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Economic Dependency and Contractual Imbalance of Self-Employed Workers in the Italian Legal Framework

Caterina Mazzanti*

Abstract

The contribution aims at analyzing the issue of economic dependency of self-employed workers in the Italian Legal system and the problem of their contractual imbalance. At this purpose, it focuses on Art. 3, Act no. 81/2018 on unfair clauses and practices, which settles different measures in favor of self-employed workers.

Keyword: Self-employed work; Economic dependency; Unfair clauses and practices; Damages; Functions of Civil liability; Labor Law

1. Preliminary remarks on the protection of Self-employed workers in light of the Act n. 81/2017.

According to our legal system, self-employed worker has been traditionally considered the prototype of the strongest contractual party. Unlike the case of the employee, who has been always considered in a condition of weakness and subjection to the employer, and therefore protected by a specific regulation, a particular protection for self-employed workers missed for a long time. However, such situation has radically changed over time. Today, there is a wide category of self-employed workers carrying out activities without peculiar

* Caterina Mazzanti, PhD, Post Doc, University of Udine. This article has been submitted to a double-blind peer review process. The paper is the result of the researches within the project "WORKING POOR N.E.E.D.S.: NEwEquity, Decent work and Skills", CUP G24I19002630001, funded by the 2017 PRIN program (University of Udine).

characteristics, so that they are easily replaceable with each other. Consequently, they relapse into a situation of economic dependence with respect to clients.

Therefore, the Italian Legislator has introduced the first regulation in favour of self-employed workers within the Act n. 81/2017, commonly known as 'Self-employed Work Statute', which settles a first regulatory core for such category. The overmentioned Act aimed at introducing wider guarantees for self-employed workers, including those professionals who are mandatory required to be registered in professional associations, para-subordinated workers and occasional collaborators (while entrepreneurs, even if small, are expressly excluded).

The Act no. 81/2017 has introduced a large variety of measures in favour the self-employed workers. It provides a normative system aimed at strengthening the economic and social protection for self- employed workers, who carry out their activities in a non-entrepreneurial form. To summarize some of the most significant aspects enshrined in the overmentioned Act, it also includes the protection for maternity and unemployment condition. At this regard, the maternity leave consists in the right for self-employed women to receive the maternity allowance for the two months prior to the date of delivery and for the following three months, regardless of the abstention from work. In case the client agrees, they might even be replaced by other trusted self-employed workers. In addition, parental leave within the first three years of the child's life increases from three to six months.

As highlighted before, the overmentioned Act provides also a specific regulation for the unemployment condition. It consists, in fact, in a specific benefit (the so-called 'DIS-COLL'), so far transitory, for 'coordinated and continuous collaborators' (the so-called 'co.co.co') who have involuntarily lost their job.

In additions, the Act n. 81/2017 tackles both issues of economic dependency and imbalanced contractual relationship between client and self-employed worker (art. 3). The present paper will especially focus on such provision.

2. Unfair clauses and practices against the self-employed worker. The discipline of art. 3 of the Act n. 81/2017.

According to Art. 3, Act n. 81/2017,[1] are to be considered unfair and consequently ineffective the following clauses: those that determine payment terms exceeding sixty days, as well as those that allow one-sided changes to the contract in favour of the client or to

[1] According to Art. 3, Act n. 81/2017, «1. The clauses that give the client the right to unilaterally modify the conditions of the contract or, in the case of a contract having as its object a continuous activity, to withdraw from it without adequate notice as well as the clauses by which the parties agree the payment in more than sixty days from the date of receipt of the payment request are unfair and ineffective.
2. The client's refusal to sign a written contract is unfair.
3. In the cases described by paragraphs 1 and 2, the self-employed worker has right to compensation for damages, also by promoting an attempt to conciliation through authorized bodies.
4. To the contractual relationships governed by this chapter is applied, inasmuch as compatible, Art. 9, Act. no. 192/1998 on abuse of economic dependency».

withdraw from a long-term contract without adequate notice. Even the refusal of the client to sign a written contract is considered unfair.

In all the overmentioned cases, the self-employed worker has the right to claim for damages.

To deeply analyse the provision of Art. 3, Act n. 81/2017 and to understand the impact of such norm on our legal framework, it might be possible to classify the described instances into two main groups.

The first one (Art. 3, par. 1), consisting in a set of unfair clauses provoking disparity between self-employed worker's rights and obligations and rights and obligations of the client. At this regard, the norm appears to have been designed on the model of Art. 9, Act no. 192/1998 on the abuse of economic dependency in subcontracting agreements.[2] Therefore, after providing a definition of abuse of economic dependency, the article highlights a number of cases referring to such pathologic situation.

At this regard, Art. 3, Act no. 81/2017 is also similar to Art. 33, legislative Decree no. 206/2005 (so-called 'Costumer Code'), but with significant differences, as it will be highlighted hereinafter (see paragraph 4).

The second instance – referring to the unfair behaviour of the client within the contractual relationship with the self-employed worker – is the client's refusal to sign a written contract. Such refuse might hide, in fact, the intention to take an unjust advantage from the economic dependency of the self-employed worker.

Thus, the over-mentioned cases indicate the situation of abuse of economic dependency. In this circumstance, the legislator has recognised a specific protection for the self-employed worker, by providing him the right for compensation. It is, in fact, a remedy deriving from both the provision of unfair contractual clauses and the refusal to sign a contract.

A letteral interpretation of this norm might suggest that such right automatically derives from the presence of such conditions and therefore, independently to the existence of a real damage. Nevertheless, it has to be pointed out that in case the contract will be regularly performed, the sole refusal to sign the contract do not provoke any damage. Therefore, the provision rises a wider issue, concerning the alleged existence of a punitive and deterrent objective behind the imposition of civil liability in this specific case and, by a deeper analysis, in the Italian employment law system. The *ratio* of the provision seems to be, in fact, to punish the wrongdoer instead of to repair a real damage (see paragraph 5).

[2] According to art. 9, Act no. 192/1998, «The abuse by one or more companies of the state of economic dependence in which a customer or supplier company is in itself or in their regards is prohibited. Economic dependence is considered to be the situation in which an enterprise is able to determine, in commercial relations with another enterprise, an excessive imbalance of rights and obligations. Economic dependence is assessed also taking into account the real possibility for the party who has suffered the abuse of finding satisfactory alternatives on the market. 2. The abuse can also consist in the refusal to sell or in the refusal to buy, in the imposition of unjustifiably burdensome or discriminatory contractual conditions, in the arbitrary interruption of the commercial relations in progress. 3. The pact through which the abuse of economic dependence takes place is null and void. The competent ordinary judge is aware of the actions in the matter of abuse of economic dependence, including injunctions and compensation for damages».

3. The definition of Self-employed worker's economic dependency.

The research aims at pointing out the self-employed condition of weakness within the Italian Labour Market as a consequence of his economic dependency, especially in case of a single-client relationship.

On a practical level, the economic dependency has two different faces. The first one shows itself through the weakness of one subject compared to another, due to their different positions within the market. This condition, in itself neutral and physiological, could still have a pathologic development as it delves into the misuse, by the subject with a stronger bargaining power,[3] of his economic supremacy in order to obtain an unjust advantage through a distorted exercise of private autonomy. In fact, the weaker contractual partner is prompted to accept those conditions unilaterally imposed by the other one, otherwise he will be excluded from the market.

A general definition of the notion of economic dependency within the Italian legal framework appears to be of fundamental importance. Nevertheless, the legislator has not provided it. In fact, a description of the phenomenon has been introduced for the first time only with regard to the regulation on "Subcontracting Agreement" (Art. 9, Act no. 192/1998). Thus, there is neither a general definition, nor a specific provision with respect to the case of the self-employed worker. Hence, Art. 3, Act no. 81/2017 has established that economic dependency is definable by adapting the definition enshrined in Art. 9, Act no. 192/1998.[4] In particular, it is the situation in which a subject is able to determine an excessive imbalance of rights and obligations.

As highlighted before, economic dependency might be a neutral condition, but it might have a pathologic effect when it provokes an imbalance within the contractual relationship and it causes the impossibility, for the self-employed worker, to find a proper alternative within the market.

The fact that Art. 3, Act no. 81/2017, explicitly referrers to the notion of economic dependency described by the overmentioned Act on Subcontracting Agreement[5] shows that the case of the abuse of economic dependence still represents an unsolved problem, to the point that the legislator has felt the need to regulate the phenomenon again, this time by

[3] Maugeri M., *Abuso di dipendenza economica ed autonomia privata*, Giuffrè, Milano, 2003, 132 ff.; Pinto V., *L'abuso di dipendenza economica «fuori dal contratto» tra diritto civile e diritto antitrust*, in *Rivista di Diritto Civile*, 2000, 389 ff.; Roppo V., *Parte generale del contratto, contratti del consumatore e contratti asimmetrici (con postilla sul "terzo contratto")*, in *Rivista di diritto privato*, 2007, 683 ff.; Musso A., *la subfornitura*, in De Nova G. (a cura di), *Commentario Scialoja Branca Galgano*, Zanichelli, Bologna, 2003, 843.

[4] Perulli A., *Il Jobs Act degli autonomi: nuove (e vecchie) tutele per il lavoro autonomo non imprenditoriale*, in *Working Papers C.S.D.L.E. "Massimo D'Antona".IT – 235/2015*, 173; Perulli A., *Il Jobs Act degli autonomi: nuove (e vecchie) tutele per il lavoro autonomo non imprenditoriale*, in *Rivista Italiana di Diritto del Lavoro*, 1, 2017, 173; Perulli A., *Oltre la subordinazione*, Giappichelli, Torino, 2021, 85 ff.; Zoppini A., *Il contratto asimmetrico tra parte generale, contratti d'impresa e disciplina della concorrenza*, in *Rivista di Diritto Civile*, 2008, 515; Galgano F., *Libertà contrattuale e giustizia del contratto*, in Scalisi V., *Il ruolo della civilistica italiana nel processo di costruzione della nuova Europa*, Giuffrè, Milano, 2009, 547 ff..

[5] Caso R., Pardolesi P., *La nuova disciplina del contratto di subfornitura industriale: scampolo di fine millennio o prodromo di tempi migliori?*, in *Rivista di diritto privato*, 1998, 4, 725; Di Lorenzo G., *Abuso di dipendenza economica e contratto nullo*, Cedam, Padova, 2009, 30; Fabbio Ph., *L'abuso di dipendenza economica*, Milano, Giuffrè, 2006, 100; Oppo, G., *Antitrust e professioni intellettuali*, in *Rivista di Diritto Civile*, 1999, 2, 123 ff.

preparing specific remedies for self-employed workers. The regulatory intervention originates from a context of radical changes, which affect especially the social type of the self-employed.

As highlighted, there is a wide group of low-skilled self-employed workers, easily replaceable with each other and, consequently, in a condition of economic dependence with respect to clients. Therefore, they are forced to accept those conditions unilaterally imposed by the counterparty, who unfairly takes advantage of their weakness.

As pointed out, the norm enshrined in Art. 3, Act n. 81/2017 represents the first intervention against negative consequences of self-employed workers' economic dependency and is based on two international legal models.[6]

The first one is the so-called "Gross Disparity" discipline described in Art. 3.2.7., Unidroit Principles, according to which "(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependency, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and (b) the nature and purpose of the contract.".

The second one, is Art. 4:109, Principle of European Contract Law, according to that «a party may avoid a contract if, at the time of the conclusion of the contract: a) it was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and b) the other party knew or ought to have known of this and, given the circumstances and purpose of the first party's situation in a way which was grossly unfair or took an excessive benefit».

4. The unfair advantage of economic dependency.

Once defined the economic dependency, the purpose of the paper is to analyse the most problematic instances deriving from the misuse of such situation. In fact, in all those cases, the weakness of self-employed workers would force them to bear the imposition of unfavourable contractual conditions, otherwise they would be exposed to the risk of being excluded from the labour market.

At this regard, Art. 3, Act n. 81/2017 identifies two main categories. The first is referred to the "black list" of unfair terms, which attributes the client the right to unilaterally change terms and conditions of the contract, to withdraw from the contract without adequate notice or to determine payment terms exceeding sixty days. In those cases, it is automatically assumed that the strong contractual party is abusing its dominant position. In other words, the Legislator has established that there is no possibility for the client to unilaterally modify the contract, otherwise those clauses are (according to the letteral wording of the norm) 'ineffective'.

[6] Perulli A., *Un Jobs Act per il lavoro autonomo: verso una nuova disciplina della dipendenza economica?*, in *Rivista Italiana di Diritto del Lavoro*, 2015, 1, 119 ff.

The norm is clearly based on the model of the Consumer Regulation[7] (Art. 33, Legislative Decree n. 206/2005, "Consumer Code") with a significant difference. While the Self-employed Statute establishes that unfair terms are *ineffective*, the Consumer Code states the *nullity* of such clauses, according to the so-called "*Invalidity for protection*".[8] Whether those two expressions, '*nullity*' and '*ineffectiveness*' should be, in this specific case, considered as two synonyms is not certain. However, since in both cases the contractual relationship has an asymmetrical nature, it can be assumed that the expression 'ineffective' refers to the nullity with a protective function. In fact, the ratio pursued by Art. 3 is to offer to the self-employed worker, the weak part of the relationship, tools that might adjust an imbalanced relationship. Differently, it would be unreasonable to adopt different sanctioning systems with regard to similar situations.

By the way, the common aspect of both disciplines is to tackle the asymmetry within the relationship between the parties by only intervening on the invalid clause and leaving the contract effective for the rest.

Focusing the attention on the second circumstance of the misuse of the economic supremacy by the client, it occurs when the client refuses to sign a written contract. Through this rule, the Legislator requires the written form in order to protect the weaker partner of the contractual relationship,[9] since the sign of a contract prevents from the risk of any change of terms and condition. In particular, such refusal assumes a precise meaning in the eyes of the Legislator, since it indicates the intention to mask the will to harm the interests of the self-employed worker.

The legislative provision of formal requirement constitutes, however, an exception to the general principle of freedom of forms,[10] under which the parties choose which negotiating form has to be adopted. Such exception could be explained taking into consideration the fact that within the European Union law system, the form is often used as a protecting measure for the weaker party, especially in the case of asymmetric contracts, characterized by the opposition of a strong party to a weaker one. In this situation, the infringement of the formal requirement provokes the nullity of the contract.

So, the form, in its protective garb (hence the expressions 'form of protection')[11] constitutes an element of validity of the contract and at the same time it guarantees an adequate information regarding the content of the contract, in response to the need for

[7] Art. 33. Unfair terms. 1. In the contract concluded between the consumer and the professional, clauses that, in spite of good faith, determine a significant imbalance of the rights and obligations deriving from the contract are considered unfair to the consumer. 2. Clauses that have as their object, or effect, of: (…) h) allow the professional to withdraw from contracts without reasonable notice, except in the case of just cause; m) allow the professional to unilaterally modify the clauses of the contract, or the characteristics of the product or service to be supplied, without a justified reason indicated in the contract itself (…).

[8] Art. 36. 1. The clauses described by Articles 33 and 34 are null while the contract remains valid for the rest. (…).

[9] Betti E., *Teoria generale del negozio giuridico*, Edizioni Scientifiche Italiane, Napoli, 2002, 125 ff.; Di Giovanni F., *La Forma*, in Gabrielli E. (eds.), *I contratti in generale*, Utet, Torino, 2006, 887 ff.; Scalisi V., *Contratto e regolamento nel piano d'azione delle nullità di protezione*, in *Rivista di Diritto Civile*, 2005, 1, 459 ff.; Bianca C.M., *Diritto civile*, III, Giuffrè, Milano, 2003, 273 ff.

[10] Giorgianni M., *Forma degli atti,* in *Enciclopedia del diritto*, Giuffrè, Milano, 1968, 988 ff.

[11] Irti N., *Studi sul formalismo negoziale*, Cedam, Padova, 1997, 80 ff.

transparency. Thus, the written form of the contract removes the danger of alterations and oral modifications.

Nevertheless, it seems that the formal requirement enshrined in Art. 3 does not exactly refers to the overmentioned case of the 'protective form'. In fact, the infringement of such provision does not determine the invalidity of the contract, but only the right to compensation for damages.

In addition, the norm does not require any specific minimum content of the contract, otherwise, the contractual freedom would be compromised.

5. The provision on the compensation for damages. Rethinking about the function of civil liability from the perspective of labour law.

As highlighted, Art. 3, Act no. 81/2017 provides a right for compensation in both cases of unfair terms and refusal to conclude an agreement in written form. With specific regard to the second circumstance, the compensation arises automatically from the refuse of a written contract and independently from the existence of a real loss or damage. In other terms, civil liability seems to be exceptionally used in order to prevent damages and to punish the wrongdoer and not to compensate the injured party, as it traditionally occurs within the Italian legal framework.

The provision suggests a wider analysis on the functions of civil liability into the Italian legal system. At this regard, the issue is to understand whether it is possible to laid down the basis for a multi-functional civil liability discipline in our legal framework.

Nowadays, consensus is still missing amongst academics and practitioners on a common approach to tackle such issue; on the contrary, it is possible to identify two main positions which have been adopted by the Corte di Cassazione and by the most important authors in their contributions.

According to the traditional position, civil liability does not have a punitive scope under Italian law, as its role should be confined to the need of compensating the injured party.[12] In this regard, the Italian Corte di Cassazione pointed out that the matter (objective) of punishment and of sanction is alien to the system.

From this traditional point of view, the punitive purpose in civil liability would entail a violation of the general principles of the 'Ordre Publique' and of the 'wrongful enrichment', which inform the Italian legal system.

On the contrary, the most recent developments as emerging in legal literature, highlight a multifaceted civil liability figure which is characterized not only by a reparatory function, but also by punitive and preventing features.[13]

[12] Among the authors, see in particular Rodotà S., *Il problema della responsabilità civile*, Giuffrè, Milano, 1967; Constitutional Court, 27th October 1994, no. 372, in *Foro italiano*, I, 3297.

[13] Ponzanelli G., *La irrilevanza costituzionale del principio di integrale riparazione del danno*, in Bussani M., *La responsabilità civile nella giurisprudenza costituzionale*, Napoli, 2006, 67; Perlingeri P., *La responsabilità civile tra indennizzo e risarcimento*, in *Rassegna di diritto civile*, 2004, 1061 ff.; Di Majo A., *La responsabilità civile nella prospettiva dei rimedi: la funzione deterrente*, in Sirena P., *La funzione deterrente della responsabilità civile alla luce delle riforme straniere e dei Principles of European Tort Law*, Giuffré, Milano, 2011, 21.

A further corroboration of the multifaceted identity of civil liability comes from the European Group on Tort Law (also known as The Tilburg Group) which has developed the topic of civil liability based on the contribution of several European and international academics. In particular, in its 'Principles of European Tort Law' The Tilburg Group highlighted that 'damages also serve the aim of preventing arm' (Art. 10:101).

Recently, the Joint Division of the Italian Corte di Cassazione ruled, for the very first time, in favour of the enforceability in Italy of foreign decisions granting the payment of so-called punitive damages (Cass. civ. 16601/2017).

There are, in fact, many cases of civil liability with punitive aim in both private law and labour law fields. In particular, Art. 125, legislative Decree no. 30/2005 ('Code of Industrial Property') empowers the judge to impose the payment of a pecuniary amount in relation to the violation and the delay in the execution of the judicial orders.[14] This case is known also in the Common Law system (so-called 'disgorgement damages'[15]). Moreover, the law concerning the publishing of newspaper and books (Art. 12, Act no. 47/1948). In case of libel a specific amount, calculated with regard to the distribution of the press, has to be paid.[16]

With specific regard to the Labour law field, Art. 18, par. 2, Act no. 300/70, (*Statuto dei Lavoratori*) provides that, in case of an employee's wrongful dismissal, the pecuniary sanction shall never be lower than the remuneration of five months: in this case, the payment of the pecuniary sanction does not depend on a real damage, whose amount could hypothetically be lower than five months. Also Art. 28, par. 2, legislative Decree no. 81/2015, disposes that in case of an improper use of fixed-term employment contract, such working arrangement will be converted into an open-ended one. In addition, a compensation (whose amount has to be determined between 2,5 and 12 monthly retribution) has to be paid.[17] Furthermore, a similar provision has been recently introduced by the legislator as a solution against the damage to the image of the Public Administration caused by the employee.[18]

[14] Pardolesi R., *Risarcimento del danno, retroversione degli utili e deterrence: il modello nord-americano e quello europeo*, in *Diritto industriale*, 2012, 2, 133; Pardolesi R, *La retroversione degli utili nel nuovo codice dei diritti di proprietà industriale,* in *Il diritto industriale*, 2005, 1, 38 ff.; Pardolesi R., *Un'innovazione in cerca di identità*, in *Danno e responsabilità*, 2006, 1605 ff.; Galli C., *Risarcimento del danno e retroversione degli utili: le diverse voci di danno,* in *Diritto industriale*, 2012, 2, 109 ff.

[15] Smith L.D., *Disgorgement of the profit of breach of contract: Property, contract and efficient breach*, in *Canadian Business Law Journal*, 24, 2005, 121 ; Mc Camus J.D., *Disgorgement for Breach of Contract: A comparative Perspective*, , *Loyola of Los Angeles Law Review*, 1st January 2003, accessible at the following link:
https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2362&context=llr

[16] Zeno Zencovich V., *Il risarcimento esemplare per diffamazione nel diritto americano e la riparazione pecuniaria ex art. 12 della legge sulla stampa*, in *Responsabilità civile e previdenza*, 1983, 40 ff.

[17] According to Art. 28, par. 2, «In cases of transformation of the fixed-term contract into an open-ended contract, the judge condemns the employer to pay compensation for the damage in favor of the worker by establishing an all-inclusive compensation in the amount between a minimum of 2.5 and a maximum of 12 monthly payments of the last salary, taking into account the criteria indicated in article 8 of Law no. 604 of 1966. […]».

[18] According to Art. 55-quarter, paragraph 3-quarter of legislative Decree no. 165/2001 on Public Employment, «The amount of the compensable damage is remitted to the judge's equitable assessment also in relation to the relevance of the fact. In any case the amount cannot be less than six months of the last salary, plus interest and costs of justice».

The issue is whether the provision of Art. 3, Act no. 81/2017 might be considered as an exceptional case of civil liability with a deterrent and punitive scope. The right to a compensation derives automatically by the existence of those situations described in Art. 3.

If so, the problem could be addressed to the methods of calculating such damage, since the norm does not identify any parameter. Differently from the overmentioned cases, the norm does not provide a specific amount of compensation. On a practical level, Jurisprudential decisions on this aspect still miss. Thus, such profile will be problematic and will probably have a negative impact on the applicability of such rule.

6. Conclusion. The blurred frontier between labor law and private law.

In conclusion, in order to tackle the contractual asymmetry, the analysed discipline seems to show the tendency to import private law tools in labour law.

The economic dependency of self-employed workers has been, in fact, regulated similarly to other cases, belonging to the private law field, as the Subcontracting Agreement and the Consumer regulation, even if with significant differences.

Thus, it is necessary to understand where the protective intervention is directed: in a logic of protection of the weak contractor or in a perspective of guarantee of the subject as a worker.

It is therefore necessary to rethink the relationship between private and labour law, in order to establish a relationship of cooperation between the two subjects.

In this perspective, the overmentioned article is an excellent opportunity to verify the possibility to adopt an 'hybrid solution', based on a shared discipline.

In this sense, as pointed out by some authors, there is a general trend to rediscovery traditional private law rules in order to implement the protection of the weaker party and make it more effective.

In a phase of "identity crisis" of the traditional forms of protecting measures, the use of private law tools could paradoxically lead to the main goal of labour law: the protection of disadvantaged subjects.

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