traditional

[61] See respectively points 33 and 34 of *FNV* judgment.

[62] See point 71, the judgment *FNV* refers to.

[63] Perulli, *Il diritto del lavoro "oltre la subordinazione": le collaborazioni etero-organizzate e le tutele minime per i riders autonomi*, in *WP CSDLE "Massimo D'Antona".IT - 410/2020*, p. 34 more recently *Oltre la subordinazione*, cit., pp. 70-73 and pp. 200-204.

concept of subordinated employment based on the direction, shall not match with that of a worker undergoing supervision and a unilateral revocation. Instead, someone who's not autonomous on the market. This is the reason why the judgment *FNV* draws upon the precedents on the notion of the company: the purpose is to specify in which case this autonomy ceases and drags with it the qualification of the company, leading to the notion of "false self-employed".

In the above-mentioned precedents – key references for the issues under examination – it is specified that ceases to be qualified as a company, someone who, though providing services and goods on the market, "is acting on behalf of a principal, by working as a subsidiary body, part of the business of the principal and forming with the said company a single economic entity"[64]. The Court has repeatedly covered the concept of an economic entity, setting out that it applies when a "principal includes the contribution of a service provider in the final product" and "it is the sole to operate on the goods and services market by setting the price and the terms of the product offer": in this hypothesis the service provider forms part of the production process organized by the principal and, with regard to competition, it represents a single company acting on the market[65]. In addition, the Court specifies that the service provider acts as a subsidiary of the principal when also pursuant to specific agreements, only the latter enjoys of the "economic functions of an independent economic operator", that is, among the others, fixing "sales price of a service". This has as a consequence that "the prevalence of financial and commercial risks related to the same economic transaction is ascribed to the principal"[66].

Against the background of these principles, it is not strange to think that the autonomy in choosing one's own behaviour on the market – the *ubi consistam* of the "false self-employed" – exists, when the one providing a service is not setting the sales conditions of a product and more specifically the price. A "false self-employed", thus, identifies with a subject who, after losing the qualification of the company, has never completely escaped the

[64] Court of Justice December 16th 1975, *Coöperatieve Vereniging "Suiker Unie" UA and others vs Commission of European Community, Joint*, Case 40 a 48, 50, 54 a 56, 111, 113 and 114-73.

[65] Court of Justice September 16th 1999, *Jean Claude Becu, Annie Verweire, Smeg NV, Adia Interim NV*, Case C-22/98.

[66] Court of Justice December 14th 2006, *Confederación Española de Empresarios de Estaciones de Servicio v. Compañía Española de Petróleos SA.*, Case C-217/05.

analysis of the Court: as demonstrated by the mentioned precedents. A major innovation brought about by *FNV* is that it draws the due consequences in terms of balance between competition and social policy. When the working activity does not fit with the notion of the company, going on enforcing a ban on negotiating is pointless: the free competition – seems to conclude the *FNV* judgment – is not here affected.

14. Follows. *Following the* FNV *case, also the Commission takes a stake*

The proposed assumptions have been confirmed in a recent European Commission Communication[67]: a soft law act that shall not be underestimated. If under point 5 of the document, the thesis identifying a "false self-employed" in someone "acting under the direction of an Employer" seems re-surfacing, under points 22 and successive, the Commission calls back the *FNV* Judgment[68] and places the focus on the workers, who is comparable to "employees", are falling out of the "scope of article 101 TFEU".

Against the background of such an approach, the Commission considers it difficult both to "identify … the status of company" and to identify "when this status ceases to apply" and, thus, it "draws up a list" of cases where the service provider is comparable to a worker. It represents the most interesting part of the Communication, based on which the said circumstance occurs, when someone performing individual self-employment: a) is economically dependent; b) works "side by side" with employees; c) is a platform worker.

Apart from the second group, which seems to advance the idea of self-employment only "nominally" autonomous, the Commission refers to individuals who are not bearing the commercial risks and are not "fully

[67] European Commission, Communication from the Commission, *Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons*, 2022/C 123/01.

[68] The reference is specifically to the passage where it is clarified that "a collective agreement concerning independent service providers can be considered as the outcome of a social dialogue, when the said providers are in a position similar to those of employees" and the other where it is specified also that "a service provider may lose its quality of independent economic operator and, hence, of company, when it is not free to establish its own behaviour on the market … for not bearing any of the financial and commercial risks deriving from the economic activity he/she performs and for acting as a subsidiary incorporated in the company of the said principal".

autonomous in carrying out their activity". The first and third groups represent consistent interpretations of the proposed reconstructions. The first includes those who "provide services only or mainly for a single counterpart" and "whose overall annual income depends for at least 50% on a single counterpart": they – the Commission adds – are not autonomous in the definition of their behaviour on the market and, instead, depend on their principal. The third group includes those, who, working via platforms, can be confronted with "a take it or leave it offer", where the negotiating margin for the performance terms is limited or non-existing at all: platforms impose the "sales terms of a service on the market without even informing nor asking the individual self-workers", who in turn only must accept them.

15. *Conclusions: recent developments of EU law*

Before concluding the analysis, a final question must be raised: to what extent the recent developments of EU law are affecting the reconstructed balance?

The question is not negligible, since, according to some authors, directive 2019/1152, with recital 8[69], would entail a meaningful and unprecedented opening to EU case law as for the notion of worker: it has been defined as "a break with the past", but it shall be clarified that it is more apparent than real.

Firstly, according to the Court of Justice, "the 'recitals' of an EU act have no binding judicial value"[70]. And, above all, art 1, par. 2, specifies that the directive "sets out minimum rights applied to all EU workers having a work contract or a working relationship as defined by law, by collective contracts or the practices in force in each Member States, considering the case law of the Court of Justice". Similarly, to the other directives based on

[69] Where it reads that "In its case law, the Court of Justice of the European Union (Court of Justice) has established criteria for determining the status of a worker. The interpretation of the Court of Justice of those criteria should be taken into account in the implementation of this Directive. Provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive. Genuinely self-employed persons should not fall within the scope of this Directive since they do not fulfil those criteria".

[70] Court of Justice February 25th 2010, *Müller Fleisch GmbH v Land Baden-Württemberg*, Case C-562/08.

art. 153 TFEU, also the directive on "transparent and predictable working conditions" marks a floor of right that can be adjusted to the national level according to the "existing technical rules", including the rules on the notion of the employee. It is not marginal to stress it again, since the "applicable" case law can only be the one which derives from a referral to national systems the possibility for autonomous and discretionary choices, without prejudice to the constraint of reasonableness: the only consistent solution with the approach of the minimum harmonisation, based on the grounds explained.

Another "break with the past", only partial for the moment, has been observed in the draft directive on platform work. Under art. 4, to get to the core of the issue is considered as subordinated[71], and, consequently, the national legislation applies, a relationship, where the platform controls the execution of a performance: a control that arises in the presence of at least two of the elements listed under art. 4. A discussion is now ongoing on these two elements and some authors recognize in it an echo of EU case law on the employee notion. Hence, the question: would this draft directive, if approved, strengthen this notion?

This question is not trivial, since, if the hypothesis in object would really strengthen the European notion of worker, this would heavily impact the national legislations, becoming the national legislation on employee extended even to relationships lacking any external direction: that is, what in many Members States still represents the core of subordination and that is not mentioned at all under art. 4.The risk of altering the minimum harmonisation – legal basis of the proposed directive is once again art. 153 TFEU – would be real, since the latter, as repeatedly affirmed, would not allow this outcome.

[71] This is how the hypothesis as under art. 4 is interpreted, see ALLAMPRESE, BORELLI, *Prime note sulla proposta di direttiva della Commissione sul miglioramento delle condizioni di lavoro su piattaforma*, in *RGL online*, 2021, n. 12; BARBIERI, *Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni nel lavoro con piattaforma*, in *LLI*, 2021, n. 2; BRONZINI, *La proposta di Direttiva sul lavoro nelle piattaforme digitali tra esigenze di tutela immediata e le sfide dell' "umanesimo digitale"*, in *LDE*, 2022, n. 1; FERRANTE, *La nozione di lavoratore subordinato nella dir. 2019/1152 e nella proposta di direttiva europea rivolta a tutelare i lavoratori "delle piattaforme"*, in *WP CSDLE "Massimo D'Antona"* - 158/2022; MAGNANI, *La proposta di direttiva sul lavoro mediante piattaforme digitali*, in *Bollettino Adapt*, May 9th 2022, n. 18; PONTERIO, *La direzione della direttiva*, in *LDE*, 2022, n. 1; TOSI, *Riflessioni brevi sulla Proposta di Direttiva sul lavoro su piattaforme*, in *LDE*, 2022, n. 1.

Despite the existing doubts on the appropriateness of the hypothesis[72], the draft directive does not apparently go that far since the same hypothesis has no absolute but a relative nature. A clarification comes from art. 5 par. 2, allowing platforms to reject this hypothesis, if "the contract-based relationship is not a working relationship as defined under law, under collective contracts or under the practices in force in each Member State concerned, considering the case law of the Court of Justice; the burden of proof is on the digital work platform". Along with challenging the hypothesis, this rule reopens the issue of qualification: the evidence to the contrary is not limited to the non-existence of the elements listed under art. 4, and yet, in the event of their existence, it can be supported also by proving that the working relationship does not fall under the national notion of the employee. The scenario does not become different when referred to the case law of the Court of Justice that, for the reasons just explained, acquires a similar meaning to the one already mentioned for art. 1, par. 2, of directive 2019/1152.

[72] Tosi, *Riflessioni brevi sulla Proposta di Direttiva sul lavoro su piattaforme*, in *LDE*, 2022, n. 1.

Abstract

The Author retraced the historical origins of the *Lawrie-Blum* formula, investigates recent trends to broaden its scope and make it the fulcrum of the entire European social protection system. Having highlighted the problematic issues of these reconstructions, the A. identifies in the jurisprudence of the Court of Justice an approach to the notion of the worker which is markedly sectoral and examines its implications in the controversial relationship between competition and collective bargaining.

Keywords

Labour law, worker, free movement, minimum harmonisation, competition.