

**COLLECTIVE BARGAINING AND COMPETITION LAW:
A COMPARATIVE STUDY ON THE MEDIA, ARTS
AND ENTERTAINMENT SECTORS**

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1. INTRODUCTION

A. BACKGROUND

The conflict between collective bargaining and competition law is not necessarily new. However, while not entirely immune to the rules of competition law, it is widely acknowledged that collective agreements concluded in good faith, dealing with core labour subjects such as wages and working conditions are in principle legal and therefore fall outside the scope of competition law.¹

Yet, there are few legislations providing for clear statutory exemptions that remove collective bargaining from the range of competition laws and it has been mostly a matter for the courts to harmonize this conflicting relationship at times. At EU level, for example, the exemption was supported by the decisions of the European Court of Justice (ECJ) in the *Albany*, *Brentjens* and *Drijvende Bokken* cases. For instance, in *Albany*, the ECJ held that:

It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty [now Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)] when seeking jointly to adopt measures to improve conditions of work and employment.

*It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.*²

These decisions, however, have been given a narrow interpretation, and competition authorities in a number of countries have been particularly active lately, targeting some categories of workers who have concluded collective agreements on the grounds that these are agreements between “undertakings”, aimed at “price-fixing”, and therefore restrict competition. This has an impact especially on workers in the media, art and entertainment sectors (but not only), a number of which are “self-employed”.

One can argue that it would be enough to acquire the status of “employee” to avoid the proceedings conducted by competition authorities. However, such argument relies on the assumption that the worker would be free to opt for the status of his or her choice, based on personal considerations, whereas in practice such “choice” is generally determined by either the employer – with the objective to escape the payment of social charges – or a set of environmental factors that make employment more complicated or expensive for the worker. It is also worth mentioning that where the “work-for-hire” principle applies “employees” have their intellectual property rights automatically assigned to their employer. It is therefore impossible for those workers to retain their intellectual property rights unless they are “self-employed”.

¹ See the *COLCOM Report*, available at http://www.sfs-research.at/projekte/P11-Collective%20Agreements/colcomreport_en.pdf.

² *Albany International v Stichting Bedrijfspensioenfonds Textielindustrie*, (1999) ECR 5751, paras 59-60.

B. QUESTIONS AND SCOPE

In this scenario where competition authorities oppose to the organized activity of “self-employed” workers in connection with collective bargaining, the following questions arise: what is the relationship between competition law and the right to collective bargaining? Can “self-employed” workers negotiate collective agreements? Can they be prevented from doing so by antitrust regulation?

This paper addresses these questions with the aim to determine whether this conflict impairs or have the potential to impair the right to collective bargaining of “self-employed” workers, in particular those in the media, arts and entertainment sectors. It examines whether there are possible contradictions or incompatibilities between competition law and the right to collective bargaining, and more specifically whether the right to collective bargaining applies to “self-employed” workers. In doing so, these issues will be examined in light of the ILO Conventions No. 87 and No. 98, and will propose recommendations in these respects.

C. RESEARCH METHOD

The study describes the legal situation in a selection of ten (10) countries, most of them from the EU. The study was carried out mostly through the analysis of different references, including legislation, case law, as well as articles, all with regard to the legal situation in the selected countries. In addition, other limited ex-legal sources were examined, such as information available on organization websites, specific agreements and other materials.

D. RESEARCH GOALS

The main goal of the study is to have a comparative study within the ILO framework analysing the conflict between the said above two different legal fields. In addition to describing the legal tools, such as international conventions, legislation and court decisions, the study also proposes some alternatives or solutions.

The research aims to rethink about the said above situation in a broader way – one that emphasizes the collective bargaining right as a tool for achieving economic efficiency and growth. This way of thinking might lead to the conclusion that legal decision makers should be aware of the conflicting rights and hence, especially in the media, arts and entertainment sectors, move towards a more balanced solution.

2. THE LEGAL BASIS

The freedom of association belongs to the so-called “first generation of human rights” which includes civil and political individual rights and is based on the value of liberty. Furthermore, it is one of the pillars of democratic societies, since democracy requires the interaction of stable and representative groups that allow different opinions to emerge.³

³ A. P. BARBOSA-FOHRMANN, *Association, Freedom of, International Protection*, (October 2009), in Max Planck Encyclopaedia of Public International Law (Oxford Press), available at http://www.mpepil.com/subscriber_article?id=/epil/entries/law-9780199231690-e755

A. ILO STANDARDS: FREEDOM OF ASSOCIATION AND THE RIGHT TO COLLECTIVE BARGAINING IN ILO CONVENTIONS

Scope and Goals.

Collective bargaining covers the negotiation and conclusion of collective agreements and is the main way by which employers' and workers' organizations decide on terms and conditions of employment that are better than what each worker could achieve individually. It is also an instrument that guarantees a peaceful, cooperative and more efficient labour market by not having to resort to more drastic forms of industrial action, since employers can expect in return improved productivity and greater loyalty from a more motivated and skilled workforce enjoying better working conditions.

These are some of the reasons why the rights and principles concerning freedom of association and collective bargaining are at the heart of the ILO. For instance, they are referred to in the ILO Constitution and the Declaration on the Fundamental Principles and Rights at Work of 1998. They are developed in various conventions and recommendations adopted by the International Labour Conference, mainly Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, of 1948, and Convention No. 98 on the Right to Organise and to Bargain Collectively, of 1949.⁴ These instruments, which enjoy widespread support,⁵ are international treaties with binding obligations once member States have ratified them.

In general, Convention No. 87 essentially provides for the right of workers (and employers) to establish and join organisations of their own choosing without any previous authorisation from public authorities, while the Convention No. 98 focuses on the rapports between workers and employers and their respective organisations, and supports the regulation of terms and conditions of employment by means of collective agreements, requiring member States to adopt appropriate measures that encourage and promote the full development and utilisation of machinery for voluntary negotiation.

More in detail, Convention No. 87 explicitly states the right of workers to organize and to decide on their activities in full freedom. In this regard, Article 2 says that:

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

In addition:

⁴ Other ILO Conventions and Recommendations that complete the *corpus juris* on freedom of association and collective bargaining include the Right of Association (Agriculture) Convention (No. 11), of 1921; the Right of Association (Non-Metropolitan Territories) Convention (No. 84), of 1947; the Collective Agreements Recommendation (No. 91) and the Voluntary Conciliation and Arbitration Recommendation (No. 92), of 1951; the Cooperation at the Level of the Undertaking Recommendation (No. 94), of 1952; the Consultation (Industrial and National Levels) Recommendation (No. 113), of 1960; the Communications within the Undertaking Recommendation (No. 129), of 1967; the Examination of Grievances Recommendation (No. 130), of 1967; the Workers' Representatives Convention (No. 135) and Recommendation (No. 143), of 1971; the Rural Workers' Organizations Convention (No. 141) and Recommendation (No. 149), of 1975; the Labour Relations (Public Service) Convention (No. 151) and Recommendation (No. 159), of 1978; and the Collective Bargaining Convention (No. 154) and Recommendation (No. 163), of 1981

⁵ By August 2011, Convention No. 87 and Convention No. 98 had 150 and 160 ratifications, respectively.

Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes (Article 3(1)).

Relevant for the discussion, Convention No. 87 also addresses the connection between public authorities / national law and the rights granted by the instrument, which suggests that the latter should prevail in case of conflict:

The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof (Article 3(2));

and

The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention (Article 8(2)).

One key issue concerns the term “workers” and whether the provisions of these instruments apply as well to “self-employed” workers or to “employees” alone. Both Conventions No. 87 and No. 98 do not provide a definition for it and the question has in practice been left to the discretion of the national legislations.

However, the supervisory mechanisms of the ILO, devised in parallel to its standard-setting activity, have dealt with this question in several occasions adopting a wider view. Especially the monitoring activity of the Committee of Experts and the complaint-based procedure of the Committee on Freedom of Association have developed a solid “jurisprudence” through their observations and recommendations when delimiting the scope of the two instruments, both in the law and practice of ILO member States. For instance, in relation to “self-employed” workers, as early as 1983 the Committee of Experts questioned some countries where they were denied the right to organise, and stated that in view of the fact that “they are not specifically excluded from Convention No. 87, all these categories of workers should naturally be covered by the guarantees afforded by the Convention and should, in particular, have the right to establish and join organisations”.⁶

More recently, and in close connection with the subject of this study, the Committee of Experts dealt with the situation of “self-employed” workers and collective bargaining in an observation concerning the application of Convention No. 98 in the Netherlands. The comments referred to the impact which an opinion by the Netherlands Competition Authority (NMA) had in practice, by discouraging negotiations with employers on the terms and conditions of labour contract. The Committee recalled in this case that Article 4 of Convention No. 98 establishes the principle of free and voluntary collective bargaining and the autonomy of the bargaining parties.⁷ In other words, the Committee basically states that competition law should not prevent “self-employed” workers from concluding collective agreements.

⁶ ILO, *Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4 B)*, International Labour Conference, 69th Session, Geneva, 1983, para. 98.

⁷ ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A)*, International Labour Conference, 100th Session, Geneva, 2011, p. 124.

The ILO Committee on Freedom of Association has also dealt with specific cases involving the exclusion of “self-employed” workers, underlining that these workers, as any other workers, should enjoy the right to organise and to bargain collectively. To mention a few, when addressing the case of “self-employed” workers, the Committee recalled that “[t]he criterion for determining the persons covered [...] is not based on the existence of an employment relationship, which is often non-existent, for example, in the case of agricultural workers, self-employed workers in general or those who practice liberal professions, who should nevertheless enjoy the right to organize”.⁸

Exclusions

In support of the previous arguments, Conventions No. 87 and No. 98 also explicitly state that they apply in principle to all workers without distinction whatsoever with the sole exception of members of the armed forces and the police (Convention No. 87, Article 8; Convention No. 98, Article 5(1)), as well as public servants engaged in the administration of the State (Convention No. 98, Article 6). On this matter, the ILO's supervisory bodies have also found that these exclusions are to be applied in a restrictive manner. For instance, in the case of the police and the armed forces, the Committee on Freedom of Association have stated in different cases that workers such as civilian staff in the armed forces, fire fighters, prison staff, custom officials, private security agents and others, should enjoy the right to organize and therefore have the possibility to conclude collective agreements.⁹

A restrictive view should also be taken of the exclusions relating to public servants. Also in this case the Committee of Experts has drawn a distinction between public servants who are directly employed in the administration of the State, who may be excluded from the scope of Convention No. 98, and all other workers employed by the government and other public institutions, who should benefit from the rights and guarantees set forth in the Convention.¹⁰

In sum, all workers, with the exception of members of the armed forces and the police, as well as public servants engaged in the administration of the State, should be afforded the basic and fundamental rights to freedom of association and collective bargaining, irrespective of the work arrangements or status of employment. Therefore, one might conclude that the intervention by competition authorities, which will be described in the comparative section, on the basis that collective agreements concluded by or on behalf of “self-employed” workers is against antitrust law does not reflect the protection granted under ILO Convention No. 98.

B. COMPETITION LAW

I. JUSTIFICATION AND GOALS

At large, competition or antitrust laws aim at protecting competition in a free market economy. Competition law is based on the neo-liberal economic theory of the efficiency of

⁸ ILO, *Committee on Freedom of Association, Report No. 326, Vol. LXXXIV, 2001, Series B, No. 3*, para. 416 (Case No. 2013).

⁹ ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth (revised) edition, Geneva, 2006, paras. 227 et seq.

¹⁰ ILO, *Freedom of Association and the Right to Organize Convention (No. 87), 1948, and the Right to Organize and Collective Bargaining Convention (No. 98), 1949, Report III (Part 4B)*, International Labour Conference, 81st Session, Geneva, 1994, para. 200.

free competition and open markets, which argues that competition amongst competitors produces the best economic outcomes for society. Therefore, competition law is concerned with ensuring that agents operating in the free market economy do not restrict or distort competition in a way that prevents the market from functioning optimally in terms of efficiency and consumer welfare.

Competition laws are an important and even necessary tool when dealing with market imperfections such as price fixing among competitors. This phenomenon, while profitable for the beneficiaries, may be prejudicial for society as a whole, since consumers will pay more for a product or a service when comparing to free market value, and some of them might not be able to access the product or service, since the total amount of products and services might not be sufficient to all consumers. Following this reasoning, another role for competition law is to restrain (in some cases) the activity of those undertakings having a dominant position or monopolies.¹¹

Some argue that the economic efficiency should not be the sole objective of competition law and that it should also pursue other objectives, including the preservation of liberty and dispersal of economic power, protection of competitors and fair competition, as well as sociopolitical policies. However, the extent to which competition law should pursue goals other than efficiency remains controversial and is ultimately a matter of “political” decision by policy makers.¹²

II. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING FORCE

The rights to freedom of association and collective bargaining are rooted in the recognition of the unequal bargaining power between workers and employers. However, according to competition law theory, that association may also be seen as one that can create concentration of power within one party (the workers in this case) against the other, which might have an impact on free competition and open market balance. Thus, it may also be the source of negative economic structures such as monopoly and / or price fixing.

Monopoly

Monopoly refers to a situation in which the majority of products or services within a specific market or industry, in a given geographic area, are concentrated in the hands of one undertaking (i.e. producer).¹³ The monopoly is distinguished from a perfectly competitive market in a few aspects. For instance, there is only one undertaking supplying the entire or the major part of the market instead of a variety of suppliers. In addition, the monopoly position is usually not challenged by new entrants; therefore, the undertaking in a monopoly position will not have to face any actual or potential competition.¹⁴

Consequently, there are potential disadvantages of monopoly markets. For example, the monopoly price will probably be higher than the price that would be charged for similar products or services in a competitive market. The output may also be lower and the

¹¹ A. JONES AND B. SUFRIN, *EU Competition Law* (fourth ed., 2011), p. 1-19.

¹² For further discussion of aims and objectives see *Idem*, p. 19-54.

¹³ M. FURSE, *Competition Law of the EC and UK* (Sixth ed., 2008), p. 271-272.

¹⁴ R. J. VAN DEN BERGH AND P. D. CAMESASCA, *European Competition Law and Economics: A comparative perspective* (2001), p. 83.

potentially high demand in a free market may create a circle of price escalation and quantity decline, thus impacting accessibility for specific groups of weak consumers to such products and services supplied by monopolies. In addition, the part of the consumer's income that is spent on the monopolist's product cannot be spent elsewhere, distorting other prices in the economy. That predatory behaviour may damage the interests of other legitimate competitors and consumers; create barriers preventing competitors from entering the market; and reduce or slow-down innovation and diversity in the field.¹⁵

In theory, trade unions, through collective bargaining, may meet the definition of a monopoly when one specific organization represents the entire or the majority of the work force in a given sector or area. If all or most workers belong to that organization and there is no other in the same sector that can compete with it, that organization might be considered a monopoly in its field, since an employer interested in signing an agreement might be “forced” to accept the organization's conditions.

Restrictive / binding arrangement – Price fixing

Price fixing can be described as a restrictive agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. It does not necessarily mean that competitors agree to charge the same price, or that every competitor in a given industry join the price agreement. Price fixing can take many forms and may include: establish or adhere to price discounts; hold prices firm; eliminate or reduce discounts; adopt a standard formula for computing prices; maintain certain price differentials between different types, sizes, or quantities of products; adhere to a minimum fee or price schedule; fix credit terms; not to advertise prices.

In the case of workers, restrictive agreements may appear between the members and the organisation (i.e. binding membership and price fixing) and between members (i.e. waiver of rights to compete with other members).

C. THE MEDIA, ARTS AND ENTERTAINMENT SECTORS - SPECIAL CHARACTERISTICS

Workers in the media, arts and entertainment sectors have special characteristics in terms of work arrangements.

Work in the media, arts, and entertainment sectors has a tendency to be largely project-based, which may require independent work and self-management career skills from the workers concerned. It is also generally both cheaper and more simple for employers to hire the workforce under a service providing contract rather than employment contracts. This leads to a unique situation where many workers do not work under an “employment relationship” but rather as “self-employed”.

Globalization and the current economic crisis have “fuelled” this trend, and more and more workers have shifted from the status of employees to independent contractors. In principle, it means that they will not be entitled to any rights under labour law (such as the right not to be unfairly dismissed or the right to be part of a pension program). In this context, the fact that

¹⁵*Supra* note 3.

the scope of labour laws be limited to “employees” impacts the right to collective bargaining of self-employed workers.

These characteristics and trends will be explained in this section. The aim is to assess the extent of this phenomenon and the impact that the lack of access to collective bargaining may have on workers in these sectors.

When addressing workers in the entertainment sector, we refer to those who work for employers or other entities and earn a “salary” per execution of their work, which includes journalists, photographers, dancers, music performers, actors, script-writers, sound recorders, technicians and stage assistants, who may work on either a monthly basis or per performance. Some of them may also hold intellectual property rights on intangible products (performers, authors, producers, poets, composers).

As mentioned above, those workers often share some characteristics regarding their work. Many of them do not have full, permanent, employment (the standard employment relationship); the work to be done is largely seasonal or project-based (i.e. TV show that is limited in time, concert tours or special news); many of them work for long hours without extra payment.

In many sectors, it is usual practice for employers to hire freelancers. This is common, for example, for journalists and photographers, who are often hired as “self-employed”.

The “work-for-hire” doctrine may also influence the worker’s status. According to this Anglo-American doctrine, the employer – by virtue of its status – automatically becomes the owner of all the intellectual property rights embodied in the works produced by its employees in the course of their work. Therefore, these workers may have no choice but to deliver their work as “self-employed” in order to retain the ownership over their intellectual property rights. As a result, they usually face poor working conditions and do not receive fair consideration. Many of them work for very powerful media companies (TV channels, record or film producers etc.) and therefore hold very little bargaining power, risking unfair salaries and poor working conditions (i.e. overtime work without extra payment).

Millions of workers in the arts and entertainment sector perform their activities under a “self-employed” status. For instance, the International Confederation of Societies of Authors and Composers (CISAC) represents, as of June 2011, around 3 million creators and music publishers from 232 authors’ societies from 121 countries.¹⁶ Most of the creators represented by CISAC work as self-employed.

In the Danish media, the majority of casual employees regard themselves as freelancers. About half of them are basically employees, while the other half are self-employed as far as tax and other statutory provisions are concerned. Freelancers in the employed group are basically covered by industrial relations and are therefore entitled to negotiate collectively and take collective action in accordance with current rules. On the other hand, freelancers in the self-employed group are basically covered by competition law and are therefore unable to coordinate with other self-employed professionals in the sector.¹⁷

¹⁶See <http://www.cisac.org/CisacPortal/afficherArticles.do?menu=main&item=tab2&store=true>

¹⁷ The Danish Union of Journalists, *Negotiation in the zone between industrial relations law and Competition law*.

In the United Kingdom and Israel where the “work-for-hire” doctrine applies to authors and composers, most workers in the sector must deliver their services as self-employed workers in order to keep the ownership over their intellectual property rights. In Israel, ACUM, the copyright society for music authors and composers, has a membership of 7425 members; almost all of them work as self-employed.¹⁸

Although the “work-for-hire” doctrine does not apply to all of them, an increasing number of performers work as self-employed as well, whether for fiscal reasons or because their employers want to reduce employment costs and social contributions. This is the case in UK where the Musicians’ Union, a globally respected organisation, represents over 33,000 professionals from all sectors of the music business.¹⁹

Unions deal with this kind of problem by representing the worker in a much stronger stand compared to workers standing alone.

In these industries, the distinction between employees and self-employed workers as regards their working conditions relies on no objective ground. The situation stemmed from the circumstances described above, clearly shows the need for these workers to be represented and protected by professional trade unions.

3. COMPARATIVE ASPECTS

The following part will address the legal background in twelve countries, all of which have ratified the ILO Conventions no. 87 and no. 98.²⁰ In each country, the discussion is mainly surrounding points such as: freedom of association and collective bargaining, competition law, cases / legal decisions, and comments, as the basis for the comparison.

A. IRELAND

I. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

The right to form associations and unions in Ireland is guaranteed by the Irish Constitution (*Bunreacht na hÉireann*). Accordingly, citizens may form any type of association for whatever purpose they choose. This right is limited by legislation to protect public order and morality.

Article 40 of the Constitution of Ireland states that:

“(6)(1) The State guarantees liberty for the exercise of the following rights, subject to public order and morality:

[...]

iii. The right of the citizens to form associations and unions.

Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.

¹⁸ See <http://www.acum.org.il>

¹⁹ See <http://www.musiciansunion.org.uk/about-us/>

²⁰ With the exception of Canada, which has not ratified Convention No. 98.

(6)(2) Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination.”

Also, the Trade Union Act²¹ determines, on the one hand, restrictions on carrying on negotiations for the fixing of wages or other conditions of employment, but on the other hand it explicitly provides for an exemption allowing “excepted bodies” to conduct such negotiations.

Article 6 of the Act reads as follows:

“(1) It shall not be lawful for anybody of persons, not being an excepted body, to carry on negotiations for the fixing of wages or other conditions of employment unless such body is the holder of a negotiation license”.

An “excepted body” could be an “authorised trade union”, which “carries on negotiations for the fixing of the wages or other conditions of employment of its own (but no other) employees” (Article 6(3)(a)). Such status is conferred by the Minister of Industry and Commerce to a worker’s organisation that “consists of persons who are usually employed in a particular form of work and are usually employed by the same employer” and “carries on negotiations for the fixing of wages or other conditions of employment with that employer only” (Article 6(4)(c)), among other requirements.

In addition, the Industrial Relation Act 1990,²² aims to promote harmonious relations between workers and employers and to amend the law relating to trade unions. Among others, it determines provisions and conditions for peaceful picketing (Article 11), the removal of liability for certain acts (Article 12) and restriction of actions of tort against trade unions (Article 13).

II. COMPETITION LAW

Irish competition regulations are embodied in the Competition Act 1990,²³ and the Competition (Amendment) Act 2006.²⁴

The Competition Authority has responsibility for enforcing Irish Competition Law and EC Competition Law. It may enforce competition rules by either seeking an appropriate civil remedy in the High Court or recommending the prosecution of a criminal action by the Director of Public Prosecution.²⁵

The Competition Act generally prohibits all agreements, decisions and concerted practices whose object or effect is to prevent, restrict or distort competition in trade in any goods or services in the State or in any part of the State. These agreements, decisions and concerted practices are prohibited and void.

²¹ Number 22 of 1941

²² Number 19 of 1990.

²³ Number 14 of 2002.

²⁴ Number 4 of 2006.

²⁵ The Authority pursues a criminal prosecution only when there is clear evidence that parties are in breach of the “hardcore” provisions of Section 4(1) of the Competition Act.

In this regard Section 4 of the Competition Act reads as follows:

“(1) Subject to the provisions of this section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which
(a) directly or indirectly fix purchase or selling prices or any other trading conditions
(b) limit or control production, markets, technical development or investment,
(c) share markets or sources of supply,
(d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage,
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts”.

The Competition Act also provides for exceptions to the application of competition rules in cases where “the agreement, decision or concerted practice or category of agreement, decision or concerted practice [...] contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit” (Article 4(5)). Concurrently to these conditions, the agreement, decision or concerted practice does not have to “impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives” and “afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question” (Article 4(5)(a) and (b)).

III. CASES

By a decision of 31 August 2004, the Competition Authority decided that the collective agreement concluded between the Irish Actor’s Equity (Equity) and the Institute of Advertising Practitioners in Ireland (IAPI), concerning the terms and conditions under which advertising agencies would hire actors, infringed competition laws.²⁶

In its decision, the Competition Authority made a distinction between “self-employed independent contractors”, which are subject to competition laws, and “employees”, who are generally not subject to competition laws,²⁷ and examines whether the actors represented by Equity are “self-employed” or “employees”. The Competition Authority considered this issue of paramount importance, since it was of the opinion that “[w]hile perfectly legal [for Equity] to represent employees in collective bargaining with their employers, its trade union mantle cannot exempt its conduct when it acts as a trade association for self-employed independent contractors”.²⁸

The Competition Authority concluded that the actors represented by Equity were “self-employed actors”, based on the following grounds: (i) actors providing advertising services generally are not obliged to work for a single advertising agency; (ii) they may work for several at the same time; (iii) such actors generally do not receive the benefits one usually

²⁶ Decision of the Competition Authority, No. E/04/002.

²⁷ *Idem*, para 2.10.

²⁸ *Idem*, para 2.12.

associates with a contract for labour. For example, they generally do not receive holiday pay, health insurance, maternity leave and the like; (iv) such actors generally do not have employment security; (v) such actors are free to accept or decline a specific piece of work as they see fit; and (vi) actors generally are not thought of as employees of a particular agency.²⁹ Accordingly, they were “undertakings” subject to competition law and – as a result – Equity was an association of undertakings (when it acts on behalf of “self-employed actors”).³⁰

However, the Competition Authority refrained from commencing enforcement actions (civil and criminal) since prior to the proceedings the parties “agreed” with the Authority’s concerns by signing an undertaking by which they committed not to enter into or implement any agreement that directly or indirectly fixes the fees to be paid to “self-employed” actors in return for the services rendered.³¹

IV. COMMENTS

One can conclude that although the right to form associations and unions in Ireland is strongly embodied in article 40 of the Irish Constitution and under ILO Conventions, SIPTU was not recognized nor protected as an employees union. Moreover, it was actually differentiated from an employees union. This decision was based on the fact that the actors were self employed. The decision did not consider in–depth discussion regarding social and economic reasoning, nor did it reflect awareness of the fact that self-employed workers were protected by ILO conventions. The position of the Competition Authority relied mainly and merely on the wording of the competition law.

The Irish Competition Act generally forbids all agreements, decisions and concerted practices whose object or effect is to prevent, restrict or distort competition.

The Competition Authority concluded in the said above decision that an agreement between Irish Actors’ SIPTU and the Advertising Institute of Advertising Practitioners in Ireland reference to the prices that would be charged and paid, was stated under Section 4(1) of the Act.

This conclusion declared an agreement that could be considered as collective agreement of workers as unlawful. It was actually a collective agreement, made by SIPTU, entitled agreement on minimum fees, which basically, agreed on the rates of pay and the conditions of employment to be provided to workers within radio, television, cinema and visual arts.³² This decision is problematic to freelancers and their organizations. Not only are they exposed to severe criminal sanctions, but their human right to form an association was overridden by competition law. One might say that the current restrictions on collective bargaining are contrary to all human rights standards, mentioned above (UDHR, ECHR, ILO). Furthermore, as collective bargaining is essential to "Quality Journalism" this decision might harm the quality of the relevant products and services. The decision also bears a risk that “bad rules“ will spread.³³ Antitrust authorities in different countries are interconnected and exchange data

²⁹ *Idem*, para 2.16.

³⁰ *Idem*, para 2.17.

³¹ *Idem*, para 4.1.

³² E. Lynch, Head of Legal Affairs Irish Congress Trade Unions, Freelancers’ Collective Bargaining Rights, power point presentation, October 6 2011, available at: c.runo.se/~jel/efj_2011/docs/Freelancers%20rights.ppt

³³ *Idem*.

and information. It is not surprising that the Irish decision, although not binding, was mentioned in other cases in different countries and served as the basis for similar decisions in those countries.

However, the Authority decided to close the investigation, insofar as the parties are in compliance with the terms of the Acknowledgement and Undertakings made by them to the Authority. This fact might reflect the Competition Authority's awareness of the complexity of the situation as well as give some weight to the association's freedom to decide upon fair terms and conditions. This may reflect a step toward a recommended solution to the conflicting interests that would be presented later on.

B. UNITED KINGDOM

I. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

The United Kingdom recognizes freedom of association as human rights. By enacting the Human Rights Act 1998, an instrument to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights, it is recognized that “[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests” (Article 11(1)).³⁴

By virtue of the Employment Relations Act 2004, further operative provisions offer a framework by which workers and employers engage in negotiations to reach collective agreements. In this regard, it has been reported that trade unions of the media, arts and entertainment sectors in the United Kingdom – though in limited cases – have been able to negotiate collective agreements with single employers that cover “self-employed” workers.³⁵ This is part has been possible by the broad definition of term “worker” was introduced in a number of labour Acts, which comprises both “employees” and “self-employed” workers, with the purpose to improve the protection of those who do not meet the definition of “employees”.³⁶

However, it is worth noticing that while the right to collective bargaining exists, it is sometimes (but not always) viewed as a social or human right, rather than a legal right in practice. The United Kingdom therefore does not always operate on a system of legally enforceable collective agreements; such agreements are usually not enforceable as between the parties to them (employees' unions and employers).³⁷ Alternatively, collective agreements may instead be enforceable if they contain a specific clause stating that the agreement is

³⁴ The current legislation in the United Kingdom protects workers in exercising their right to organize, namely the right to establish and join unions and the right not to join unions. See *Wilson and Palmer, NUJ v. the United Kingdom*, IRLR 128 (2002).

³⁵ R. PEDERSINI AND D. COLETTI, *Self-employed Workers: Industrial Relations and Working Conditions*. Eurofound, 2009, available at <http://www.eurofound.europa.eu/comparative/tn0801018s/tn0801018s.htm>.

³⁶ See for example the Employment Rights Act 1996, Section 230(3); and the National Minimum Wage Act 1998, Section 54(3).

³⁷ See e.g., Tenth Meeting of European Labour Court Judges, Stockholm, September 2, 2002. The Role of Collective Bargaining Questionnaire General Reporter: Judge Harald Schliemann, Federal Labour Court of Germany United Kingdom National Reporter: Judge Peter Clark Employment Appeal Tribunal London, United Kingdom; Legal opinion, Duration and legal validity of collective agreements by Klaus Lörcher, Liv Sandberg and Daniel Blackburn within LO-TCO Baltic Labour Law Project Case 16, Lithuania 4 December 2002.

legally enforceable. Collectively agreed terms are, however, found to be enforceable through the individual contract of employment made between the worker and his/her employer, if and where these terms are incorporated, expressly or impliedly, into the individual contract.³⁸

II. COMPETITION LAW

The United Kingdom also holds a system of competition law in place prohibiting agreements that distort competition and would otherwise cheat the public.

The principal legislative provisions prohibiting anticompetitive agreements and practices are found in the Competition Act 1998. The prohibition therein applies to “agreements, decisions or concerted practices between undertakings which may affect trade within the United Kingdom and which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom” (Section 2(1)). In particular, it applies to “agreements, decisions or practices which (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts” (Section 2 (2)).

Moreover, the Competition Act 1998 also restricts the conduct of an undertaking that “amounts to the abuse of a dominant position”, in particular conducts that consist in “(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts” (Section 18(1) and (2)).

On the other hand, as in many other countries, the Act also provides for some activities excluded from competition law, namely: mergers and concentrations for the purposes of Part V of the Fair Trading Act 1973, to name a few (Section 3(1) and Section 19(1)). However, the Act does not contain any explicit provision excluding collective bargaining agreements from the application of competition law.

III. COMMENTS

In the United Kingdom, collective agreements have been used in practice by weaker groups (i.e. artists and alike) who have organized in order to protect themselves against the effect of

³⁸ This can happen in one of two different ways: either by an express statement in the specific employee’s contract referring to the collective agreement or by way of ‘implied incorporation’ to be determined by a court as a question as to the intentions of the parties and enforceable as a break of contract claim. In such cases collective agreements would be enforceable as part of the employee’s contract. See *Anderson v Pringle of Scotland Ltd* CS 1998 IRLR 64, Court of Session; *South West Trains Ltd v Wightman & ors* 1998 TLR; *Kaur v MG Rover Group Ltd* CA 2004 reported at [2005] ICR 624.

their weak bargaining position. Unlike the Irish case, these collective agreements – despite the lack of an explicit exception in the legislation – do not fall within the ambit of competition law and are permitted in practice.

It is interesting to note, from a broader point of view, that if UK’s justifications were brought into the discussion, the picture might change colours. Collective agreements have recently lost a good deal of their power in the UK. In order to protect those rights nowadays, one should not rely on employee’s rights but rather on human rights. On the one hand, the tendency reflects the deterioration of the enforcement of collective bargaining in United Kingdom, but on the other hand, it reflects a different and broader approach straitening the reasoning and justifications in favour of weaker groups. The latter may be a strong argument when framing the conclusion of this study.

C. JAPAN

I. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

As in a number of other countries addressed by the study, the Constitution of Japan provides that “the right of workers to organize and to bargain and act collectively is guaranteed” (Article 28).

In addition, the Trade Union Law strives to promote collective bargaining based on the concept of equality between employers and workers, and aims to protect worker organizations and their activities towards that objective.³⁹ The law defines Unions “as those organizations, or federations thereof, formed voluntarily and composed mainly of workers for the main purposes of maintaining and improving working conditions and raising the economic status of the workers” (Article 2).

It is important to note that in Japan, about 90% of organized workers belong to enterprise unions, many of which are affiliated to higher-level industrial federations.

For an organization to be recognized as a union under the Trade Union Law it must be primarily composed of “workers”. Workers are defined as “those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation”. Since the term “wages” is not defined in the law, in cases raising questions whether a person is a “worker”, labour authorities and judicial decisions have established a substitute standard, namely a subordinate relationship to an employer. However, Prof. Sugeno criticizes this extra criteria that goes beyond the original intent of the Trade Union Law to define workers as broadly as to cover all persons who should be protected in order to benefit from the right to collective bargaining. Thus, in the sentence “persons who live on their wages, salaries, or other equivalent income”, “wages or salary” represents the compensation for the work made under a contract of employment. Accordingly, this standard should be interpreted as covering also workers who are under a contract to perform the same kind of labour (as under a contract of employment) and for whom the need and propriety of collective bargaining protections have been recognized to the same extent.⁴⁰

³⁹ K. SUGENO, *Japanese Employment and Labor Law* (English translation by Leo Kanowitz of the 5th ed. of *Rodoho* by Kazuo Sugeno (Tokyo, Kobundo publishing Co., 2001), 2002).

⁴⁰ *Supra* note 61.

It should be noted that in the CBC Orchestra Union decision (1976), the Supreme Court did not use the “subordinate-to-an-employer-relationship” test when it examined whether TV performers, i.e. orchestra members who were under a free-lance performance contract, are workers. The Supreme Court emphasized in its Judgement that (1) there had been no change in provisions of the contract which had, in advance, insured complement of musicians who were indispensable to the company's broadcasts; (2) even if it was a “free lance contract” it was premised on an obligation to abide by the company's requisition of players; (3) the company could be said to have a basic right to oversee the musicians performance and (4) the performance fees could be said to be compensation for work.

Recently, the Supreme Court handed a similar ruling and found a member of the New National Theatre Chorus to be a worker protected by the Trade Union Law, and not an individual contractor receiving singer's performance fees as the Tokyo High Court had previously ruled.⁴¹

The Trade Union Law defines a collective agreement as an agreement “between a labour union and an employer or an employers’ organization concerning working conditions and other matters shall take effect when the agreement is put in writing and is either signed by or affixed the names and seals by both of the parties concerned” (Article 14).

The function of collective agreements in the case of craft – or industry – based collective agreements, is to set forth the standard price of labour on the labour market, hereby preventing unfair competition among employers over decreasing wages and other working conditions.⁴²

Collective agreement theory and practice in Japan have been greatly influenced by their German counterparts. Collective agreements should be regarded as being originally contracts between the parties. In the light of this important function and as a result of the Trade Union Law, it has special effects – the normative effect and the general binding effect – of directly regulating individual employment relations.

II. COMPETITION LAW

Japan has also adopted antitrust legislation. The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereafter AMA) has been in force since 1947,⁴³ and comprises the four following categories:⁴⁴

- A. Substantive provisions: define anticompetitive practices and prohibit them.
- B. Sanctions: provides sanctions against offences or offenders of substantive provisions. It includes the elimination order (cease and desist order) and surcharge payment order (monetary penalty imposed by administrative procedure).

⁴¹ The *New National Theatre* case, April 12, 2011, as reported in a statement by the National Confederation of Trade Unions (Zenroren) Secretary-General ODAGAWA Yoshikazu, on April 13, 2011, available at http://www.zenroren.gr.jp/jp/english/2011/04/english110428_01.html.

⁴² Kazuo Sugeno, *Japanese Employment and Labor Law* (English translation by Leo Kanowitz of the 5th ed. of Rodoho by Kazuo Sugeno (Tokyo, Kobundo publishing Co., 2001), 2002)., see: cartel like function

⁴³ Act No. 54 of April 14, 1947 (last amended in 2009).

⁴⁴ M. KURITA, *Impediments to Effective Enforcement of Competition Law*, 10 Shinsedai Seisakugaku Kenkyuu (2011).

- C. Procedural provisions: prescribes a series of actions to follow in order to investigate and find violations and to impose sanctions on offenders, including provisions securing respondent's right of defence.
- D. Organisational provisions: establishes the Japan Fair Trade Commission (JFTC), its bodies, and enforcement powers.

It states that “no entrepreneur shall effect private monopolization or unreasonable restraint of trade” (Article 3). The term “entrepreneur” is defined as “a person who operates a commercial, industrial, financial or any other business” (Article 2(1)), while “private monopolization” is defined as “business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade” (Article 2(5)).

Chapter 6 of the AMA states a number of exemptions. Among these, organizations formed under the provisions of the Labour Unions Act are not to be considered as an “entrepreneur who purchases or sells commodities” (Article 23(5)(vii)).

III. COMMENTS

It seems that in Japan the two interests of collective bargaining and of competition law do not conflict with each other, like in other countries.⁴⁵ One can surmise that this is a result from the combination of (1) the exclusions explicitly provided for by the AMA with respect to trade union activities, i.e. collective bargaining, and (2) the broad interpretation of the definition of a worker in labour legislation.

D. THE NETHERLANDS

I. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

Freedom of association and collective bargaining have a solid legal foundation in the Dutch legal system. Freedom of association (right to organize) is rooted in the Constitution (Article 8), while the Collective Labour Agreements Act (*Wet op de Collectieve Arbeidsovereenkomst*) was adopted in 1927. According to this act, only the employer's confederations and trade union confederations, as well as separate employer's associations (or individual employers) and trade unions may be parties of collective agreements.⁴⁶

The Act defines collective agreements as “an agreement between one or more employers or organisations of employers and one or more organisations of workers, which mainly or exclusively regulates working conditions to be observed in employment contracts” (Article 1(1)).

II. COMPETITION LAW

Competition laws are also well established in the Dutch legal system. Actions for violation of competition law may be filed on the basis of European and / or national antitrust legislation.

⁴⁵ This research was limited to information available in English only.

⁴⁶ See www.eurofound.europa.eu/emire/netherlands/collectivebargaining-nl.htm.

The Dutch Competition Act⁴⁷ determines that “agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings, which have the intention to or will result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof, are prohibited” (Article 6(1)).

The Act also provides for a number of exceptions on which competition law do not apply. Among them, the Act determines that the prohibition of Article 6(1) “shall not apply to agreements, decisions and concerted practices which contribute to the improvement of production or distribution, or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not: (a) impose any restrictions on the undertakings concerned, ones that are not indispensable to the attainment of these objectives, or (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products and services in question” (Article 6(3)).

Also, the Act does not even apply to some anticompetitive agreements, decisions and concerted practices, when not more than 8 undertakings are involved or when combined turnover of the undertakings does not exceed a limited amount (Article 7(1)(a) and (b)). In addition, the competition authorities shall not intervene in cases where “the combined market share of the undertakings or associations of undertakings involved in the agreement, decision or concerted practice is no greater than 5 percent on any of the relevant markets affected by the agreement, decision or concerted practice” or “the combined turnover of the undertakings or associations of undertakings involved in the agreement, decision or concerted practice from the goods or services falling within the scope of the agreement, decision or concerted practice during the previous calendar year was no more than €40.000.000” (Article 7(2)(a) and (b)).

Moreover, the Act explicitly states that the prohibition set forth in Article 6(1) (agreement of undertakings, concerted practices, etc.) shall not apply to *collective labour agreements* as defined in Article 1(1) of the Dutch Collective Labour Agreement Act (Article 16(a)), or more specifically to agreements that pertain exclusively to pensions or pension schemes (Article 16(b) and (c)).

III. CASES

The Dutch Trade Union Federation (FNV) and the Dutch Musicians Union (NTB), on the one hand, and the Association of Foundations Substitutes Dutch Orchestras (VSR), on the other, had entered into a collective bargaining agreement for Substitutes Dutch Orchestras (“the Substitutes Collective Bargaining Agreement”).

Supplement 5 of the Substitutes Collective Bargaining Agreement contained a stipulation for a minimum rate for musician’s substitutes, where the substitutes had the status of “independent worker without employees” (self-employed). Thus, the Netherlands Competition Authority (NMA) initiated an (informal) inquiry of the applicability of the prohibition on competition restricting provisions on the Substitutes Collective Bargaining Agreement.

⁴⁷ Act of 22 May 1997, Providing New Rules for Economic Competition (Competition Act).

NMA informed the parties of the collective agreement that in its opinion a rate stipulation for independent workers who are not employees might violate competition law. As a result, in November 2007, the parties decided to give notice of termination of the collective agreement as of August 2008.

In addition, on 5 December 2007, NMA published the Vision Document, a policy document providing legal analysis on the issue under which conditions collective agreement stipulations may violate competition law. In the Vision Document, the NMA concluded that collective agreement stipulations for rates for self-employed persons do not fall outside the meaning of Article 81(1) of the EC Treaty (now Article 101(1) of the TFEU), and therefore the parties in such agreements would be liable under competition law.⁴⁸

Despite the termination of the collective agreement, FNV reviewed its position and later filed an action seeking – among other things – that the judiciary declares that collective agreement stipulations setting minimum rates for “independent workers without employees” are exempted of competition law, and that the publication by the NMA of the Vision Document is unlawful towards FNV.

The central issue the parties were divided upon was whether a collective bargaining agreement stipulation obliging employers to pay minimum rates to self-employed persons falls under the exception developed in European case law (“the collective bargaining agreement exception”). In the *Albany*, *Brentjens* and *Drijvende Bokken* cases, the ECJ held that an agreement on account of its nature and objective falls under the collective bargaining agreement exception, and therefore was outside the scope of Article 81 of the EC Treaty, when the agreement complied with these two cumulative conditions:

“a) *The agreement is an agreement arising from social dialogue, concluded in the form of a collective agreement and the result of collective negotiations between employer and employee organisations...*” (“*The first condition*”) and

“b) *The agreement contributes directly to the improvement of labour conditions of employees...*” (“*The second condition*”).

However, the Court of First Instance rejected the claims basically on the grounds that FNV failed to demonstrate that the fees stipulated in the agreement directly contributed to the improvement of labour conditions of employees (one of the conditions set forth in *Albany*, *Brentjens* and *Drijvende Bokken*).

The Court held that the “collective bargaining agreement exception” does not apply because the second condition of the exception was not met. Even if a rate stipulation for self-employed persons contributes to the improvement of the broad concept of labour conditions of employees, this at the most may be considered to be an indirect contribution to the improvement and not a direct improvement of labour conditions of employees, as the ECJ required. As the two conditions set above are cumulative, the Court did not consider whether the first condition of the “collective bargaining agreement exception” had been met.⁴⁹

⁴⁸ NMA, *The Vision Document ‘Collective Bargaining Agreement – rate stipulations for self-employed persons and the Dutch Competitive Trading Act’*.

⁴⁹ *FNV Kunsten Informatie en Media v De Staat der Nederlanden (Ministerie van Economische Zaken, Nederlandse Mededingingsautoriteit)*, Case 343076 / HA ZA 09-2395, para 4.7 (the case is pending on appeal).

IV. COMMENTS

The court concluded that a collective bargaining agreement stipulation obliging principals to pay self-employed persons minimum rates does not fall under the collective bargaining agreement exception, which was developed in European case law (Article 81 of the EC Treaty). Therefore, collective bargaining agreement stipulations for rates for self-employed persons, in view of their nature and objective, are not exempted in advance from competition law.

Similar to the Irish case, the Dutch court decided that the activity of the organization in favour of its members, at the scope of payment, contradicts competition law. As in the Irish case, the discourse about human right was missing. Even the attempt to represent both sides by adopting the two-steps test assessing the fairness of the collective agreement failed. However, this test will be partially adopted in the final conclusion of this study.

E. ITALY

I. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

Generally, each member state has its own law/courts/rules re: the issue we are investigating. And on the other hand, there is definitely EU law on the issue too —but it seems to be the case there might be a general collective bargaining type of ‘immunity’ with respect to competition law on the EU basis (see, e.g. Albany case — Sept 1999 case decided by European Court of Justice re: trade unions and collective bargaining/pension fund case and recognizing the rights set forth in the EU Charter of Fundamental Rights (Article 28), the right of collective bargaining. Here, the European Court of Justice upheld collective agreements as exempt from the competition law of the EC.⁵⁰

The Italian Constitution recognizes the right of citizens to associate freely (article. 19) and goes so far as to also proclaim the right of employees to join associations or unions - “[t]rade unions may be freely established” (article 39).⁵¹ Furthermore, in order to reinforce the effectiveness of the concept of trade union freedom in the Constitution, the Workers' Statute - the country’s main labour law – recognizes in its article 14 the fundamental rights to trade union freedom.⁵²

Unions can therefore freely negotiate collective agreements at provincial, regional and national levels; collective bargaining can regulate all aspects of the employer-employee relationship, except those that are regulated by law. In practice, there are more trade unions in Italy than in any other country in the EU and collective agreements are considered a part of the backbone of the Italian Labour system.

II. COMPETITION LAW

⁵⁰ Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie, Case C-67/96; with joined cases C-115/97, C-116/97 and C-117/97, [1999] ECR I-575

⁵¹ www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

⁵² <http://www.eurofound.europa.eu/emire/ITALY/FREEDOMOFASSOCIATIONTRADEUNIONFREEDOM-IT.htm>.

Competition (antitrust) law in Italy is consolidated in one statute: Law No. 287, otherwise known as ‘The Competition and Fair Trading Act.’⁵³ The basis of such law lies indirectly in the Constitution (which does not explicitly refer to a freedom of competition) which establishes, the ‘freedom of private economic initiative.’ Article 2 of the Law provides for the prohibition of agreements, practices and decisions of “associations” of undertakings, which have as their object or effect to appreciably prevent, restrict or distort competition within the national market or a substantial part thereof.

III. COMMENTS

This law itself does not directly address the intersection of competition law and collective bargaining/agreements; thus, collective agreements may in fact be viewed within the rubric of the competition law being that the law prohibits restrictive ‘agreements’ agreed ‘between undertakings.

However, when taking a closer look at the law and its relevant definitions, it appears that trade unions are not considered recognized “associations” (as defined by Italian law) and the pursuance of an economic activity is not considered as one of their main activities: it therefore follows that the parties cannot be considered as restricted “enterprises” in terms of the national legislation on competition.⁵⁴

F. SLOVENIA

I. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

Article 76 of the Constitution of the Republic of Slovenia, clearly states that the freedom of association in trade unions – the right to establish, operate and join trade unions is guaranteed.⁵⁵ Therefore, the law itself guarantees trade unions freedom in their operations, particularly with respect to collective bargaining.

Slovenia has a centralized system of collective bargaining. Historically, in Slovenia, Collective agreements have been used as an instrument for regulation of employment relationships for many years. Collective agreements, today, exist at three levels, ensuring the complete coverage of employees by collective agreements. The three levels include (i) state (ii) branch (activity) or professional and (iii) enterprise level. There is a strong policy in place, to promote collective bargaining.

Slovenia’s employment law regulates collective bargaining. The Employment Relationship Act regulates individual contractual relations between workers and employers (since 2003)

⁵³ See, e.g. <http://internationalcompetitionlaw.wikidot.com/system:templates-on-horizontal-restrictions>.

⁵⁴ Collective Bargaining in Europe. COMISIÓN CONSULTIVA NACIONAL DE CONVENIOS COLECTIVOS p.161-192 available at:

www.mtin.es/es/sec_trabajo/ccncc/.../CollectiveBargainingInEurope.pdf. note – this seems to be the general law re: the issue – particular cases I did not uncover here – other than the idea of the Albany case/EU cases being relevant, other Italian (translated) case laws, in particular, could add to the discussion.

⁵⁵ XIVth Meeting of European Labour Court Judges, 4 September 2006, Court de cassation, Paris. Slovenia, Collective agreements, National reporter: Judge Miran Blaha, Supreme Court, Slovenia p.2 <http://www.ilo.org/public/english/dialogue/ifpdial/downloads/judges06/slovenia2.pdf>.

and the Law on Collective Agreements (in this study: “LCA”),⁵⁶ regulates collective labour relations (since 2006 and adopted after twelve years of negotiations). The LCA regulates parties, contents, procedure relating to collective agreements between workers and their regular employers, its format, validity and termination date, and resolution of collective work disputes.⁵⁷

II. COMPETITION LAW

The main legislation dealing with anticompetitive practices in Slovenia is Article 5 (Prohibition of restrictive agreements) of the Competition Act, adopted in 2008.⁵⁸

III. COMMENTS

Being that Slovenia has a strong legal and cultural tradition of trade unions – there seems to be no question of a conflict as between Slovenia’s collective bargaining laws and competition laws.

Further development in the future may better clarify the legal situation.

G. CANADA

I. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

The Canadian Constitution, enshrines enumerated fundamental freedoms, includes the general right of the people to “freedom of association.”⁵⁹

II. COMPETITION LAW

Canada’s competition legislation, like other countries, governs business conduct and prevents anticompetitive activities.⁶⁰ The competition Act is aimed at encouraging competition and protecting the consumer. In this case, the provisions of the Canadian Competition Act include a specific exemption for collective bargaining, which permits employees to form unions or groups to negotiate wages and other conditions of employment.⁶¹

*“Nothing in this Act applies in respect of
(a) combinations or activities of workmen or employees for their own reasonable
protection as such workmen or employees.”*⁶²

⁵⁶ Available at: www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/.../zkolp_en.pdf. This act was part of the Europization and privatization of the Slovenian labor force. See, e.g., <http://www.eurofound.europa.eu/eiro/2006/04/articles/si0604029i.htm>.

⁵⁷ <http://ijc.md/Publicatii/seenpm/Slovenia.pdf>

⁵⁸ Andrej Fatur, King’s College (London), Antitrust encyclopedia: Slovenia, November 2007, available at: http://www.concurrences.com/nr_one_question.php3?id_rubrique=517#ancre97;

http://www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/ZPOmK_neuradno_precisceno_besedilo_-_ang.pdf.

⁵⁹ Canada Charter of Rights and Freedoms section 2(d), available at: http://laws-lois.justice.gc.ca/eng/charter/page-1.html#anchorbo-ga:l_I-gb:s_2.

⁶⁰ Competition Act - R.S.C., 1985.

⁶¹ Available at: <http://laws-lois.justice.gc.ca/eng/acts/C-34/page-2.html?term=collective#s-4>. This exemption and others apply only if they do not lead to violation of other relevant provisions of the law.

⁶² Competition Act - R.S.C., 1985, c. C-34. Section 4 (1) (a).

III. COMMENTS

Thus, collective bargaining does not typically fall under the disallowed actions set forth in the Competition Act. Furthermore, in 2007, in a landmark decision, the Supreme Court of Canada, (overturning a trilogy of previous cases) declared the right to collective bargaining a fundamental and “constitutional right.”⁶³ The case involved an attack by B.C.'s government on the rights of unionized health care workers, invalidating important provisions of collective agreements that were then in force. The Court overruled the act concluding that “[t]he right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers...” and that the Canada Charter of Rights and Freedoms, stated right to the “freedom of association”⁶⁴ “protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues.”⁶⁵

More recently, this landmark decision has been somewhat (and arguably) qualified by the Court. In *Fraser*, agricultural workers and a union seeking to organize them challenged the constitutionality of Ontario’s Agricultural Employees’ Protection Act, 2002 (AEPA) – which gave agricultural employees some protections for organizing, but did not impose an obligation on employers to bargain in good faith – or, at all – with an employees’ association.⁶⁶ The Court ruled that being that the right to collectively bargain is a right to a “process, not to an outcome” (as held by the court in the *Health Services* case) and since the AEPA contained an implied right to have employee submissions considered in good faith by the employer, it followed that the AEPA did not violate the Charter.

The tradition and the law still remain strong in Canada as regards the right to collective bargaining, therefore fulfilling the need to alleviate structural negotiation imbalances. Finally, it should be noted that the rights of workers in the entertainment sector might be considered protected under the freedom of association. One can assume that a collective organization of self-employed workers in the entertainment sector is additionally protected under certain provisions of the Competition Act.⁶⁷

H. ISRAEL

I. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

Freedom of association is a basic legal and enforceable right in Israel.

The Collective Agreement Act, 1957 explicitly protects the right of association and the right of employees to form a union as well to collective bargaining. This act protects these rights in many ways, including, for example, the right to initiate activities aimed to establish an employees' trade union at the workplace, the right of employees involved in union activities

⁶³ *Health Services and Support Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27.

⁶⁴ Canada Charter of Rights and Freedoms section 2(d), *available at*: http://laws-lois.justice.gc.ca/eng/charter/page-1.html#anchorbo-ga:l_1-gb:s_2.

⁶⁵ *Health Services and Support Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27.

⁶⁶ *Ontario (Attorney General) v. Fraser*. [2011] S.C.J. No. 20 2011 SCC 20 *available at*: <http://scc.lexum.org/en/2011/2011scc20/2011scc20.html>

⁶⁷ Canada Copyright Act *available at*: <http://laws-lois.justice.gc.ca/eng/acts/C-42/index.html>. See also the Creators' Copyright Coalition (CCC) <http://www.creatorscopyright.ca/documents/hebb-sheffer/contracts-study-part3.html>.

to be protected against unfair working conditions, dismissals or any other discriminative treatment as well as the right of employees and union representatives to go on strike. The definition of an employees union is based partly on the act mentioned above and partly on court decisions.

A representative union should be elected by at least a third of the employees it represents.⁶⁸ Free joining and quitting must be proven,⁶⁹ and evidence of a stable structure of the union including judicial, executive and rule makers division at a satisfactory level must be provided. The main condition that is relevant to this study is that the members of the union (which is protected by labour laws) must be employees (and not self-employed). The main purpose of this union should be to bargain terms and conditions of collective agreements within the framework of the workplace.⁷⁰

A famous Israeli Supreme Court decision denied the recognition of an organization, whose members were mainly self-employed workers, on the ground - *inter alia* - that they were not employees.⁷¹

Self-employed workers have the right to establish organizations and to be a member of such organizations, based on general freedom of speech and other related democratic rights. However, those organizations are not considered employees' unions and therefore are not subject to benefits and exemptions of an employees' union such as protection during strike or enforceable negotiation.

II. COMPETITION LAW

Israeli Antitrust Act forbids restrictive arrangement and monopolistic unfair treatment.⁷² The definition of a restrictive agreement contains two parts. Part one relates to any arrangement that can impair free competition. Part two contains a list of activities that are considered restrictive, such as price fixing.⁷³

Any entity or person involved in restrictive arrangement without the antitrust commissioner's consent or in unfair treatment of monopolistic nature may be considered as infringing a criminal as well as civil Prohibition and may therefore be subject to criminal and civil sanctions by law. Moreover, any restrictive arrangement shall be invalid and void.⁷⁴ One of the exceptions to the definition of a restrictive arrangement is the employees union (as described above). The activities of such union cannot be restricted by the Israeli Antitrust Act.

III. COMMENTS

⁶⁸ Collective Agreements Act, 1957, section 3.

⁶⁹ 7092/95 Supreme Court of Justice, **the Histadrut vs. Supreme Labour Law Court**, Piskai Din 42 (1) 62, Justice Zamir (Israel).

⁷⁰ 7092/95 Supreme Court of Justice, **the Histadrut vs. Supreme Labour Law Court**, Piskai Din 42 (1) 62, Justice Zamir (Israel).

⁷¹ 7092/95 Supreme Court of Justice, **the Histadrut vs. Supreme Labour Law Court**, Piskai Din 42 (1) 62, Justice Zamir (Israel).

⁷² Israeli Anti Trust Act, 1988, sections 2-16 and 26-41.

⁷³ Israeli Anti Trust Act, 1988, sections 2

⁷⁴ DN"E 4465/98 Supreme Court, **Tivol (1993) Ltd. v. Shef Hayam** (1994) 56(1) 56.

Workers in the entertainment sector are organized in collective organizations. Most of them organize self-employed workers in different fields. There is usually one organization in each sector. In other words, all the songwriters are members of an organization named “AKUM”. Scriptwriters are organized in another organization – “TALI” – and so on. Although their members are generally self-employed, some organizations also represent employees from the same sector. For example, journalists are organized in a Journalists union, which is also an employees union (not very active as regards working conditions). To become a member of one of these organizations, the candidate must sign an exclusive agreement prohibiting direct negotiation with any entity outside the said organization.

In one interesting case, the Supreme Labour Court ruled that 97 workers of the Israel Broadcasting Authority, mostly self-employed, were *in facto* employees of the Israel Broadcasting Authority and were therefore covered by the relevant collective agreements⁷⁵, despite the fact that many of these workers had signed agreements (for more than ten years) stating that they would not be considered employees.

Recently, the question of the activities of artists' organizations in the framework of antitrust law was brought to courts. In few law cases, the courts accepted the opinion of the Antitrust Commissioner accusing workers' organizations in the entertainment sector of being involved in illegal restrictive arrangements and conducting unfair monopolistic activities. The courts declared, among other statements, that price-fixing of the rate received by workers for their services was illegal, because against antitrust law.⁷⁶ Part of the court decisions focused on illegal fixed rate lists and part on the illegal structure of the organizations (as well as royalty distribution system, which is less relevant to this study).

The courts were aware of the collective organization's claims regarding the organization's efficiency and the workers' poor bargaining position vis-à-vis the media corporations. Therefore, the courts gave the parties a reasonable period of time to sign new agreements under the courts' approval, which enabled the organization to pursue its activity without contradicting the Antitrust Act. Agreements were signed allowing members to negotiate outside the organization as well as to transfer their rights to third parties.⁷⁷ In some agreements, price fixing was transformed into a recommended rate.

The new terms and conditions are published on the organizations' websites and are accessible to all potential new members.

The Israeli case lacked discussion about freedom of association. Although freedom of association, the right to organize and the right to collective bargaining constitute three basic legal binding rules in Israel, self-employed workers are not considered to be subject to employment protection. Therefore, in-depth legal discussions about the organization of artists

⁷⁵ A" A 300245/97 **Moshe Asulin and 96 others v. Israel Broadcasting Authority, opinion by Justice Steven Adler, who was at that time the President of the Supreme Labour Court.**

⁷⁶ Court of Antitrust, Organization of Compositors, Authors and Publisher of Music in Israel Ltd (AKUM) vs. Israeli Antitrust Commissioner (June 2, 2011). Israeli Antitrust Commissioner Declaration of Organization of Compositors, Authors and Publisher of Music in Israel Ltd as Illegal Monopoly and Declaration of Illegal Restrictive Arrangements Under sections 43 (a)(1) and 26(a) of the Antitrust Act.

⁷⁷ Court of Antitrust, Organization of Compositors, Authors and Publisher of Music in Israel Ltd (AKUM) vs. Israeli Antitrust Commissioner (June 2, 2011). Israeli Antitrust Commissioner Declaration of Organization of Compositors, Authors and Publisher of Music in Israel Ltd as Illegal Monopoly and Declaration of Illegal Restrictive Arrangements Under sections 43 (a)(1) and 26(a) of the Antitrust Act.

did not balance these (unrecognized) rights of self-employed workers, which resulted in a biased decision whereby the activities of the organizations are regarded as infringing antitrust laws.

I. DENMARK

I. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

Freedom of Association and Collective Bargaining are well established within the Danish laws.

Section 78 of the Danish constitution determines that: "The citizens shall be entitled without previous permission to form associations for any lawful purpose."⁷⁸

In Denmark questions about freedom of association of trade unions are primarily regulated by collective agreements.⁷⁹

II. COMPETITION LAW

The Danish competition law is similar to the corresponding EU legislation.

The Competition Act prohibits entering into agreements, whose object or effect directly or indirectly prevent, restrict or distort competition. Section 6 of the Act lists the following as examples of prohibited behaviour: "price-fixing; limiting or controlling production, sales, technical development or investments; dividing markets or supply chains; applying unequal conditions or service to equivalent transactions; attaching sale of one product or service to the sale of an unrelated product or service; Coordination of competitive behaviour between undertakings through a joint venture, or; controlling resale prices."⁸⁰

Prohibition of such activities under the act apply to both horizontal agreements and vertical agreements, but not to agreements between companies of the same corporate group. In Denmark, The Competition Council and the Competition Authority are the relevant competent authorities in competition matters. Decisions from the Competition Council may be appealed to the Competition Appeals Tribunal.⁸¹

III. CASES

The conflict of laws regarding antitrust laws and the workers from the entertainment sector appears also in Denmark.

⁷⁸ Section 78 of THE DANISH CONSTITUTION 1953. www.servat.unibe.ch/icl/da00000_.html.

⁷⁹ Carsten Jørgensen, Freedom of association of trade unions in Denmark. faos.ku.dk/pdf/forskningsnotater/forskningsnotater_2004/fnotat52.pdf/

⁸⁰ Moalem Weitemeyer Bendtsen, Competition Law.

www.mwblaw.dk/Doing%20Business%20in%20Denmark/~/_media/Doing%20Business%202011/Competition%20Law.ashx

⁸¹ Moalem Weitemeyer Bendtsen, Competition Law.

www.mwblaw.dk/Doing%20Business%20in%20Denmark/~/_media/Doing%20Business%202011/Competition%20Law.ashx.

In 1994, the Competition Appeals' Tribunal decided that a minimum and additional price list for freelance press photographs did not relate to pay and working conditions, stressing in this connection that the term “freelance” itself spoke against this being a matter of pay and working conditions.⁸²

In 1997, the Danish Competition Authority launched legal proceedings against the Danish Union of Journalists (DJ), accusing it of violating the competition act. DJ was accused of price-fixing because they published a leaflet entitled “Recommended Terms for Freelance Journalists”, recommending a minimum rate to its freelance members. The Authority found that the DJ was not guilty of anticompetitive practice, because freelance journalists, who deliver casual work equivalent to the work delivered by employees, should be regarded as employees who are not covered by collective agreements and therefore fall outside the scope of competition law.⁸³ The employers appealed against this decision and the Appeals Tribunal remitted the case to the Competition Authority for reconsideration, because the Danish Union of Journalists' definition of self-employed professionals was found too unclear for a decision to be made.⁸⁴

In 2010, the Danish Competition Council decided that the Danish Funeral Directors' Trade Association has violated the Competition Act. The Funeral Directors' Trade Association had entered into an illegal agreement with its members, in respect to three provisions in the association's ethical rules that restricted the members' use of certain marketing methods in the marketing of their shops, and by making general announcements to the members on the basis of these provisions.⁸⁵

The restriction of the members' marketing consisted of the following:

First, a provision stating that radio and TV might only be used in the context of the association, either at national level or through the local branches

Second, a provision requesting members not to use prices in their advertising as, according to the association, this could have a misleading effect; and

Third, a provision stating that it was not permitted to advertise with services free of charge.

The case was initiated in March 2010 when the Danish Competition Authority carried out a dawn raid at the Danish Funeral Directors' Trade Association.

The Competition Council ruled that the provisions in the Funeral Directors' Trade Association's ethical rules were illegal according to section 6 of the Competition Act.

The Competition Council ruled that: “the provision stating that Radio and TV may only be used in the context of the association, either at national level or through the local branches, entails a restriction of competition between the members of the association in its object and consequence.

⁸² The Danish Union of Journalists, Negotiation in the zone between industrial relations law and Competition law.

⁸³ European federation of journalists –Exercising the right to collective bargaining VS anti-competitive practice: the case of freelance journalists.

⁸⁴The Danish Union of Journalists, Negotiation in the zone between industrial relations law and Competition law.

⁸⁵ Illegal ethical rules in Danish Funeral Directors' Trade Association.

www.kfst.dk/en/competition/decisions/decisions-2008-and-earlier/afgoerelser-2010/illegal-ethical-rules-in-danish-funeral-directors-trade-association/

The provision requesting members not to use prices in their advertising entails a restriction of competition between the members of the association in its object and consequence.

The provision stating that it is not permitted to advertise with services free of charge entails a restriction of competition between the members of the association in its object.”⁸⁶

The Competition Council ruled that the association has to revoke the three provisions.⁸⁷

IV. COMMENTS

The right to form associations and unions in Denmark is guaranteed in section 78 of the Constitution.

The Danish Competition Act prohibits entering into agreements, which directly or indirectly have as object or effect to prevent, restrict or distort competition.

The Competition Authority found that the Danish Union of Journalists was not guilty of anticompetitive practice, by recommending a minimum rate to its freelance members.

The Authority explained that freelance journalists, who deliver casual work equivalent to the work delivered by employees, should be regarded as employees not covered by collective agreements, and therefore fall outside the scope of competition law. The Appeals Tribunal remitted the case to the Competition Authority for reconsideration because the Danish Union of Journalists' definition of self-employed traders was found too unclear for a decision to be made.

In 2010, the Danish Competition Council decided that the Danish Funeral Directors' Trade Association had violated the Competition Act. The Trade Association had entered into an illegal agreement with its members, which adopted three provisions in the association's ethical rules that restricted the members' use of certain marketing methods in the marketing of their shops. The Competition Council ruled that the association should revoke the three provisions.

J. GERMANY

I. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

Germany is one of the leading countries regarding freedom of association and collective bargaining.

Article 9.3 of the German constitution (The Basic Law for the Federal Republic of Germany 1949 (GG)) guarantees the “right to form associations to safeguard and improve working and economic conditions” “to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful.” Although article 9.3 does not refer specifically to the term

⁸⁶Illegal ethical rules in Danish Funeral Directors' Trade Association.
www.kfst.dk/en/competition/decisions/decisions-2008-and-earlier/afgoerelser-2010/illegal-ethical-rules-in-danish-funeral-directors-trade-association/

⁸⁷ Illegal ethical rules in Danish Funeral Directors' Trade Association.
www.kfst.dk/en/competition/decisions/decisions-2008-and-earlier/afgoerelser-2010/illegal-ethical-rules-in-danish-funeral-directors-trade-association/

collective bargaining, case law considers that freedom of association implies that associations have the right to collective autonomy. Collective autonomy is seen to include collective agreements and has a self-determination aspect: matters such as wages, working hours and holiday time are ceded to bargaining by the parties.⁸⁸

The bargaining parties have total freedom to decide the territorial framework of the collective agreement. Regional collective agreements predominate. Workers from the same branch or sector have identical working conditions, so the agreements have a “cartel function”.

The provisions of territorial or industry-wide collective agreements are established by the works council via enterprise agreements. The works council is elected by all the workers employed in the company and the owner of the said company. Articles 77.3 and 87.1 BetrVG establish the pre-eminence of collective agreements over enterprise agreements signed by the representative body (works council). This pre-eminence expresses the principal of dual representation: the trade unions have authority in the sector and region and the works councils in the company.

Collective agreements are as effective as laws as they cannot be revoked regarding the minimum conditions.

There is no general legal definition of employee or self-employed. Sectoral definitions of subordinate employment exist (for social security and for tax law). German Law uses the concept of *economically dependent worker*. The 1999 Act on the Promotion of Self Employment aims to draw the boundaries of dependent employment. A person is deemed to be an employee for social security schemes, if the person meets at least three of the following criteria:

- The worker does not employ other employees who are subject to social security obligations.
- The worker usually works for only one contractor
- The same job is also performed by regular employees
- Prior to this job, the worker concerned carried out the same work as an employee
- The worker has not initiated any entrepreneurial activities

This open, case-by-case approach of the scope of economically dependent employment clearly aims to extend social security protection to atypical contractual arrangements.⁸⁹

Regular unions have chosen to embrace self-employed members within existing structures. The largest of these unions is the United Services Union (Ver.Di.), which is affiliated to the Confederation of German Trade Unions (DGB). Ver.Di. claimed in 2006 that 30,000 (of 2.2 million members) were self-employed. In particular, Ver.Di. organizes self employed workers in the media and culture sectors, such as writers, translators and journalists, through lower level organizations.⁹⁰

⁸⁸ Collective Bargaining in Europe, English Edition of the book "La Negociazione Collettiva in Europa" Published by Ministerio de Trabajo y Asuntos Sociales, Spain 2004.

⁸⁹ See: self employed comparative study 2010, Roberto Pedersini and Diego Colletto, Self-employed workers: Industrial relations and working conditions, University of Milan 2010.

⁹⁰ See: self employed comparative study 2010, Roberto Pedersini and Diego Colletto, Self-employed workers: Industrial relations and working conditions, University of Milan 2010.

Collective bargaining on behalf of self-employed workers rarely occurs, since such workers are recognized as companies and thus not allowed to agree upon common prices or fees by antitrust regulations. However, article 12a of the Collective Agreement Act (TVA) allows the conclusion of collective agreements for self-employed workers with “economic dependence” (more than 30%-50% of their income derives from contracts with a single client or employer). On this basis, a number of single employer collective agreements exist with many broadcasting companies on compensation for self-employed workers. In the private sector, collective agreements exist only for freelance journalists and photographers in daily newspapers where they cover and define collectively agreed rates for articles and pictures provided by self-employed workers. However, outside the media sector, there has been no knock-on effect and thus article 12a of the TVA is not regarded as a model of success.

Trade unions are often faced with a dilemma: providing protection to quasi-subordinate workers (the new self-employed) will be difficult to achieve at no cost for the rest of the workforce. German Trade unions have therefore adopted a very reserved attitude to the “new self employed”. Some statutory regulations do not allow the trade union to accept quasi-subordinate or semi-independent members.

From the current debate on the inadequacy of the economically dependent workers, four proposals have emerged, all of which are currently under review by Germany:

Maintaining the status quo: use and develop existing legal channels to protect economically dependent workers. For Instance, some German writers suggested the application of principle 242 (good faith) of the BGB to quasi-subordinate workers (e.g. when contract is arbitrarily terminated for discriminatory reasons). Demerit: too weak a protection. Leaving the decision to the market forces might end in social dumping.

Creating a new kind of employment relationship lying somewhere between subordinate employment and self-employment. Demerit: legal problems deriving from the new classification.

Redefining and extending the subordinate employment model to cover quasi subordinate workers. Demerit: maximalist theory whereby economically dependent workers would basically become employees.

Creating a hard core of social rights applicable to all employment relationships (subordinate, independent and quasi subordinate) and a higher level of protection for subordinate employees. (Proposal 4 is considered the most realistic by Perulli in the paragraph subordination report.)

II. COMPETITION LAW

Regarding Competition law, Germany has the oldest competition law regime in the European Union. The Act against Restraints of Competition (in this study: "ARC") has been in force since 1958. The Seventh Amendment to the ARC came into effect on 1 July 2005.

The Federal Cartel Office (in this study: "FCO") strongly enforces the ARC's prohibitions. When a civil dispute arises regarding the ARC or articles 81 or 82 to the EC Treaty, the courts must notify the FCO, enabling it to intervene with written statements. The 7th amendment to the ARC included a specific intention of facilitating private antitrust enforcement. Although private damages actions based on cartel infringements are still not

widespread, they are becoming more common. In 2007 approx. 5% of the private competition cases were regarding Art, entertainment and recreation.⁹¹

Section 1 of the ARC corresponds to article 101(1) TFEU and broadly prohibits agreements or concerted practices between undertakings that have as their object or effect the prevention, restriction or distortion of competition. Until 1 July 2005, when the Seventh Amendment came into force, section 1 of the ARC only prohibited anticompetitive agreements or concerted practices between competitors (horizontal restrictions). The prohibition has been extended to cover agreements or concerted practices between undertakings at different levels of the supply chain (vertical restrictions). Practices that are prohibited under section 1 of the ARC include price fixing, bid rigging, and allocation of customers, quotas or territories, limiting production or distribution and the exchange of sensitive market data (e.g., prices).

Section 2 of the ARC corresponds to article 101(3) TFEU and exempts agreements from the prohibition of section 1 of the ARC if they (1) contribute to an improvement in the production or distribution of goods, or help promote technical or economic progress, (2) while allowing consumers a fair share of the resulting benefit, and (3) do not impose restrictions on the undertakings that are not indispensable to the attainment of these objectives; or (4) afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. In addition, section 2 of the ARC incorporates the European Commission's block exemption regulations, even for cases that do not have an effect on trade between member states and are therefore governed by German competition law only.

Section 20 ARC (prohibition of discrimination and unfair hindrance) forbids discriminatory behaviour of undertakings not enjoying a dominant position in the market. While section 19 (abuse of dominant position) lays out the conditions in which undertakings are presumed to be dominant, section 20 prohibits the discrimination and unfair hindrance of other undertakings in business activities if small and medium sized undertakings depend on them as suppliers or purchasers. In practice, section 20 becomes relevant only if the dominance criteria (in section 19) are not met.⁹²

The 7th amendment to the ARC (in force since July 2005): Copyright collection exemption (previously section 30) from the prohibition stated in sec. 1 (Prohibition of Cartels) and sec. 14 (Prohibition of Agreements Concerning Prices or Terms of Business) ARC has been abolished, among other special exemptions.

Section 30 Copyright Collecting Societies (abolished by the 7th amendment):

(1) Sections 1 and 14 shall not apply to the establishment of copyright collecting societies which are subject to supervision pursuant to the Act on the Administration of Copyrights and Related Rights, or to agreements and decisions by such copyright collecting societies, to the extent they are necessary for the effective administration of the rights within the meaning of Section 1 of the Act on the Administration of Copyrights and Related Rights, and have been notified to the supervisory authority. The supervisory authority shall forward the notifications to the Federal Cartel Office.

⁹¹ S. PEYER, *Private Enforcement of Competition Law - A Case Study from Germany*.

⁹² Sebastian Peyer, private enforcement of competition law - a case study from Germany.

III. COMMENTS

Apart from the European Commission's block exemption regulations, the only exemption available under the ARC applies to agreements that are concluded between small and medium-sized undertakings and are designed to rationalize economic processes through cooperation between undertakings without significantly limiting competition in the relevant market.

Agreements that violate the ARC are void and are therefore not enforceable before German courts. In addition, the FCO can impose fines on individuals and companies.

In Germany, the market structure of collecting societies developed into a natural monopoly. Though several collective societies may be counted, they specialize in different categories of works, such as arts, music, writing, films and photography or administer copyright or neighbouring rights only. However, the German law takes precautions against abusive behaviour by the natural monopoly by two provisions: Art. 6 of the Act on Collective Administration stipulate a duty to contract on the part of the collecting society vis-à-vis the right holders and art 11 stipulates similar duty vis-à-vis commercial users requesting a license. (BTW, Application of these provisions, however, does not depend on the existence of a monopoly.) On second thought, the legal duty of collective societies to contract with all interested right holders does not appear as "preventive" legislation, responding to the "God given" natural monopoly, but rather as the very cause of such a monopoly. Under such legislation, a new entrant has little chances to attract a repertoire that is large and attractive.⁹³

In light of the legal situation in German, one might suggest that the important and relevant question may be the following: what is the goal of regulating the markets of collective management of copyright? Is it allocated efficiency? Or should it perhaps be promoting creativity? The goal we select will dictate the way we evaluate the pros and cons of monopoly or various competition-oriented solutions.⁹⁴

K. FRANCE

I. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

The French Constitution guarantees freedom of association rights, including the right to create and join trade unions. Today, there are many labour laws concerning freedom of association rights, but the bulk of them focus on collective bargaining and workplace representation.⁹⁵ France is one of the leading countries in the world where freedom of associations and the right to bargaining and to create unions are very strong.

II. COMPETITION LAW

⁹³ J. DREXL, *Collecting Societies and Competition Law* (2008).

⁹⁴ See: Petra Linsmeier, Moritz Lichtenegger, A German court holds that reciprocal representation agreements concluded between national collecting societies are not void for breach of Art. 81 EC (GEMA / BUMA, STEMRA), 7 November 2008, e-Competitions, No26678, www.concurrences.com

⁹⁵ Legislationline, France, Freedom of Association and Labour Law. legislationline.org/topics/country/30/topic/1/subtopic/17

Competition rules have been settled in the 1986 act. This act does not refer to the situation of collective agreements. Therefore, the solution to this problem has to be found in the case law. Unfortunately, due to the lack of any decisive jurisprudence on the matter, there is still great uncertainty over the complex debate of the link between collective agreements and competition rules.

The common opinion among French authors is that collective agreements do not constitute cartels. Consequently, collective agreements should not fall under the scope of Article 7 of the 1986 Act, which prohibits “cartels agreements, express or tacit concerted practices or coalition”.

Moreover, trade unions are not considered as undertakings, mainly because they do not pursue any economic objectives. The social aims of trade unions provide legitimate grounds for excluding the application of competition rules to collective agreements. Nevertheless, unlike Article 101 of the Treaty on the Functioning of the European Union (former Article 81 of the EC Treaty), Article 7 of the 1986 French regulation does not use the concept undertaking. This could imply that the French regulation has a broader scope than the Treaty on the Functioning of the European Union.⁹⁶

III. CASES

Artists and performers decided to launch a strike, due to the refusal of some trade associations of producers and TV channels to pay a complementary bonus in order to compensate for rehearsals. At the same time, the artists concluded a separate agreement with other TV channels, in which the TV channels committed, while the strike was going on, not to engage in coproduction with those who did not allocate the complementary remuneration. Even if the agreement was lapsed by the subsequent acceptance of this complementary remuneration by all TV channels, the trade associations who had refused to pay a complementary bonus, along with non-signatory producers, brought an action before the French Competition Authority, accusing the artists of violating the competition act.

The Competition Authority decided to examine the validity of a collective agreement with regard to competition rules. This decision contradicted the traditional view that collective agreements have not only of a contractual but also of a legislative nature.⁹⁷ In 1991, in a much more cautious approach, the Court of Appeal upheld the decision of the Competition Authority. The Court did not assess the validity of the collective agreement but only of the separate agreement, which is interpreted as an unlawful cartel.⁹⁸

⁹⁶ CENTRE OF INTERNATIONAL ECONOMIC LAW, CIEL, DEPARTMENT OF LAW, COLCOM REPORT - COLLECTIVE AGREEMENTS ON THE COMPETITIVE COMMON MARKET. A STUDY OF COMPETITION RULES AND THEIR IMPACT ON COLLECTIVE LABOUR AGREEMENTS.
www.sfs-research.at/projekte/P11-Collective%20Agreements/colcomreport_en.pdf.

⁹⁷ Decision of the 26 the Syndicats d’artistes-interprètes, Rec. Lamy, n.400, note M.-A Rotschild-Souriac (1990). CENTRE OF INTERNATIONAL ECONOMIC LAW, CIEL, DEPARTMENT OF LAW, COLCOM REPORT - COLLECTIVE AGREEMENTS ON THE COMPETITIVE COMMON MARKET. A STUDY OF COMPETITION RULES AND THEIR IMPACT ON COLLECTIVE LABOUR AGREEMENTS.
www.sfs-research.at/projekte/P11-Collective%20Agreements/colcomreport_en.pdf.

⁹⁸ Contracts, concurrence, consummation, 1991, n.108, note L.Vogel. CENTRE OF INTERNATIONAL ECONOMIC LAW, CIEL, DEPARTMENT OF LAW, COLCOM REPORT - COLLECTIVE AGREEMENTS ON THE COMPETITIVE

In a more recent decision, the Court of Appeal of Paris discussed a case regarding different types of collective actions taken by a co-ordination of various trade unions called “Comité intersyndical du livre parisien” against a newspaper publisher and a printing house.

French printing houses are divided into two categories. The first category is: “the Imprimeries de presse”, which print daily newspapers. For this category the “Comité intersyndical du livre parisien” has a monopoly for the placement of workers.

The second category, the “Imprimeries de lauréat” is dealing with magazines and specialized daily newspapers. The monopoly for the placement of workers does not exist for this category, which is covered by a specific collective agreement.

In 1992, a newspaper publisher decided to stop printing its newspapers with the “Imprimerie de presse” and moved to the “Imprimeries de lauréat”. The “Comité intersyndical du livre parisien” reacted by taking different types of actions against the newspaper's publisher and the printing house.

Even though there was a clear restriction of competition, the question was whether competition rules applied to trade unions.

The Competition Authority considers that no abuse of dominant position exists concerning the monopoly for placement of workers in the printing house, since the “Comité intersyndical du livre parisien” is not an undertaking. The free of charge character of the activity of placement excludes the “Comité intersyndical du livre parisien” from the scope of Article 8 of the act which refers expressly to undertakings.

On the other hand, since Article 7 of the 1986 Act does not mention the term “undertaking”, trade unions should fall under its scope and, therefore, the actions carried out by the organization of trade unions constituted unlawful concerted actions.

The interpretation of the competition authority was that Article 7 had a wider scope than Article 8 and covers not only undertakings.⁹⁹

The Court of Appeal reversed the decision and determined that even if Article 7 of the act does not refer to undertaking, it requires that one of the parties of the cartel carries out an economic activity. The Court held that the sporadic actions carried out by the “Comité intersyndical du livre parisien” could not confer the status of economic actor.

According to this decision, both a collective agreement and a collective action are immune from the scope of Article 7 of the 1986 Act, as long as trade unions are not considered economic actors.¹⁰⁰

COMMON MARKET. A STUDY OF COMPETITION RULES AND THEIR IMPACT ON COLLECTIVE LABOUR AGREEMENTS.

www.sfs-research.at/projekte/P11-Collective%20Agreements/colcomreport_en.pdf

⁹⁹ Decision 99-D41, 22/06/1999, Comité intersyndical du livre parisien. CENTRE OF INTERNATIONAL ECONOMIC LAW, CIEL, DEPARTMENT OF LAW, COLCOM REPORT - COLLECTIVE AGREEMENTS ON THE COMPETITIVE COMMON MARKET. A STUDY OF COMPETITION RULES AND THEIR IMPACT ON COLLECTIVE LABOUR AGREEMENTS.

www.sfs-research.at/projekte/P11-Collective%20Agreements/colcomreport_en.pdf

IV. COMMENTS

The French Constitution guarantees freedom of association rights, including the right to create and join trade unions.

Competition rules have been settled in the 1986 Act that does not refer to the situation of collective agreements. Therefore, the solution to this problem has to be found in the case law. In 1990, Artistes and performers decided to launch a strike, due to the refusal of some trade associations of producers and TV channels to pay a complementary bonus in order to compensate for repeats. They concluded a separate agreement with other TV channels, in which the TV channels accepted, while the strike was going on, to refuse any coproduction with those who did not allocate the complementary remuneration. The trade associations who refused before to pay a complementary bonus, along with non-signatory producers, brought an action before the Competition Authority, Accusing the artistes of violating the competition act. The Court of appeal did not assess the validity of the collective agreement but only of the separate agreement which is interpreted as an unlawful cartel.

In a more recent decision from 1992, the Court of Appeal discussed a case regarding different types of collective actions taken by a co-ordination of various trade unions called “Comité intersyndical du livre parisien” against a newspaper publisher and a printing house, following its decision to stop printing its newspapers with the “Imprimeries de presse”, with which the “Comité intersyndical du livre parisien” has a monopoly for the placement of workers, and move to the “Imprimeries de laur”, where no monopoly exists for the placement of workers, and which are covered by a specific collective agreement. The “Comité intersyndical du livre parisien” reacted by taking different types of actions against the newspaper's publisher and the printing house. According to this decision, both a collective agreement and a collective action are immune from the scope of Article 7 of the 1986 Act as long as trade unions are not considered economic actors.

In the last case, one can clearly see another approach taken by French court. The French court took into consideration the fact that a legitimate and legal-protected union was subject to its decision. This fact for itself distinguishes France from the other countries. Still the court held that trade union was immune from competition law, as long as the trade union was not considered as economic actor. On the one hand, this exam is vague and may therefore be subject to interpretation. On the other hand, trade unions are usually not considered economic actors as they main goal is to protect the rights of their members.

L. SPAIN

I. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

Article 28.1 of The Spanish Constitution of 1978 declares that the freedom of association is a fundamental right.

¹⁰⁰ Cour d'Appel of Paris, 29/02/2000, unpublished. CENTRE OF INTERNATIONAL ECONOMIC LAW, CIEL, DEPARTMENT OF LAW, COLCOM REPORT - COLLECTIVE AGREEMENTS ON THE COMPETITIVE COMMON MARKET. A STUDY OF COMPETITION RULES AND THEIR IMPACT ON COLLECTIVE LABOUR AGREEMENTS. www.sfs-research.at/projekte/P11-Collective%20Agreements/colcomreport_en.pdf

Article 37.1 of the constitution confirms the right to bargain collectively as constitutional right of ordinary level.¹⁰¹

II. COMPETITION LAW

Spanish Competition Act regulates the competition rules in the country.

Article 1 of the Spanish Competition Act prohibits:

“any agreement, decision or collective recommendation or any concerted or consciously parallel practice that has as its object or effect the prevention, restriction or distortion of competition in all or part of the Spanish market, and in particular those that:

- *Directly or indirectly fix prices or any other commercial or service terms*
- *Limit or control production, distribution, technical development or investments*
- *Share markets or sources of supply*
- *Apply dissimilar conditions to equivalent transactions in commercial or service relations, thereby placing some competitors at a competitive disadvantage; and*
- *Make the conclusion of contracts subject to the acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”*¹⁰²

Article 1 defines a cartel as “any secret agreement between two or more competitors, whose object is to fix prices, production or sales quotas, share markets including bid-rigging or restrict imports or exports”.¹⁰³

III. CASES AND COMMENTS

In September 2011, the Competition Commission opened formal proceedings against UNICO, Unión de Correctores (“UNICO”) for a possible anticompetitive practice, consisting of the publication of minimum copy editing rates on its website.

This practice has been detected by the Investigations Division following a confidential probe, there appears to be prima facie evidence that UNICO has committed a breach of article 1 of the Competition Act 15/2007 of 2007.¹⁰⁴

In October 2011, the Competition Commission has opened formal proceedings against the association of Literary Authors of Audiovisual Resources (Autores Literarios de Medios Audiovisuales - ALMA) for a possible anticompetitive practice, consisting of the preparation and publication of collective recommendations relating to the fixing of prices charged by independent scriptwriters in the field of audiovisual resources.

¹⁰¹ CENTRE OF INTERNATIONAL ECONOMIC LAW, CIEL, DEPARTMENT OF LAW, COLCOM REPORT - COLLECTIVE AGREEMENTS ON THE COMPETITIVE COMMON MARKET. A STUDY OF COMPETITION RULES AND THEIR IMPACT ON COLLECTIVE LABOUR AGREEMENTS.

www.sfs-research.at/projekte/P11-Collective%20Agreements/colcomreport_en.pdf.

¹⁰² GCR – Global Competition review: The European Antitrust Review 2012

www.globalcompetitionreview.com/reviews/37/sections/132/chapters/1403/

¹⁰³ GCR – Global Competition review: The European Antitrust Review 2012

www.globalcompetitionreview.com/reviews/37/sections/132/chapters/1403/

¹⁰⁴ Spanish National Competition Commission, web site, available at:

<http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=395011&Pag=4>

The investigation was undertaken by the Investigations Division, after it became aware of the existence and publication by ALMA of recommended fees for independent scriptwriters in audiovisual resources, which may amount to a breach of article 1 of the Competition Act 15/2007 of 2007.¹⁰⁵

4. DISCUSSION AND CONCLUSIONS

A. THE CONTRADICTION BETWEEN COLLECTIVE BARGAINING AND COMPETITION LAW

Two different fields of law have met at a conflicting junction: competition law and the legal safeguarding of collective bargaining. Each field has developed from different justifications, which are (apparently) inconsistent with each other. Whereas competition law's main goal is to protect free market trade, collective bargaining promotes a distinctive set of goals aimed at protecting the social and employment conditions of workers (as the weaker part in the imbalanced relation with the employer).

The clash however does not occur at horizontal level alone (i.e. in national legislation), since international treaties or other supranational regulations, which are binding to the States that have adopted them, also regulate the issues at stake. However, a key consideration when addressing this clash is the fact that freedom of association and collective bargaining are basic human rights, while competition laws are a limitation of free market. Thus, they are not at the same level.

However, in the face of weakly upheld human rights in certain sectors, economic regulations are successfully being used to posit property rights and economic “freedoms” as basic rights. Therefore, “property” rights of corporations are effectively limiting human rights, including not only those incorporated in ILO standards but also in the Universal Declaration of Human Rights and other regional standards such as the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union.

The fact that trade unions and other organizations representing the interests of workers in the arts, media, and entertainment sectors, in almost all the countries in the study, are exposed to the effect of antitrust law means that the workers have become much more vulnerable. The workers cannot negotiate properly with those who have commissioned their work or performance. Without collective bargaining power, they cannot claim fair consideration and remuneration for their work and are not protected when using industrial action mechanisms to promote their rights, such as strikes. This impacts on the quality of working conditions, even to the extent of driving down employment by making it impossible to earn a decent living from working in the field.¹⁰⁶

¹⁰⁵ Spanish National Competition Commission, web site, *available at*:

<http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=404141&Pag=2>

¹⁰⁶ Ashley Kelly, *Bargaining Power On Broadway: Why Congress Should Pass The Playwrights Licensing Antitrust Initiative Act In The Era Of Hollywood On Broadway*, 16 J.L. & Pol'y 881, 889, 898, 899, (2007-2008). The article compares the US scriptwriters, protected by exception to the antitrust law against playwrights, who are not covered by this exception, resulting in stronger organization of scriptwriters and much better work conditions of scriptwriters because of their better bargaining power.

The structure of the market in the entertainment field increases the need to protect those workers. Media corporate interests are increasingly dominating the market. In light of this imbalance, it is all the more unfortunate that only one entity does not have a seat at the bargaining table: the organizations of workers from the entertainment sector that are not protected from antitrust laws.¹⁰⁷

The organizations of workers in the entertainment sector may be the only professional association for self-employed workers, such as performers, composers, playwrights, and technicians. If those organizations are not regarded as unions, they cannot protect their members.¹⁰⁸

Collective bargaining is also an essential factor to ensure the quality and quantity of the workers' products and services within the art and entertainment fields. This conclusion is part of an efficiency assessment of freedom of association and the right to collective bargaining in the entertainment sector. A protected working environment and fair working conditions are the basic conditions for fruitful and productive work of artists and other workers in this sector. The result may be to enrich the world with cultural products that contribute to the wellbeing of all of us. Antitrust restrictions may function as an obstacle against reaching this goal.¹⁰⁹

One further aspect of the discussion is the understanding that the activities of associations of artists play an important role in promoting distributive justice.¹¹⁰

Thus, the basic assumption that workers from the art, entertainment and media sectors should be protected by ILO's international Conventions No. 87 and No. 98, which regulate freedom of association and the right to organize, as fundamental legally binding tools, brings us to these several key conclusions.

As explicitly guaranteed by the ILO's Convention No. 98 and Convention No. 87, both workers and their organizations should be protected (at least to some extent) from the abuse of power by authorities and/or parliaments.¹¹¹

B. TRENDS AT NATIONAL LEVEL

¹⁰⁷ Alison Zamora, *Playwright Licensing Antitrust Initiative Act: Empowering the Starving Artist through the Convergence of Copyright, Labor, and Antitrust Policies*, 16 DePaul-LCA J. Art & Ent. L. 413 (2005-2006), Based on the testimony of **Arthur Miller**, a critically acclaimed playwright, having written such plays as the "Death of a Salesman" and "The Crucible", spoke on the merits of the proposed legislation amendment to the antitrust law excepting the play writers organization, which is not protected. See Playwrights Licensing Antitrust Initiative Act: Hearing Before Comm. on S. Judiciary, 108th Cong. (2004) (statement of Arthur Miller, Playwright, 2004) WL 939462.

¹⁰⁸ Ibid at p. 415, the testimony of Mr. Steven Sondheim, a successful playwright and winner of a Pulitzer Prize and several Tony awards, in favor of law amendments in the US that will protect these workers. See Playwrights Licensing Antitrust Initiative Act: Hearing Before Comm. on S. Judiciary, 108th Cong. (2004) (statement of Steven Sondheim, Playwright), 2004 WL 939463 (Apr. 28, 2004).

¹⁰⁹ Alison Zamora, *Playwright Licensing Antitrust Initiative Act: Empowering the Starving Artist through the Convergence of Copyright, Labor, and Antitrust Policies*, 16 DePaul-LCA J. Art & Ent. L. 413 (2005-2006)

¹¹⁰ Alison Zamora, *Playwright Licensing Antitrust Initiative Act: Empowering the Starving Artist through the Convergence of Copyright, Labor, and Antitrust Policies*, 16 DePaul-LCA J. Art & Ent. L. 413 (2005-2006)

¹¹¹ F. VON PRONDZYNSKI, *Freedom of Association and Industrial Relations: A Comparative Study* (1987), p. 1.

Many of the countries in this study have adopted restrictive positions whereby freedom of association and collective bargaining fall outside the scope of antitrust law. However, the exception from antitrust law, which protects union activities, fails in most countries to protect trade unions representing self-employed workers in the entertainment sector, who make up an ever-growing part of the workforce.

There are some exceptions. In the UK, legal opinion claims that organizations of artists or other workers in this sector are not subject to antitrust law. However, the conclusion was not in fact drawn from in-depth discussion about freedom of association and related rights. France is the only country where a court decision protects trade union as such (as far as the trade union is not considered an economic entity).

Generally speaking, none of the discussions at national level in the different countries have demonstrated a satisfactory level of consideration and analysis of workers' rights. The comparison serves to highlight that in fact the discussion of legal, social and human rights of self-employed workers and the justifications arising from these rights, in the context of competition law, were either totally absent or only very partially raised, thus reflecting a very low level of consideration of these rights in the formulation of regulation. Most of the countries neither considered this issue nor even discussed the ramifications of the rights in question. This was the case even when the workers' rights to associate and organize were raised by the organisations affected. Approaching these rights with a broader and deeper understanding of their context, legal basis and aim could have led to other conclusions.

This comparative study's main conclusion is that further and deeper understanding of self-employed workers and indeed employment relationships in this sector is needed. Therefore, one can conclude that the general ILO international conventions (such as Convention No. 87) have proved insufficient in respect to the issues raised and discussed in this study. A specific convention regarding workers in the entertainment field may contribute to better understanding, regulating and hence, better implementing their rights. More analysis of the conflict between these different fields of law is required for a comprehensive solution.

C. SOME ALTERNATIVES

In light of the situation described, some consideration should be given to alternative approaches to addressing the issues at stake and redressing the balance. These include:

I. CREATING A DISTINCTION BETWEEN “RATES OF REMUNERATION” AND OTHER WORKING CONDITIONS

This first approach might be considered as the weakest solution, as it fails to really address the legal issues at the heart of the matter. Thus it consists of accepting the fact that competition authorities have targeted collective agreements concluded by, or on behalf of, “self-employed” workers which set their remuneration (fees, rates), on the ground that they amount to agreements between “undertakings” aimed at “price-fixing”, but making the argument that this would not exclude the possibility that all other provisions of such collective agreements aimed at achieving decent working conditions, remain valid and in place.

These might include negotiations over one or many other working conditions, such as working time, rest hours, vacations, health insurance coverage, social security, and the like.

Although probably not the preferred solution, it might be considered as a first step. It has the advantage that it avoids confrontation with the competition authorities and hence litigation costs. However, the danger is that it does not challenge the fundamental premise that rate-setting for “self-employed” workers in collective agreements amounts to price-fixing.

II. THE LIMITATIONS OF COMPETITION LAW

Competition law itself seems to furnish some alternatives by providing for limitations that could potentially exclude its application in cases of collective agreements concluded by or on behalf of “self-employed” workers. These alternatives may be found at two different levels.

In the first place, even with the assumption that a group of organized workers could be considered as an “undertaking”, not all “agreements” (or “price-fixing”) between “undertakings” are against competition law, but only those that are aimed at the “prevention, restriction or distortion of competition”. Thus, when deciding whether an agreement violates competition rules, competition authorities must assess their objective or their effect on competition, rather than their wording or form.

Certainly there are agreements that, due to their business value, the number of undertakings involved, the geographic area or “relevant market” of application, do not constitute a threat to competition rules because the violation is not “appreciable” or “substantial”.

However, while the violation with regard to competition needs to have an “appreciable” or “substantial” effect on competition, a test has to be undertaken in order to assess whether the agreement or concerted practice also creates sufficient benefits to outweigh the anticompetitive effects.

In the second place, competition law in general – provide for a set of exemptions and/or exceptions that limit the application of competition rules to a number of economic or business activities. For instance, the Treaty for the Functioning of the European Union (TFEU) provides that competition law does not apply to agreements, decisions and concerted practices which contribute to the “improvement of production or distribution”, or to the “promotion of technical or economic progress”.

Taking these two considerations together, we may therefore conclude that even with the assumption that a collective agreement in the conditions described above is an agreement between “undertakings”, the other conditions, such as the one set forth in Article 101(1) of the TFEU, that it is an agreement aimed at the “*prevention, restriction or distortion of competition*” in the market, have to be met.

Moreover, if for any reason a collective agreement concluded by “self-employed” workers should meet those conditions, competition laws might establish other exemptions, like the one provided for in Article 101(3) of the TFEU, which states that the prohibition may be declared inapplicable when such agreement (or practice) “*contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit*”.

It is not clear whether the competition authorities have examined (and proved) whether any of these conditions have been met when conducting their investigations on the cases referred

above. Where proceedings allowed for discussion in more detail, perhaps it would have been possible to assess whether there was a tangible and substantial distortion of the market due to such agreements, as well as whether the “social policy objectives” of collective agreements concluded by “self-employed” workers also fall within the “promotion of economic progress” referred to in Article 101(3) of the TFEU.¹¹²

III. THE “SELF-EMPLOYED” WORKER VS. EMPLOYEE STATUS

As stated above, competition law in some countries provides for a clear-cut exception that removes collective agreements from the sphere of competition law. In these cases, there is no need to prove whether the agreements restrict competition or promote economic progress.

Taking into account the cases reviewed above, competition authorities have not targeted trade unions whose affiliates are “employees” of any given company or employer. Instead, they have made a distinction between “self-employed” workers and employees, arguing that the “collective bargaining exception” applies to “employees” alone.

Nevertheless, it is not in fact clear whether the “collective bargaining exception” of competition legislation is meant to apply to employees only, as the competition authorities and the courts (as in the case of the Netherlands and other countries) have inferred. For instance, in *Albany*, *Brentjens* and *Drijvende Bokken* the ECJ did not adopt such a narrow approach. By stating that “*agreements concluded in the context of collective negotiations between management and labour [...] by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty*”, they had no obvious intention to draw a line between “employees” and “self-employed” workers, the only condition stipulated being that the agreements arise from social dialogue and that they pursue “*social policy objectives*”.

Competition authorities have adopted a very formalistic approach when assessing the status (“employee”/“self-employed”) of those benefiting from the collective agreements. As the cases above show, no thorough analysis has been provided to evaluate the true nature of the (employment) relationship between the parties. Such analysis was undertaken in the earlier case decided by the Competition Appeals Tribunal of Denmark, which ruled against the competition authority after establishing that the work performed by freelance journalists was of the same nature as the work delivered by the permanent staff of media companies, but on casual basis.¹¹³

Thus, better account also needs to be taken of the real employment relationship, as the distinction made by competition authorities is in practice not a clear-cut one.

¹¹² See the answer given by the European Commissioner for Competition to the question whether there is any provision in European competition law that would prevent freelance journalists from forming a professional association or union to negotiate pay rates and terms and conditions with their employers, where she stated the procedure to be followed to assess whether an agreement that negotiates rates and conditions with the clients of freelance journalists violates Article 81(1) EC [now Article 101(1) of TFEU]. Available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-6260&language=EN>.

¹¹³ See the comments issued by the Danish Competition and Consumer Agency, available at <http://www.kfst.dk/index.php?id=16242> (in Danish).

IV. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING AS HUMAN RIGHTS

One of the major pitfalls that arise in the cases discussed in this study is a lack of fundamental legal and economic arguments when addressing the conflict between the rights to freedom of association and collective bargaining and competition laws.

In the majority of cases, the claims and reasoning used by those defending the workers' interests were partial, incomplete, and therefore inconclusive. In most cases – if not all – neither ILO Conventions nor any other human rights instrument were brought forward explicitly to counteract the weight of the economic arguments advanced by the competition authorities. For example it is clear that the decision in the Irish case, although not binding, served as the basis for similar decisions in other countries.

As mentioned above, the fact that freedom of association and collective bargaining are deemed to be part of the set of basic human rights – unlike competition rules – should be a powerful argument and is one that has not been properly exploited to protect the rights of workers.

All of the elements brought together in these conclusions, as well as other possible avenues, should be explored so that better arguments can be developed and advanced to counter the proceedings initiated by the competition authorities. While it may be an expensive and time-consuming exercise, this will be the vital basis to finally clarify the boundaries of competition law to the benefit of all workers.