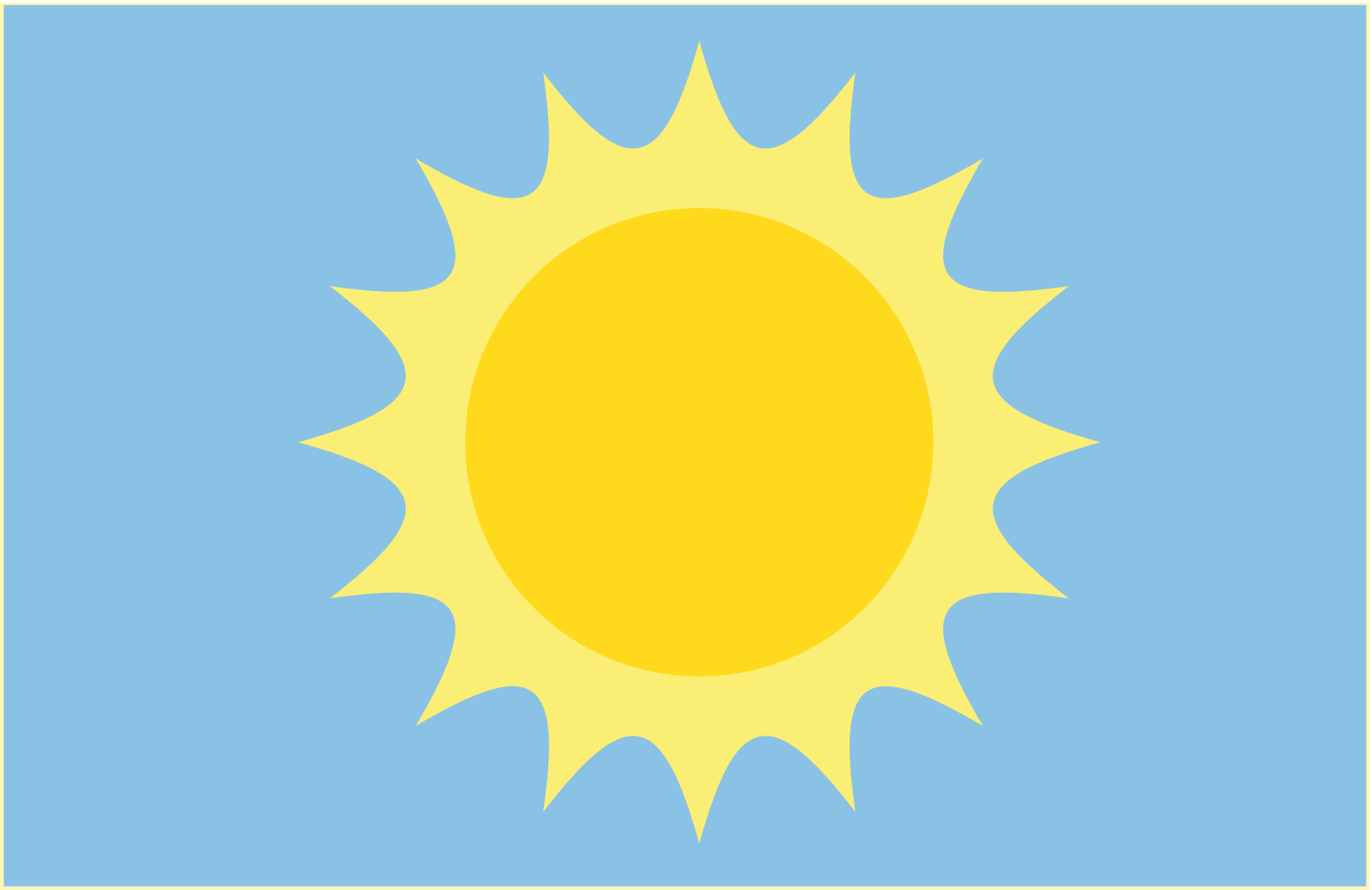

AN ASSESSMENT OF THE EU'S DRAFT GUIDELINES ON THE APPLICATION OF EU COMPETITION LAW TO COLLECTIVE AGREEMENTS OF THE "SOLO SELF-EMPLOYED"

BY
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AN ASSESSMENT OF THE EU'S DRAFT GUIDELINES ON THE APPLICATION OF EU COMPETITION LAW TO COLLECTIVE AGREEMENTS OF THE SOLO SELF-EMPLOYED

By Despoina Georgiou

On December 9, 2021, the European Commission published its draft Guidelines on collective bargaining for solo self-employed persons. The Guidelines aim to remove existing competition law restrictions to collective bargaining for vulnerable solo self-employed people. This article provides an overview and initial assessment of the draft Guidelines. After demonstrating the reasons that led to the adoption of the new instrument (part 1), the article analyses its protective provisions (part 2) and assesses its potential impact (part 3). As it is explained, even though the draft Guidelines go a long way in providing protection to a large category of self-employed persons, they (i) do not capture all those who are in need of protection; (ii) do not address issues regarding the application of Article 101 to decisions of associations of self-employed persons-undertakings or agreements between self-employed persons-undertakings concluded outside the context of collective bargaining negotiations that concern the improvement of their working conditions; and (iii) do not address the possible application of Article 102 to collective agreements by self-employed persons-undertakings.

01
BACKGROUND

On December 9, 2021, the European Commission published its draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons. The draft Guidelines are part of a package which includes a proposal for a Directive on improving the working conditions in platform work[2] and a Communication on harnessing the full benefits of digitalisation for the future of work.[3]

The aim of the draft Guidelines is to remove existing competition law restrictions to collective bargaining for self-employed people who are in need of protection. Under EU competition law, only 'associations of workers' are allowed to bargain collectively for the amelioration of their working conditions. This was decided by the European Court of Justice (hereafter 'ECJ' or 'the Court') in the seminal case of *Albany*.[4] The case concerned the compatibility with competition law provisions of a sectoral pension scheme created after a collective agreement between management and labor. Using a teleological approach,[5] the Court found that, under "an interpretation of the provisions of the Treaty as a whole which is both effective and consistent, agreements concluded in the context of collective negotiations between management and labor […] must, by virtue of their nature and purpose, be regarded as falling outside the scope of [Article 101(1)] of the Treaty."[6] This way, a "limited antitrust immunity"[7] was created for associations of workers to bargain collectively for their rights.

The *Albany* rubric, however, was not applied in a subsequent case concerning a collective agreement concluded by an association of self-employed medical specialists and their counterparts.[8] Emphasizing that the Treaty "contains no provisions […] encouraging the members of the liberal professions to conclude collective agreements,"[9] the ECJ said that the collective agreement in question could not "by reason of its nature and purpose, fall outside the scope of [Article 101(1) of the Treaty]."[10]

The limits of the *Albany* formula were tested in *FNV Kunsten*.[11] FNV was a mixed Dutch trade association representing both employed and self-employed orchestra musicians. After concluding a collective agreement with the respective association of employers, a question arose regarding whether its self-employed members could take advantage of the agreed worker-protective measures. The Court noted that, as far as the employed musicians were concerned, the *Albany* exception applied, and the agreement was not caught by Article 101 TFEU. However, "in so far as [the] organization carried out negotiations acting in the name, and on behalf, of those self-employed persons who were its members, it [did] not act as a trade union association and therefore as a social partner, but, in reality, [acted] as an association of undertakings."[12] Since the provisions regarding the self-employed members "did not constitute the result of a collective negotiation between employers and [workers]," the Court decided that they "could not be excluded, by reason of their nature, from the scope of Article 101(1) TFEU."[13]

The only exception the Court was ready to make regarded "false self-employed" musicians. Following settled case law, the ECJ noted that "a service provider can lose his sta-

2 European Commission, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work COM(2021) 762 final. Available here: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605 .

3 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Better working conditions for a stronger social Europe: Harnessing the full benefits of digitalisation for the future of work COM(2021) 761 final.

4 C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751.

5 M. Lorenz, *An Introduction to EU Competition Law* (CUP 2013) 64. See also R. van den Bergh & P. Camesasca, "Irreconcilable principles? The Court of Justice exempts collective labour agreements from the wrath of antitrust" [2000] 25(5) ELRev 492.

6 *Albany* (n 4) para 60.

7 Opinion of AG Jacobs in *Albany* (n 4) para 183.

8 C-180 to 184/98, *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-06451.

9 *Ibid*. para 70.

10 *Ibid*.

11 C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden* [2014] Electronic Reports of Cases

12 *Ibid*. para 28.

13 *Ibid*. para 30.

tus of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market but is entirely dependent on his principal."[14] False self-employed musicians thus could take advantage of the favorable measures concluded by the FNV union if they were not 'undertakings' but 'workers' for the purposes of EU provisions. It was left to domestic courts to examine the *de facto* working relationship between the parties and classify them accordingly.

From the above, it becomes clear that EU competition law poses restrictions on the self-employed persons' right to bargain collectively for the amelioration of their working conditions. While collective bargaining agreements concluded between associations of workers and employers are not captured by Article 101(1) TFEU, the same is not true for agreements concluded between associations of employers and self-employed persons-undertakings. If these appreciably restrict competition between Member States by object or effect, they are caught by Article 101(1) TFEU. This means that, if the agreement cannot be granted an individual exception under paragraph 3 of that article, the association will be exposed to large fines.

The competition law restraints imposed on the right of self-employed persons to bargain collectively is problematic. As various academics have pointed out, the right to collective bargaining is so pivotal[15] that it should be enjoyed by both employed and self-employed individuals.[16] The problem becomes even more acute if we consider the number of working persons who are currently classified as 'self-employed' albeit being under the control of their principal(s) and economically dependent upon them. Not only are these persons disenfranchised, most of the time, from EU labor and social protection legislation, but they are also unable – because of competition law restraints – to bargain collectively for their rights.

With these issues in mind, the European Commission launched on 30 June 2020 a first-stage consultation of the social partners on collective bargaining for the self-employed. As Executive Vice-President Margrethe Vestager, in charge of competition policy, said:

> *"today we are launching a process to ensure that those who need to can participate in collective bargaining without the fear of breaking EU competition rules. As already stressed on previous occasions the competition rules are not there to stop workers forming a union but in today's labour market the concept 'worker' and 'self-employed' have become blurred. As a result, many individuals have no other choice than to accept a contract as self-employed. We therefore need to provide clarity to those who need to negotiate collectively in order to improve their working conditions."*[17]

The consultations concluded with the publication by the European Commission of draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons.

02
THE DRAFT GUIDELINES

The draft Guidelines set out principles for assessing the compatibility of agreements concluded between associations of solo self-employed persons and their counterparties with Article 101 TFEU. More particularly, the draft Guidelines (i) clarify that certain categories of collective agreements concluded with solo self-employed people fall outside the scope of Article 101 TFEU and (ii) specify that the Commission will not intervene against certain other categories of collective agreements concluded with the solo self-employed.

In respect of the first category, the draft Guidelines stipulate that agreements will fall outside the scope of Article 101 TFEU if they (a) are concluded after collective negotiations between associations of solo self-employed persons who are "in a situation comparable to that of workers" and their counterparts and (b) concern their working conditions. The term 'solo self-employed' refers to "persons who do not have an employment contract or who are not in an employ-

14 *Ibid*. para 33 and references therein.

15 On the importance of collective bargaining for reducing inequality and ameliorating working standards see Keith Ewing & John Hendy, "New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining" (2017) 46(1) ILJ 33.

16 Valerio de Stefano & Antonio Aloisi, "Fundamental Labour Rights, Platform Work and Human-rights Protection of Non-standard Workers" (2018) Bocconi Legal Studies Research Paper No. 3125866; Mark Freedland & Nicola Kountouris, "Some Reflections on the "Personal Scope" of Collective Labour Law" (2017) 46(1) ILJ 67.

17 European Commission, "Competition: The European Commission Launches a Process to Address the Issue of Collective Bargaining for the Self-Employed" (30.05.2020) European Commission <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1237> (accessed 31.12.2021).

ment relationship and who rely primarily on their own personal labour for the provision of the services concerned."[18] Hence, persons who employ staff and who do not rely primarily on their own personal labor are not covered by the draft Guidelines. Persons are considered not to rely on their own personal labor when their economic activity consists in the sharing or exploitation of goods or assets (i.e. rental of housing), or the resale of goods or services (i.e. resale of automotive parts). Persons can, however, make certain investments in goods or assets in order to be able to provide their services. Hence, a cleaner can invest in cleaning materials and a musician can invest in the purchase of a musical instrument without falling outside this category. As it stipulated, "in these instances, the goods are used as an ancillary means to provide the final service"[19] and so, the person will still be considered to be "solo self-employed."

From all solo self-employed persons, the Guidelines specify that Article 101 TFEU will not capture the collective agreements of those who are in a "situation comparable to that of workers."[20] Three categories of solo self-employed persons are identified as being in a situation comparable to workers: (a) those who are economically dependent; (b) those who work "side-by-side" with workers; and (c) those who provide their services through digital labor platforms.[21]

The first category (i.e. economically dependent solo self-employed persons) includes those who provide their services exclusively or predominantly to one principal.[22] More particularly, the draft Guidelines stipulate that a solo self-employed person will be considered to be in a situation of economic dependence if he or she "earns at least 50% of his or her total annual work-related income from a single counterparty."[23]

The second category captures solo self-employed persons who perform the same or similar tasks 'side-by-side' with workers for the same counterparty. The persons are considered to work 'side-by-side' with workers when "they provide their services under the direction of their counterparty and do not bear the commercial risks of the counterparty's activity or enjoy any independence as regards the performance of the economic activity concerned."[24]

The third category relates to solo self-employed persons who provide services through digital labor platforms. The term "digital labor platform" is defined in the same way in the draft Guidelines as in the Commission's proposal for a Directive on improving working conditions in platform work.[25] Individuals who cannot benefit from the legal presumption of "worker" status established in Article 4 of the proposed Directive or whose status as "workers" has been successfully rebutted (Article 5), will fall under the category of "solo self-employed persons who are in a situation comparable to that of workers" for the purposes of the draft Guidelines.

"The second category captures solo self-employed persons who perform the same or similar tasks 'side-by-side' with workers for the same counterparty

In general, solo self-employed persons who fall under one of the aforementioned three categories are considered to be in a situation comparable to that of workers. This means that their collective agreements with their counterparties will not be captured by Article 101 TFEU, provided the other preconditions set in the draft Guidelines apply. More particularly, for the exclusion to apply, the agreements need to be concluded with a counterparty and (need) to relate to the solo self-employed persons' working conditions. These include matters such as remuneration, working time and working patterns, holiday, leave, physical spaces where work takes place, health and safety, insurance and social

18 Draft Guidelines (n 1) para 19.

19 *Ibid*.

20 *Ibid*. para 23.

21 *Ibid*. chapter 3.

22 *Ibid*. para 24.

23 *Ibid*. para 25.

24 *Ibid*. para 26.

25 Proposal for a Directive on improving working conditions in platform work (n 2), Article 1(1). For an assessment of the potential loopholes in the personal scope of the proposed Directive see Despoina Georgiou, "Some Thoughts on Potential Loopholes in the Personal Scope of the Commission's Proposed Directive on Platform Work," available at: https://www.researchgate.net/publication/356971811_Some_Thoughts_on_Potential_Loopholes_in_the_Personal_Scope_of_the_Commission's_Proposed_Directive_on_Platform_Work and Antonio Aloisi & Despoina Georgiou, "Two steps forward, one step back: The EU's plans for improving gig working conditions" (07.04.2022) Ada Lovelace Institute https://www.adalovelaceinstitute.org/blog/eu-gig-economy.

security, and conditions under which the solo self-employed person is entitled to cease providing his/her services, for example, in response to breaches of the agreement relating to working conditions.[26] Collective agreements which go beyond the regulation of working conditions by determining the conditions (in particular, the prices) under which services are offered by the solo self-employed persons or by the counterparty to consumers, or which limit the freedom of employers to hire the labor providers that they need are not covered by the draft Guidelines.[27] The same applies to decisions by associations of self-employed persons-undertakings and unilateral agreements concluded between self-employed persons-undertakings (not with a counterparty). These do not fall within the scope of the draft Guidelines and are captured by Article 101 TFEU.

Apart from solo self-employed persons who are in a "situation comparable to workers," the draft Guidelines also cover the solo self-employed who are in an "imbalanced negotiating position towards their counterparty." However, unlike collective agreements with the former category (solo self-employed persons who are in a "situation comparable to workers") which are not captured by Article 101 TFEU, collective agreements with the latter category (i.e. solo self-employed who are in an imbalanced negotiating position towards their counterparty) could still fall under the scope of Article 101. Nevertheless, the Commission commits in the draft Guidelines not to take action against them.

Two categories of solo self-employed persons are considered to be in an "imbalanced negotiating position": (a) those who are facing an imbalance in bargaining power due to negotiation with counterparties of a certain strength and (b) those who are entitled to bargain collectively pursuant to national or EU legislation.

To identify the persons who fall within the first category (i.e. 'solo self-employed persons who are facing an imbalance in bargaining power due to negotiation with counterparties of a certain strength'), the Commission sets two quantitative criteria. As it is stipulated, such an imbalance exists (i) when the solo self-employed negotiate or conclude collective agreements with one or more counterparties which represent the whole sector or industry or (ii) when the solo self-employed negotiate or conclude collective agreements with a counterparty whose annual aggregate turnover exceeds 2 million euro or whose staff headcount exceeds 10 workers (individually or jointly).[28]

The second category includes persons who are entitled to bargain collectively pursuant to national or EU legislation. The Commission notes that, in some instances, national legislators have recognized the imbalance in the bargaining power between the parties and have taken measures to address it either by explicitly granting solo self-employed persons in certain professions the right to collective bargaining or by excluding their collective agreements from the scope of national competition law.[29] In a similar vein, at the EU level, the Copyright Directive[30] has set the principle that authors and performers shall be entitled to receive appropriate and proportionate remuneration when they license or transfer their exclusive rights for the exploitation of their works and any other subject matter protected by copyright and related rights.[31] In the draft Guidelines, the Commission commits not to intervene against collective agreements that have been negotiated and concluded by solo self-employed persons in pursuance to national or EU legislation adopted in order to redress the imbalance in the bargaining power between the parties.

To better explain how the Commission will apply Article 101 to collective agreements between solo self-employed persons and their counterparties, the draft Guidelines provide several examples that demonstrate the Commission's approach.

03 ASSESSMENT

The draft Guidelines should be welcomed as a big accomplishment. Together with the Commission's proposed Directive on improving the working conditions in platform work, they demonstrate the EU's strong commitment to delivering on the European Pillar of Social Rights. The draft instrument removes competition law restrictions to collective bargaining for vulnerable solo self-employed persons,

26 Draft Guidelines (n 1) para 16.

27 *Ibid*. para 18.

28 *Ibid*. para 35.

29 *Ibid*. para 36.

30 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1 OJ L 130, 17.5.2019, p. 92–125.

31 Draft Guidelines (n 1) paras 37-38.

allowing them to unionize and bargain collectively for the improvement of their working conditions. With the adoption of the new instrument, trade unions and other associations will be able to represent, negotiate, and conclude collective agreements for solo self-employed persons who fall within the ambit of the draft Guidelines without the fear of being found liable for breaching Article 101; something that would expose them to large fines.

An important element of the proposed Guidelines is that they cover persons working both online and offline. Hence, unlike the proposed Directive on improving the working conditions in platform work – that applies only to persons providing services through digital labor platforms – the draft Guidelines cover individuals who are engaged in all types of work.

At the same time, there is still room for improvement. Some categories of self-employed persons are not covered by the draft Guidelines despite being in need of protection. More particularly, the following aspects can prove problematic.

> *An important element of the proposed Guidelines is that they cover persons working both online and offline*

The draft Guidelines center around the concept of "personal work." This concept has been advanced in the competition law context by Lianos, Countouris & De Stefano[32] and has also been supported by Rainone[33] & Biasi.[34] The Directive covers 'solo self-employed' persons defined as "persons who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labor for the provision of the services concerned."[35] This means that self-employed persons who employ one or more individuals are not covered by the draft Guidelines, even if they have little influence over their working conditions because they are in a situation comparable to workers (for example, because they are dependent on one or two principals/clients for subsistence) or because they are in an imbalanced negotiating position towards their counterparty.

Furthermore, the requirement that the economic activity of persons must not rely on the exploitation of goods or assets might prove restrictive for persons who have to make substantial investments in tools, machinery, or software in order to be able to provide their services. While it is stipulated that individuals can invest in certain goods or assets in order to be able to provide their services (i.e. a cleaner can invest in cleaning materials or a musician can invest in a musical instrument), it is not clear *how much* a person can invest before losing his or her 'solo self-employed' status.

Moreover, the category of "economically dependent solo self-employed persons" is narrowly defined. In order for a solo self-employed person to be considered to be "economically dependent," he or she must derive more than 50 percent of his or her work-related income from one principal. Arguably, this threshold is set high, especially considering that many persons, nowadays, work for multiple principals. It is not an uncommon phenomenon, for instance, for academics or persons in the liberal professions to be engaged in numerous, short -term contracts with multiple principals/clients. For these persons, the 50 percent threshold will be difficult to ascertain. Hence, they will not be considered to be "economically dependent" for the purposes of the draft Guidelines and will not be provided protection,[36] even though they might, in reality, be reliant on all their principals for subsistence.

The category of solo self-employed persons working "side-by-side" with workers might prove to be equally restrictive. For solo self-employed persons to fall within this category they must work under the same conditions as "workers" employed by the counterparty. In many areas, however, there is not a permanent employee that works under the same conditions as the self-employed and with whom a comparison can be made. Furthermore, employers can alter their business model so that they do not engage em-

32 Nicola Countouris, Valerio De Stefano, & Ioannis Lianos, "The EU, Competition and Workers' Rights" CELS Research Paper Series 2/2021; Ioannis Lianos, Nicola Countouris, & Valerio De Stefano, "Rethinking the competition law/labour law interaction: Promoting a fairer labour market" (2019) 10(3) ELLJ 291-333; Nicola Countouris & Valerio De Stefano, "The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively." in Bernd Waas & Christina HieBl (eds.), *Collective Bargaining for Self-Employed Workers in Europe* (Kluwer Law International B.V. 2021) 9.

33 Silvia Rainone & Nicola Countouris, "Collective Bargaining and Self-Employed Workers: The Need for a Paradigm Shift" (2021) ETUI Policy Brief 2021.11.

34 Marco Biasi, "'We will all laugh at gilded butterflies.' The shadow of antitrust law on the collective negotiation of fair fees for self-employed workers" (2018) 9(4) ELLJ 354-373.

35 Draft Guidelines (n 1) para 19.

36 These persons will be provided protection if they fall under one of the other categories of solo self-employed persons covered by the Directive.

ployed and self-employed persons under the same or similar conditions. This point is also raised by De Stefano who argues that "working side-by-side with workers can be too easily circumvented."[37]

Furthermore, paragraph 26 provides that solo self-employed persons work side-by-side, and hence are in a comparable position, with workers when they "provide their services under the direction of their counterparty and do not bear the commercial risks of the counterparty's activity or enjoy any independence as regards the performance of the economic activity concerned."[38] Under many modern-day contracts for services, however, solo self-employed persons assume various financial and commercial risks (i.e. payment-related risks, material and human capital investment and maintenance risks, redeployment risks, health and safety risks, third-party liability risks etc.).[39] Moreover, many solo self-employed persons enjoy some level of independence in the performance of their tasks. Arguably, those solo self-employed who assume business risks and have a level of autonomy as regards the performance of their economic activity will not be considered to work 'side-by-side' with workers and will not be afforded protection under the draft Guidelines.

Finally, even though the Commission commits, in the draft Guidelines, not to act against collective agreements concluded by solo self-employed authors or performers in pursuance to the Copyright Directive to ensure their fair and appropriate remuneration for the exploitation of their works; it is not clear how the Commission will act vis-à-vis collective agreements concluded by the same persons (i.e. authors or performs) that regard working conditions other than remuneration. Collective agreements, for instance, concluded by solo self-employed authors, journalists, artists, musicians, singers, actors etc. might not be afforded protection under the draft Guidelines if they concern matters other than the remuneration for the exploitation of their works. Considering that these persons (i) usually work for multiple principals (so they do not derive more than 50 percent of their income from one source) and (ii) are usually made to assume a certain level of business risks while having some independence in regards to the performance of their tasks, it is unlikely that they will be considered to be "economically dependent" or working "side-by-side" with workers. Hence, if they do not provide their services via digital labor platforms or they do not satisfy the quantitative criteria set out in paragraph 35, they might not be covered by the draft Guidelines.[40]

From the above it becomes clear that, even though the draft Guidelines go a long way in removing competition law restraints to collective bargaining for many solo self-employed people, they will not cover all those who are in need of protection. As De Stefano notes, "the Guidelines are still not entirely sufficient to provide collective bargaining protection to all workers who need it and have a right to collective bargaining under ILO's and Council of Europe's Standards."[41]

> ***The category of solo self-employed persons working "side-by-side" with workers might prove to be equally restrictivee***

It should also be noted that the draft Guidelines set out the Commission's approach vis-à-vis collective agreements concluded by or for certain categories of solo self-employed persons and their counterparts under Article 101 TFEU. As such, they do not provide guidance on the Commission's approach to other contentious issues concerning the relationship between EU labor and competition law. More particularly, the draft Guidelines do not cover decisions by associations of self-employed persons-undertakings or agreements concluded between self-employed persons-undertakings with one another (i.e. not with counterparties in the context of collective bargaining negotiations), even if they concern the improvement of their working conditions.

These can still be captured by Article 101 and have to be assessed for their object and effects on inter-State trade. Hence, an association of solo self-employed persons cannot adopt a decision urging its members not to engage with a platform that does not abide by certain standards or take decisions on worker-protective behavior (i.e. set minimum prices for the services of self-employed members) without

37 https://twitter.com/valeriodeste/status/1468907829306212359.

38 Draft Guidelines (n 1) para 26.

39 Despoina Georgiou, "'Business Risk-Assumption' as a Criterion for the Determination of EU Employment Status: A Critical Evaluation" (2022) 50(1) ILJ 109-137. Available here: https://academic.oup.com/ilj/advance-article/doi/10.1093/indlaw/dwaa031/6104500?login=true.

40 The same applies to other categories of solo self-employed persons. As De Stefano notes, "domestic workers who often are misclassified as self-employed, don't work side by side with other workers, and often don't receive 50% of their income from a single household are excluded if they don't work for a platform." See https://twitter.com/valeriodeste/status/1468907830807773184.

41 https://twitter.com/valeriodeste/status/1468907832296755200.

the risk of attracting the attention of competition law authorities. In *Consiglio nazionale dei geologi*,[42] for instance, an Italian professional organization of geologists was fined for suggesting the introduction of minimum fees for its self-employed members. Similar decisions or guidelines issued by associations of self-employed persons-undertakings that set, for instance, minimum charges for services or encourage the adoption of worker-protective behavior, can be found to infringe Article 101, provided that the rest of the preconditions of that Article are met.

The same applies to agreements concluded between solo self-employed persons (or decisions of their associations) to boycott certain employers who refuse to enter into collective bargaining negotiations. As paragraph 16 of the draft Guidelines provides, "agreements under which solo self-employed persons collectively decide not to provide services to particular counterparties, for example because the counterparty is not willing to enter into an agreement on working conditions require an individual assessment. Such agreements restrict the supply of labor and may therefore raise competition concerns."[43]

The same applies to agreements concluded between solo self-employed persons (or decisions of their associations) to boycott certain employers who refuse to enter into collective bargaining negotiations

Decisions by associations of self-employed undertakings and agreements between self-employed persons-undertakings can also be found to infringe Article 102 if they constitute an abuse of the undertakings' collective dominant market position.[44] As Lianos, Countouris & De Stefano observe, the activities of associations of self-employed persons-undertakings "may be found to constitute an abuse of a dominant position (e.g. excessive pricing), even if the arrangement does not fall under Article 101 TFEU, for instance because of the *Albany* exception."[45]

Finally, it should be noted that regardless of whether the collectively agreed scheme is captured by Article 101 TFEU, the social security institution that provides it can be found to infringe Article 102 if it holds a dominant market position which it abuses. In *Pavlov*,[46] for instance, the agreed pension scheme was found to be dominant but "survived the day"[47] because it was not considered to abuse its dominant market position.[48] In other cases, collectively agreed schemes were exempted under Article 106(2) TFEU as services of general economic interest.[49] As Schiek & Gideon argue, the important thing here is that, for collectively agreed schemes, there is not "an exclusion from Article 102 TFEU *per se* such as the '*Albany* exclusion' from Article 101 TFEU. Depending on the specific schemes, institutions set up by collective agreement could thus still potentially infringe Article 102 TFEU, irrespectively of whether or not the agreement itself fell under Article 101 TFEU or not."[50]

Hence, even though the draft Guidelines go a long way in providing protection to a large category of self-employed persons, they (i) do not capture all those who are in need of protection; (ii) do not address issues regarding the application of Article 101 to decisions of associations of self-employed persons-undertakings or agreements between self-employed persons-undertakings concluded outside the context of collective bargaining negotiations that concern the improvement of their working conditions; and (iii) do not address the possible application of Article 102 to collective agreements by self-employed persons-undertakings.

42 C-136/12, *Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato and Autorità garante della concorrenza e del mercato v. Consiglio nazionale dei geologi* [2013] Electronic Reports of Cases.

43 Such agreements can be exempted if it can be shown that such a coordinated refusal to supply labor is necessary and proportionate for the negotiation or conclusion of the collective agreement, it will be treated for the purposes of these Guidelines in the same way as the collective agreement to which it is linked (or would have been linked in the case of unsuccessful negotiations).

44 For collective dominant position see C-395/96, *P Compagnie Maritime Belge* [2000] ECR I-1365, paras 41-42; T-193/02, *Laurent Piau v. Commission* [2005] ECR II-209, para 111.

45 Ioannis Lianos, Nicola Countouris, & Valerio De Stefano, "Rethinking the competition law/labour law interaction: Promoting a fairer labour market" (2019) 10(3) ELLJ 303.

46 *Pavlov* (n 8) paras 120-130.

47 Mark Freedland & Nicola Kountouris, "Some Reflections on the 'Personal Scope' of Collective Labour Law" (2017) 46(1) ILJ 61.

48 *Pavlov* (n 8) paras 120-130.

49 Dagmar Schiek & Andrea Gideon, "Outsmarting the gig-economy through collective bargaining - EU competition law as a barrier?" (2018) CETLS Online Paper Series 6, 7.

50 *Ibid*.

The Commission has invited interested parties to submit their comments on the draft Guidelines. As it has announced, it aims to publish the final version of the Guidelines in the second quarter of 2022. It remains to be seen whether the text will be amended to provide protection from competition law supervision to a larger category of vulnerable self-employed persons.

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