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Collective agreements on working conditions of solo self-employed persons: perspective of EU competition law[1]

Abstract: The 2022 Guidelines of the European Commission on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons apparently introduced a fresh approach towards collective agreements in a gig economy era. The main aim of this paper is to discuss whether the 2022 Guidelines are an appropriate tool to address the problems of solo self-employed persons (i.e. persons who are not in a formal employment relationship and who rely primarily on their own personal labour to provide services) from the perspective of EU competition law. To this end, we first present key competition problems related to collective agreements (section 1). Second, we analyse the regulatory framework for exemptions from competition law, with a view for a potential exemption relevant for collective agreements, as well as an approach to collective agreements in EU case law (sections 2 and 3). Third, the background for adopting the Guidelines, and their goals,

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is analysed (sections 4 and 5). Fourth, the Guidelines are discussed in more detail in sections 6 and 7 from the perspective of exemptions from Art. 101(1) TFEU. Finally, we examine the relationship between the Guidelines and a proposal for a platform work directive. The article attempts to verify the hypothesis that the Guidelines may be considered a pseudo-development.
Keywords: collective bargaining, competition law, digital platforms, solo self-employed persons

Introduction

Broadly defined as an economic system that uses online platforms to digitally connect on-demand freelance workers with customers or clients to perform fixed-term tasks (Duggan et al., 2021, p. 1 ff., and the literature quoted there), the gig economy has definitely generated as many chances and opportunities for economic and social development as it has problems of a social and legal nature. The latter can hardly be solved by existing 'traditional' regulations that were in fact adopted to respond to problems and conflicts in an 'analogue' economy. The appearance of digital platforms was crucial for the market for services, as they totally changed the structure of the process of service provision. A direct horizontal relationship between a service recipient and a service provider has been replaced by a more complicated structure involving two relationships: one between a digital platform and a customer or client and the other between the platform (acting as a supplier of orders) and a service provider. One of the key problems is the nature of the latter relationship: Is it employment or a classical business-to-business contract? An answer to this question is crucial not only for labour law, but also for competition law. The 'Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons' (European Commission, 2022, pp. 2–13), adopted by the European Commission in 2022, seem at first glance to introduce a fresh approach towards collective agreements in a gig economy era. By analysing existing case law, the background for adopting the Guidelines, the Guidelines themselves and their relationship to a proposal for a platform work directive, this paper aims to discuss the appropriateness of the Guidelines as the Commission's reaction to the problems of solo self-employed persons (i.e. persons who are not in a formal employment relationship and who rely primarily on their own personal labour to provide services) from the perspective of EU competition law. Taking into account a wide range of potential measures at the disposal of the Commission (block and individual exemptions, former case law, regulations and directives of labour law), we intend to check if 'regulating' the issue through guidelines in the area of competition law was the best regulatory choice to eliminate the potential risks resulting from EU competition law for the collective bargaining of solo self-employed people working for digital platforms. Whereas some authors have assessed the Guidelines as an important achievement (Giedrewicz-Niewińska & Kurzynoga, 2023, p. 18; Giovannone, 2022, p. 228; Mella Méndez & Kurzynoga, 2023, p. 206; Rainone, 2022,

pp. 15–16), this article attempts to verify our hypothesis that they may be considered a pseudo-development from the perspective of solo self-employed persons, as well as in regard to the consistency of EU competition law. The research methods employed here include, first, a doctrinal legal method (to systematically analyse the relevant provisions and the case law involved) and, second, systemic and teleological approaches.

1. Collective agreements in EU competition law: Key issues

Art. 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'. On the one hand, if persons working through digital labour platforms are deemed workers (not undertakings), their collective agreements would probably be covered by an exemption from the operation of Art. 101(1) (Buendia Esteban, 2022, p. 476, and the literature quoted there; Schmidt-Kessen et al., 2020, pp. 11–12). On the other hand, the extensive definition of the notion of an undertaking – as a 'generic EU legal concept' (Cengiz, 2021, p. 80), covering any entity engaged in economic activity regardless of its legal status and the way in which it is financed (Judgment of the Court of Justice of the European Union 1991, para. 21) – implies the broad application of EU competition rules to collective bargaining for self-employed persons (Schiek and Gideon, 2018, pp. 18–19) as a '[r]elabeling[,] […] not a free pass to restrict competition' (Schmidt-Kessen et al., 2020, p. 15). This, in turn, may result in treating collective agreements as anti-competitive agreements, prohibited, albeit not without exceptions, by Art. 101(1) TFEU. At first glance, this compromises the fundamental right to collective bargaining and leaves self-employed persons in a vulnerable position, without bargaining power.

The right to collective bargaining is protected, as a fundamental right, in most of the constitutions of the Member States and at the European and international levels (EU Charter of Fundamental Rights, Arts. 28 and 31; ECHR, Art. 11). The conclusion of collective agreements is also an objective of the TFEU (Arts. 151 and 155), allowing the improvement of workers' employment conditions; to achieve this goal, collective agreements are in fact frequently considered a more efficient tool than a legislative act (Monti, 2021, p. 2). It is important to point out, however, that the provisions of the Treaty on employment (Arts. 145–150 TFEU) and social policy (Arts. 151–161 TFEU) are related to the notion of a worker, while economic activities carried out by the self-employed fall into the field of industrial policy (Art. 173). And as has already been alluded to (Opinion of Advocate General Wahl, 2014, paras. 41–42), Art. 173 TFEU, unlike Arts. 151 and 155, does not encourage the self-employed

to conclude collective agreements, because 'the ways in which the professional activities of those two groups are organized and exercised differ profoundly' (Opinion of Advocate General Wahl, 2014, para. 43): a self-employed person must assume the commercial and financial risks of the business and is not subordinated to the employer.

2. The regulatory framework for exemptions from competition law

The questionable assessment of collective agreements reflected in a juxtaposition of social and industrial policy goals raises the issue of potential exemptions from competition law. As the complex variety of exemptions is offered, various legal classifications are developed. Exemptions to competition laws, including exemptions from the prohibition of anti-competitive agreements, can be classified into: (1) public policy-based exemptions that reflect a belief that (i) competition laws cannot be properly applied to certain conduct because of conflicting policies about the intended reach of those laws; and that (ii) the free-market principles of competition laws should be secondary to other regulatory or economic goals, especially where there is a relevant regulatory authority charged with monitoring the market and marketing practices (e.g. labour or agriculture organisations, insurance, certain aviation agreements); (2) special industry exemptions where the broader public-policy goals do not seem to justify the protection given (McDonald & Miller, 2011). *Largo sensu* exemptions to competition laws can be classified into (Orlanski, 2011, pp. 28–42):

1. exemptions concerning regulated activities, typically applicable to infrastructure industries where there is a specific regulatory agency controlling and enforcing the regulations (which in fact should not be considered an actual exemption);
2. particular exemptions for certain industries, based on political, social, cultural, historical or other non-market-based circumstances (e.g. shipping liner companies, certain air transport agreements);
3. particular exemptions for certain collective activities and associations, often linked to a certain type of industry, and usually where they are viewed as having benefits or low risks of harm;
4. a general category of exemptions based on market or economic rationale (block exemptions on the basis of Art. 101(3) TFEU);
5. on-demand discretionary exemptions;
6. other direct governmental interventions in the economy.

From the perspective of Art. 101(1) TFEU, block exemptions are of particular importance. The EU legislature chose to give effect to competition rules in EU primary law by way of the Council's regulations or directives (Art. 103 TFEU).

The Commission may adopt block exemption regulations, however, only with the authorisation of the Council (Art. 105(3) TFEU). Regulations, which are by their nature binding, do not have merely the 'decorative' effect of defining existing law (Frenz, 2016, p. 420). A system of such 'safe harbours' strikes a balance between legal certainty for undertakings and reasonable protection of competition. As for the grounds for exemptions in Art. 101(3) TFEU, its broad interpretation allows undertakings to rely on either explicit justifications set out in this provision or other objectives of the Treaty which in turn gives them a wide range of justifications, including aspects related to, for example, environmental protection or general welfare (Frenz, 2016, pp. 537–539). Nevertheless, legislating in the form of a regulation is only reasonable if there is something that needs to be regulated (Frenz, 2016, p. 419).

Soft law is a different type of an instrument. It has no binding legal effect for either national authorities and national courts or for the EU courts (Judgment of the Court of Justice of the European Union 2012). Soft law only provides information on the Commission's administrative practice in the interpretation and application of law for undertakings, authorities and courts. However, although the authorities and courts of the Member States must not simply ignore soft law issued by the Commission, because of their duty of sincere cooperation, they are not bound by it (even though they must give reasons for any divergences, which can be judicially reviewed) (Opinion of Advocate General Kokott, 2012).

3. A case-law approach to collective agreements in competition law

In its well-established case law, the Court of Justice ruled that agreements concluded within the framework of collective bargaining between employers and employees need, in certain circumstances, to be exempted from the application of EU competition law. In *Albany* (Judgment of the Court of Justice of the European Union 1999, C-67/96), the Court of Justice ruled that subjecting collective agreements to competition law would seriously undermine the social-policy objectives contained in those agreements; collective 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 [Art. 101(1)] of the Treaty' (Judgment of the Court of Justice of the European Union 1999, C-67/96, para. 60). The case concerned Dutch pension legislation, allowing the Minister of State to make an affiliation to a supplementary pension scheme, created by a collective agreement, compulsory for the textile sector. This type of agreement would not be caught by the Art. 101(1) prohibition if two conditions were met: if the agreement were the result of social dialogue and if it intended to improve the employment and working conditions of workers (Ichino, 2001).

Subsequent application of the *Albany* exemption by the Court of Justice confirmed that agreements that ameliorate the employment and working conditions of employees are exempted from competition law. Examples include, in particular, *van der Woude* (Judgment of the Court of Justice of the European Union 2000), concerning a collective agreement establishing a healthcare insurance scheme for the hospital sector, *Brentjens* (Judgment of the Court of Justice of the European Union 1999), regarding a collective agreement creating supplementary pension schemes, and *Drijvend* (Judgment of the Court of Justice of the European Union 1999), concerning a compulsory affiliation to a sectoral pension scheme. However, in *Pavlov* (Judgment of the Court of Justice of the European Union 2000), regarding a compulsory affiliation to a supplementary pension scheme, the Court decided that self-employed medical specialists should be considered undertakings and that the *Albany* exemption could not apply.

Furthermore, the exemption of collective agreements from the application of EU competition law was discussed in *FNV Kunsten* (Judgment of the Court of Justice of the European Union 2014). The Court ruled that agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Art. 101(1) TFEU (Judgment of the Court of Justice of the European Union 2014, para. 23). According to the Court, the essential feature of the employment relationship is that 'for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration' (Judgment of the Court of Justice of the European Union 2014, para. 34). However, service providers are formally independent economic operators in relation to their principal, so they are, in principle, 'undertakings' within the meaning of Art. 101(1) TFEU, even if they are in fact 'false self-employed', as the relationship with a supervisor resembles employment (paras. 27 and 31). The Court held that collective agreements covering false self-employed workers would also fall within the exemption from Art. 101(1) TFEU, as such individuals are 'in a situation comparable to that of employees' (para. 31). This stance was applauded by some as it enforced the principles of solidarity and labour protection (Ankersmit, 2015), and criticised by the others for establishing a vague test of little or no use for new forms of work (Daskalova, 2017; Pennings 2015). Advocate General Wahl went a step further and, drawing parallels with American solutions which provide an explicit antitrust exception for labour unions, suggested that the *Albany* exemption should be extended to collective agreements concluded by trade unions representing both employees and self-employed persons, to avoid the risk of 'social dumping' (where, without an agreement, workers could be replaced by self-employed persons at lower cost) (Opinion of Advocate General Wahl, 2014, paras. 84–100). The Court did not, however, follow this proposal.

In a digital economy, labour relationships have totally changed, and the classic distinction between a worker and a self-employed person has become blurred, so the situation requires a fresh look at the existing case law. At the same time, whether the traditional goals of competition law (economic efficiency and consumer welfare) are its sole objectives has been challenged, in and outside the EU (see below).[2] A new approach to collective agreements in the context of digital platforms seems to be a challenge in this regard.

4. The background for adopting the Guidelines

The appearance of new forms of labour relationship resulting from the specific nature of digital labour platforms has raised many concerns related to the proper classification of natural persons delivering services as 'traditional' workers or independent contractors (Koutsimpogiorgos et al., 2020, pp. 529–530; Stojković & Ostojić, 2021, pp. 269–281). A lot of effort has been put into adapting well-known labour-law conventions, including regulations on collective agreements, to the new economic conditions of a digital environment (Unterschütz, 2020, pp. 80–94). The issue has been a subject of interest for international organisations (e.g. OECD, 2020), national authorities and trade unions (Ranaraja, 2022, pp. 60–89).

EU institutions have also become involved in a process of creating regulatory proposals for the gig economy. In a 2017 resolution on a European Agenda for the collaborative economy, the European Parliament called on the Commission 'to publish guidelines on how Union law applies to the various types of platform business models' (European Parliament, 2017, para. 40). In January 2021 the Commission informed the public for the first time about its initiative called 'Collective bargaining agreements for self-employed – scope of application of EU competition rules' and asked for primary feedback on a presented roadmap. The Commission announced a public consultation on the draft document. As a result of the public consultation, held from March to May 2021, the Commission gathered 310 pieces of feedback, the majority of them (199) coming from EU citizens, with 40 opinions from trade unions and only 2 by public authorities.

On 9 December 2021 the Commission adopted a communication on an approval of draft Guidelines (European Commission, 2021a) as a part of a package of three regulatory proposals related to platform work, including a proposal for a directive on improving working conditions in platform work (the Platform Work Di-

2 Outside the EU, the New Brandeis movement in the USA suggests that antitrust law should not be limited to the lessons of the Chicago School of economics (Khan, 2018), while in the EU the dominant view has been that EU competition law has multiple goals besides economic efficiency and consumer welfare, such as, for instance, the improvement of the internal market (Andriychuk, 2017). Cengiz (2021) even suggests a shift from consumer welfare to citizen welfare.

rective) (European Commission, 2021d). In a Communication titled 'Better working conditions for a stronger social Europe: Harnessing the full benefits of digitalisation for the future of work', the Commission highlighted that '[f]or self-employed people, an additional obstacle to collective bargaining arises from the current interpretation of EU competition law' (European Commission, 2021b, p. 4). The starting point for the Guidelines was a statement that 'people working through digital labour platforms cannot usually negotiate collectively to improve their working conditions without the risk of infringing EU competition law' (European Commission, 2021b, p. 4). The second round of public consultation lasted until 24 February 2022. Some entities that submitted responses contested a proposal of merely introducing an exemption from Art. 101(1) TFEU for agreements for solo self-employed people: the Confederation of German Employers' Associations, noted that '[e]xtending the possibility of negotiating collective agreements to self-employed workers is counterproductive. The initiative risks blurring the lines between [the] rights and obligations of self-employed and employed workers […] There is no need to change the existing EU competition rules to allow self-employed workers to participate in collective bargaining or wage agreements' (European Commission, 2021c). A few organisations expressed their doubts on guidelines as a regulatory measure and proposed a directive as an appropriate regulatory tool (European Commission, 2021e). The final version of the Guidelines on collective agreements was adopted on 20 September 2022.

5. The goals of the Guidelines

The Guidelines aim at setting out 'the principles for assessing', under Art. 101 TFEU, 'agreements between undertakings, decisions by associations of undertakings and concerted practices' (in the meaning of Art. 101 TFEU), 'concluded as a result of collective negotiations between solo self-employed persons and one or several undertakings ("the counterparty/ies"), concerning the working conditions of the solo self-employed persons' (Guidelines, para. 1). Counterparties – as explained in para. 2(b) – are 'undertakings to which the solo self-employed persons provide their services', so digital platforms shall be treated as counterparties.

Taking into account that the issue of an application of competition rules to agreements on collective bargaining (collective agreements) seemed to have been ruled over by the Court of Justice in the past (see section 1 above), it is striking that the Commission decided to go back and to 'regulate' this issue by way of soft law. Despite the fact that the Guidelines establish the rules for the application of competition law to collective agreements, it is clear from the very beginning of the document that competition rules are treated as a tool to achieve goals other than just protecting the internal market in its economic dimension. The Commission explicitly refers to the social aspect of the internal market (the social market economy declared by Art.

3(3) TEU) by also underlining the Union's objective of facilitating dialogue between social partners, expressed in Art. 152 TFEU, and invoking Art. 28 of the Charter of Fundamental Rights of the European Union that recognises the right of collective bargaining and action (Guidelines, para. 4). The Guidelines evidence a serious shift in EU competition law: it is no longer only about the economy and efficiency, but also about social goals and fairness, as was confirmed by Commissioner Vestager, who does not see efficiency and fairness as two opposing objectives for competition enforcers (Vestager, 2022). The Commission seems to follow a path identified by Gerard a few years ago: '[I]nstead of weakening legal certainty, the candid exposure of the fairness rationale underlying competition principles […] might increase the predictability of individual assessment by shedding light on some of the variables capable of affecting outcomes' (Gerard, 2018, p. 212).

The issues of collective bargaining and collective agreements have been vigorously discussed in recent years in the context of the development of digital platforms (see section 2 above); the Commission also notices the trend, saying that 'certain solo self-employed persons may not be entirely independent of their principal or they may lack sufficient bargaining power' and '[r]ecent labour market developments have contributed to this situation, notably […] the digitalisation of production processes and the rise of the online platform economy' (Guidelines, para. 8). Nevertheless, even if the Guidelines constitute a part of a digital labour package (Cauffman, 2022), and the online platform economy is mentioned as a background for this 'soft' legislative activity by the Commission, the Guidelines do not seem to focus specifically on economic and labour relationships with digital platforms. Only one subsection of the Guidelines (sec. 3(3), paras. 28–31) is dedicated to solo self-employed persons working through digital labour platforms, and very few examples contained in the Guidelines refer to relationships with platforms.

Still, what can be seen as a contribution of the Guidelines to legislation on the online platform economy is the definition of a digital labour platform. In the Commission's view, this is 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 by individuals, irrespective of whether that work is performed online or in a certain location (Guidelines, para. 2(d)). In the meaning of the Guidelines, the definition of a digital labour platform is limited solely to 'providers of a service for which the organisation of work performed by the individual, such as transport of persons or goods or cleaning, constitutes a necessary and essential, and not merely a minor and purely ancillary, component' (para. 30).

The direct goal of the Guidelines is to explain how the Commission will apply EU competition law (para. 10). The Guidelines do not affect definitions of workers

or self-employed persons in national law; they are also 'without prejudice to any subsequent interpretation of Art. 101 TFU by the Court, in relation to agreements entered into within the framework of collective bargaining' (Guidelines, para. 11, sentence 1). The Commission states that the Guidelines do not affect the application of EU competition law as set out in Article 42 TFEU and the relevant EU legislation in relation to the agricultural and fisheries sectors (Guidelines, para. 11, sentence 2). The Commission also declares that the Guidelines clarify 'a) that collective agreements by solo self-employed persons who are in a situation comparable to that of workers fall outside the scope of Art. 101 TFEU; and b) that the Commission will not intervene against collective agreements of solo self-employed persons who experience an imbalance in bargaining power vis-à-vis their counterparty/ies' (Guidelines, para. 9).

Bearing in mind the legal nature of the Guidelines (as a soft law, non-regulatory act), their scope and their aims as declared by the Commission, it is doubtful whether they are an appropriate tool to solve the core problem of the blurred distinction between employees and the solo self-employed in order to eliminate the possibility of applying Art. 101(1) TFEU to collective agreements by the latter.

6. Safe harbours for collective agreements established by the Guidelines

The Guidelines define a 'collective agreement' as 'an agreement that is negotiated and concluded between solo self-employed persons or their representatives and their counterparty/ies to the extent that it, by its nature and purpose, concerns the working conditions of such solo self-employed persons' (para. 2(c)). In fact, the scope of 'exemption' is narrow, limited solely to agreements on working conditions. The Guidelines apply both to negotiations and the conclusion of collective agreements. All forms of collective negotiations can be covered by the Guidelines, no matter whether they are conducted through social partners or through other associations or if they are direct negotiations by a group of solo self-employed persons or their representatives (para. 14). The Guidelines do not cover any agreements 'outside the context of negotiations (or preparations for negotiations) between solo self-employed persons and their counterparty/ies to improve solo self-employed persons' working conditions' (para. 17). In the context of the narrow scope of the Guidelines, it has also been asked in the literature why they only ensure access to collective bargaining and not to other key collective labour rights, such as the right to strike (Buendia Esteban, 2022, p. 485).

A certain degree of coordination of approaches is allowed on both sides (the solo self-employed and their counterparties), as far as is necessary and proportionate for the negotiation or conclusion of the collective agreement. It is worth noting that in the final version of the Guidelines, the Commission gave up additional explana-

tions regarding agreements of solo self-employed persons on a collective (coordinated) refusal to supply labour. In the draft Guidelines, the Commission declared a positive attitude towards such agreements, even if they may cause competition concerns; if these agreements on a coordinated refusal to supply labour are necessary and proportionate for the negotiation or conclusion of the collective agreement, they should be treated in the same way as the collective agreement to which it is linked (or would have been linked, in the case of unsuccessful negotiations) (draft Guidelines, para. 16). Elimination of the 'exemption' towards these agreements should be considered a step back in improving the position of solo self-employed individuals vis-à-vis digital labour platforms, for example, although such agreements could still be treated favourably in individual antitrust assessments.

The Guidelines introduce two approaches to collective agreements in the context of an application of Art. 101(1) TFEU. According to the first approach, which can be call d a 'non-application approach', some collective agreements just fall outside the scope of a prohibition provided for in Art. 101(1). Section 3 of the Guidelines introduces that approach towards agreements entered into by solo self-employed persons as being in a situation comparable to that of workers, regardless of whether the persons also fulfil the criteria for being false self-employed persons. The Guidelines identify three categories of solo self-employed persons who presumably are in a situation comparable to that of workers: 1) economically dependent solo self-employed persons, 2) solo self-employed persons working 'side by side' with workers, and 3) solo self-employed persons working through digital labour platforms. Economic dependency, defined as a situation where a solo self-employed person earns, on average, at least 50% of their total work-related income from a single counterparty, over a period of either one or two years (para. 24), does not constitute a necessary condition for being 'in a situation comparable to that of workers'. The categories of solo self-employed persons identified in Section 3 of the Guidelines are separate, individual categories, although they can overlap. Specifically, the Guidelines do not presume that self-employed persons providing their services at the demand of a digital labour platform are economically dependent in the meaning of the Guidelines. As a consequence, regardless of their economic (in)dependency, a collective agreement between solo self-employed persons and digital labour platforms on working conditions falls outside the scope of Art. 101(1) TFEU (Guidelines, para. 31). The final version of the Guidelines lacks a reservation that was added in the draft document: according to para. 31 of the draft Guidelines, 'collective agreements between solo self-employed persons and digital labour platforms that *by their nature* and *purpose* aim at improving working conditions fall outside the scope of Art. 101 TFEU, *even if the self-employed persons in question have not been reclassified as workers by national authorities/courts*' (emphasis added). That statement seemed to reflect a rationale for this provision in a more convincing manner.

The second approach towards collective agreements declared by the Commission in the Guidelines can be termed 'the adverse *de minimis* rule'. Section 4 of the Guidelines points to collective agreements of solo self-employed persons that the Commission will not intervene against because of the imbalance in bargaining power between these persons and their counterparty/ies. The parties to collective agreements may not bear any resemblance to workers; however, they still cannot be considered as equal partners to their counterparties, e.g. digital labour platforms, because of their lack of sufficient bargaining power to influence their working conditions. An imbalance of bargaining power is to be presumed in two cases: 1) where solo self-employed persons negotiate or conclude collective agreements with one or more counterparties that represent the whole of a sector or industry, 2) where solo self-employed persons negotiate or conclude collective agreements with a counterparty whose aggregate annual turnover and/or annual balance sheet total exceeds EUR 2 million or whose staff headcount is equal to or more than ten persons, or with several counterparties which jointly exceed one of these thresholds (para. 34). The Commission makes a reservation that other situations can also be identified as showing an imbalance between solo self-employed persons and a counterparty (para. 35). Additionally, it declares that it will not intervene against collective agreements relating to working conditions that involve categories of solo self-employed persons to which national legislation applies in pursuing social objectives and either (a) granting such persons the right to collective bargaining or (b) excluding collective agreements concluded by self-employed persons in certain professions from the scope of national competition law (para. 36).

7. The relationship between the Guidelines and a proposal for a Platform Work Directive

As stated above, the draft Guidelines were part of a package that included a proposal for a Platform Work Directive, now (12 April 2024) awaiting to be formally approved by the European Parliament during the 22–25 April 2024 plenary session and by the Council. Therefore the question arises as to how and to what extent these two documents (the Guidelines and the draft Platform Work Directive) relate to each other. Is it possible that, due to their relationship, the Guidelines will become superfluous after the adoption of the Platform Work Directive and its implementation? On the whole, it can be noticed that they only overlap to a small extent. The draft Platform Work Directive has a range of scopes, aiming to tackle a wide range of problems connected to platform work (Rosin, 2022, p. 478). In turn, as is also stressed above, the Guidelines are not demonstrably focused on work through digital labour platforms but on solo self-employed persons, including those contracting with the digital labour platforms through or to which they provide their labour.

This may be the reason why these documents have only one definition in common, i.e. the definition of a digital labour platform. This term is defined by the Guidelines in accordance with the draft Platform Work Directive, therefore the Commission will consider the need to update the definition in the Guidelines if the definition in the adopted version of the Platform Work Directive differs materially from it. The remaining definitions in the Guidelines ('solo self-employed person', 'counterparty', 'collective agreement') are not defined in the draft Platform Work Directive. The Platform Work Directive, once adopted and implemented domestically, will introduce a rebuttable legal presumption that the contractual relationship between a digital labour platform that controls the performance of work and a person performing work through that platform is an employment relationship. To this end, such a relationship needs to meet at least two criteria from a list of five. Harmonisation in this matter is likely to affect neither the soft law safe harbour based on the 'non-application' approach nor 'the adverse *de minimis* rule', unless the Guidelines are amended. The soft law safe harbour for solo self-employed persons working through digital labour platforms seems completely independent of whether, as a result of the correct determination of their employment status, they are recognised as workers or not (the false and genuine self-employed persons working through digital labour platforms). Solo self-employed persons working through digital labour platforms are considered as such in a situation comparable to that of workers, on the basis of Section 3 of the Guidelines.

Certainly, both documents revolve around the improvement of working conditions (explicitly mentioned in the title of the draft Platform Work Directive, so directly aimed at by it, and indirectly by the Guidelines, which are intended to make solo self-employed persons bargain over the improvement of their working conditions more courageously). Collective agreements 'exempted' by the Guidelines are only those concerning the working conditions of solo self-employed persons. Both documents leave this concept open. Only the Guidelines exemplify types of working conditions, mentioning the following in paragraph 15: remuneration, rewards and bonuses, working time and working patterns, holiday, leave, physical spaces where work takes place, health and safety, insurance and social security, and conditions under which solo self-employed persons are entitled to cease providing their services or under which the counterparty is entitled to cease using their services. In the public consultation on the draft Guidelines in 2022, some organisations proposed a further extension of the 'exemption' e.g. Bolt proposed group purchasing arrangements for essentials such as bike or car maintenance service contracts. However, this was not picked up by the Commission. The Guidelines include nine examples; taking their content into account, one may assess these as too simple, or even simplistic. The example 'non-exempted' agreements either are not between solo self-employed persons and a platform or do not obviously relate to working conditions (e.g. an agreement which divides the territory of a city between three platforms

as a market-sharing agreement). The example 'exempted' agreements clearly relate to working conditions. If economic life is not able to bring more sophisticated facts, the meaning of the Guidelines can be called into question.

Conclusions

Solo self-employed persons are generally considered as undertakings for the purposes of competition law, mainly Art. 101(1) TFEU, so the prohibition on anti-competitive agreements applies to any form their collaborations may take. The growth of the gig economy has created a tremendous demand for service providers and has totally changed labour relationships in markets; digital platforms have based their economic activity on solo self-employed persons, who in many cases are in a situation comparable to employees. In order to counteract anti-competitive conduct among the solo self-employed, who are expected to collude against digital platforms, the Commission decided to intervene by adopting a soft law act. The Guidelines constitute a part of a digital labour package, but they try to respond not only to problems characteristic for digital platforms, but also to a broader problem of false self-employment in relationships outside the gig economy. But even though the Guidelines define safe harbours for collective agreements by the solo self-employed, they do not bring anything new. The exemption of agreements for false self-employed persons (in a situation comparable to that of workers) from competition law does not in fact raise any doubts, in the light of the CJEU's attitudes in *Albany*, *FNV* and *Pavlov*. A potential exemption of collective agreements entered into by self-employed persons, recognised as undertakings in the light of Art. 101 TFEU, depends on the subject matter of the agreements (if they concentrate on working conditions, there are no competition concerns) or on the imbalance of power between the digital platforms and the solo self-employed. Summing up, the Commission created soft law safe harbours for collective agreements that would be attacked by hardly any competition authorities, leaving aside any clarifications for more complicated problems such as agreements on a refusal to provide labour or agreements on tariffs that are desirable from the perspective of equal treatment (Pennings & Bekker, 2023, p. 52).

In the light of the above considerations, the Guidelines may be considered a pseudo-development, as they do not solve any crucial problems that could not be addressed with simple references to the established interpretation of Art. 101(1) or previous case law; a much more active contribution of competition law to the realisation of social objectives could be expected (Schömann, 2022, p. 9). It seems that legal certainty could be better served if the harmonised criteria for an employment

relationship defined by the future Platform Work Directive were also used for the purpose of defining self-employed persons benefitting from exemption legislation when being party to collective agreements on working conditions with platforms. Further exemptions that go beyond these could be provided for in a regulation, mainly with the purpose of improving legal certainty resulting from its binding legal effect for national authorities and courts. Certainly, the Guidelines have a practical and symbolic significance (Daskalova, 2022; Rainone, 2022, p. 15), and they contribute to reducing legal uncertainty, although it is still not completely removed (Pennings & Bekker, 2023, p. 52). Consequently, the Guidelines cannot be regarded as an appropriate tool to address the legal challenges related to labour relationships in the gig economy that may appear in the area of competition law.

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