# Application of EU Competition law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons

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Collective bargaining is a means of mitigating the unequal bargaining power between employers and workers, thus allowing collective agreements to be an instrument capable of determining working conditions that are more favourable to workers. However, although the execution of collective agreements is worthy of protection as a fundamental right (cf. Articles 28 and 31 of the Charter of Fundamental Rights of the European Union), the truth is that these may raise some issues under competition law. Issues may arise if we consider that employees or employees' associations are undertakings or associations of undertakings[1] (addressees of competition rules), since by fixing contractual and price conditions (remunerations), these stipulations may have impacts on economic efficiency and the protection of consumer rights.

However, the case law of the Court of Justice (hereafter ECJ) has excluded from the concept of undertaking both employees[2] (subordinate workers) and 'false self-employed workers' - providers of services in a situation comparable to that of subordinate workers, i.e., under the direction of someone else and who do not assume economic risk[3]. Therefore, if the organisations representing these groups of workers enter into collective agreements aimed at promoting their labour conditions, they will not be subject to the competition rules. The same cannot be said in the case of an organisation of self-employed workers, whose agreements would be considered as being between undertakings. This would be subject to Article 101 (1) of the Treaty of the Functioning of the European Union (hereinafter TFEU). However, in view of the erosion of the employment relationship, the flexibility of working and employment conditions, the phenomenon of digitalisation of the labour market, among other socio-labour mutations, the traditional dichotomy of classification between employed and self-employed workers is increasingly blurred, promoting this paradigm change. This leads to many who are catalogued in the second category cannot use collective bargaining without violating the dictates of

[1] According to the jurisprudence of the Court of Justice, the following requirements must be considered in order to fulfil this concept (i) to be any economic entity that carries out an economic activity; (ii) that operates by offering goods and services in the Market; (iii) it does not matter if it aims at a profit, nor its financing method and legal status.
[2] Judgment *Albany* of 21/09/1999, Case C-67/96, EU:C:1999:430.
[3] Judgement *FNV Kunsten* of 4/12/2013, case C-413/13, EU:C:2014:2411.

competition law to solve the precariousness of their bonds, despite the fact that in several circumstances, they are also in an inferior negotiating position in relation to employers, not having a relevant isolated weight to determine decent working conditions (v.g. digital platform workers).

Although the literature has already put forward some solutions in light of the legal *status quo*[4], on 5 March 2021, the European Commission put forward a public consultation concerning the scope of application of the competition rules with regard to collective bargaining agreements undertaken by self-employed workers. This initiative culminated, on 9 December 2021, in the publication of the Approval of the content of a Draft Commission Communication on Guidelines on the application of EU Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-employed Employed Persons[5] .

Therefore, in regard to the scope of application, the present legal instrument[6] provides for two categories: (i) situations in which collective agreements are to be regarded as falling outside the scope of Article 101 TFEU; (ii) circumstances in which the Commission will not intervene, even though the respective collective agreements fall within the scope of Article 101 TFEU. Firstly, outlining the guiding axes of the first group, in it we find the situations of collective agreements of solo self-employed persons[7] comparable to workers falling outside Article 101 TFEU. In this circumscription we find the following groups: (i.i) economically dependent solo self-employed persons - "where he/she earns at least 50 % of his/her total annual work- related income from a single

[4] In summary, the solutions put forward were the following: (i) of subjective scope - exclude self-employed workers from the concept of undertaking, namely *personal work*; (ii) of substantive scope - apply Article 101(3) of the TFEU; or consider all collective bargaining as agreements between companies aiming at social policy objectives. For a more detailed reading of these doctrines, for example, see PAIS, Sofia, "The application of competition law in labour markets: participation of digital platform workers in collective agreements and non-contracting agreements", *Labour Issues*, 2021, no. 58, pp. 64-69; DE STEFANO, Valerio, *et. alii.*, "Re-thinking the competition law/labour law interaction: Promoting a fairer labour market", *European Labour Law Journal*, 2019, Vol. 10 (3), 291-333.

[5] Draft Commission Communication on Guidelines on the application of EU Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons, 9 December 2021, C(2021) 8838 final. The present version was submitted for public consultation until 24 February 2022, and the final version of the Guidelines is expected in the second quarter of 2022.

[6] It should be noted that Commission guidelines do not have binding legal force - they are not binding on other bodies, including the Court of Justice. They are therefore merely guidelines for the Commission's conduct.

[7] For the purposes of these Guidelines, the term of solo self-employed persons "refers to persons who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labour for the provision of the services concerned. Solo self-employed persons may use certain goods or assets in order to provide their services. [...] By contrast, these Guidelines do not apply to situations, where the economic activity of the solo self- employed person consists merely in the sharing or exploitation of goods or assets, or the resale of goods/services.

counterparty"[8] ; (i. ii) Solo self-employed persons working "side-by-side" with workers - they are in this situation 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"[9]; (i. iii) Solo self-employed persons working through digital labour platforms[10].

On the other hand, although these workers do not meet the requirements previously exposed, the Commission will not intervene when they are in a weak bargaining position vis-à-vis their counterparts. This class includes the following cases: (ii.i) collective agreements concluded by solo self-employed workers persons with counterparties of a certain economic strength[11]; (ii.ii) collective agreements concluded by solo self-employed persons pursuant to national or EU legislation[12] .

Finally, we cannot fail to express a positive note for the Commission's initiative in the preparation of these guidelines and for the methodological approach taken (doctrine of subjective scope). Although with some elements to be improved[13], we defend that this

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[8] In our opinion, we consider that the value stipulated is too high, especially if we take into consideration the current social reality in which several independent workers have short-term service provision contracts with various entities and in fact may be dependent on some, even if they do not meet the 50% limit.

[9] We believe that this situation can easily be circumvented by employers. Taking into consideration the undetermined concept of "side by side", the truth is that in many areas there may not be employees working under the same conditions, in order to make the comparison possible. In this way, the employer will also be free to easily change the company's management model, so that there are no subjects that can be compared.

[10] "For the purposes of these Guidelines, digital labour platform "means any natural or legal person providing a commercial service which meets all of the following requirements: (i) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application; (ii) it is provided at the request of a recipient of the service; and (iii) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location. Platforms which do not organise the work of individuals but simply provide a means through which the solo self-employed persons can reach end-users do not constitute digital labour platforms". It should be recalled that an essential condition applying to the scope of these collective bargaining agreements is that they must concern the regulation of working conditions; thus, anything beyond that (*e.g.*, pricing by zone, exclusion of competitors) falls outside the scope of the Guidelines.

[11] Such an imbalance shall be deemed to exist at least in the following cases: "with one or more counterparties which represent the whole sector or industry; and with a counterparty whose annual aggregate turnover exceeds EUR 2 million or whose staff headcount is equal or more than ten persons or with several counterparties which jointly exceed one of those thresholds".

[12] The Guidelines refer to the Copyright Directive which provides for the possibility for authors and performers to strengthen their contractual position to ensure fair remuneration in their exploitation contracts. However, in relation to this issue, the question arises whether the Commission will also intervene in cases of collective agreements of this set which are not related to remuneration issues (*e.g.*, *occupational* health and safety).

[13] In addition to some of the criticisms listed throughout our commentary, we cannot fail to mention that the Guidelines do not include all the categories of self-employed workers that may need protection - *v.g. self-employed* workers who have only one other worker under their direction, but who are also economically dependent on 50% of one entity; moreover, the present Draft only focuses on the exclusion of the rules present in Article 101(1) of the TFEU, leaving out the application (or not) of Article 102 of the TFEU, i.e., in situations where the agreement may constitute an abuse of a dominant position (v.*g.*, excessive prices) - on this last hypothesis, *see* DE STEFANO, Valerio, *et. alii*, op. cit.

legal instrument assumes itself as a position that will allow that competition law rules do not restrict the right to collective bargaining of self-employed workers who, increasingly, find themselves in a situation of great inequality of negotiating capacity, which promotes their precarious situation; in this way, collective agreements may be a relevant means to to fight the puppet role assumed by employers towards self-employed workers.