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CB4SE Project Research Report

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Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02)

Starting point

Art 101 TFEU

- Agreements / concerted practices among undertakings automatically nul and void
- 1999 ***Albany* judgment**: exemption of collective agreements for employees
- 2014 ***FNV Kunsten* judgment**: no exemption for genuinely self-employed persons

EU Commission = highest competition authority (Art. 105 TFEU)

- … but not the only one!

Approach of the Guidelines

Scope

- Agreements between self-employed persons & “counterparties” on working conditions

Part 3: exempted from competition law: solo self-employed persons who…

- are “**economically dependent**” on (= receive 50% of income from) the counterparty
- work “**side-by-side**” with employees
- Work through **platforms**

Approach of the Guidelines

Part 4: exempted from COM's "enforcement priorities": collective agreements…

- between solo self-employed and "**counterparties of certain economic strength**" on (= receive 50% of income from) the counterparty
  - representing whole sector
  - *or* annual aggregate turnover > EUR 2 million
  - *or* 10+ employees
- pursuant to **national / EU law**

Research report – collective bargaining for the self-employed (legal & trade union perspective)

The study

12 countries

- AT, BE, DE, DK, FI, FR, IE, IT, NL, PO, SE, SI
- Input by 1-2 legal experts & 1-3 union representatives

Legal & practical situation re collective bargaining for the self-employed

- Impact of the COM's Guidelines

1. Legal perspective

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Classification of working individuals

Difficult distinction employment vs. self-employment

- Social partners, public authorities, courts
- Distinction not always drawn identically for different areas of law (**AT, DE, DK, IE, NL, SE**)
- Sometimes addressed in collective agreements (**DK, IT, SE**)

Intermediate categories

- **AT, DE, FR, IT, PL, SI…**
  - **BE**: less protected category gig workers

Legal assessment under the framework for industrial relations and collective bargaining

Exemption of genuinely self-employed (entrepreneurs)

- Only employees sensu stricto (**BE, FI**)
  - Rules on coverage, erga omnes, sectoral extension…
  - **FR**: specific rules for platform workers
- Especially works councils

Legal assessment under the framework for industrial relations and collective bargaining

Subgroups covered

- **IT**: no legislation (constitutional principle)
- **IE**: “personal work”; **PL**: “persons who perform paid work”
- **NL**: mandate / contract for work
- **SI**: “economically dependent persons”; **SE**: “dependant contractors”
- **DK**: “similar” to employees
- **AT/DE**: “employee-like persons”
  - DE: 50% income from one source; AT (*new*): personal work without own business infrastructure

Legal assessment under the framework for industrial relations and collective bargaining

Broader coverage based on constitution/ international treaties?

- PL: Constitutional Court decision 2015
- Otherwise mainly academic debate
- Practice: some collective agreements without legal basis

Legal assessment under competition law

No express legal regulation (reference EU level)

- SE: since 1981
- IE: introduced in 2017 (application for exemption possible)

Concrete assessment competition authority

- IE: 3 collective agreements (artists, journalists, musicians) declared unlawful in 2004
- DK: journalists & platform cleaners – partly declared lawful
- FR: advice expressing concerns about sectoral extension of platform ride-hailing agreement

Legal assessment under competition law

Guidance published by competition authority

- Only **NL** before COM Guidelines
- Sometimes informal

Concerns shaping practice

- Discussions (**SI**), hesitation (**FI**),
- Employers' / principals' side withdrawing (**DE**, **IE**, **NL**)

2. Union perspective & development in practice

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Representation & representing organisations

No comparable data unionisation

- Possible and happening in all countries studied
  - Not all unions accept (**FI**, **SI**)
- Non-union organisations (**BE, FI, FR**)
- Not: specific unions for the self-employed
- Some unions: no collective bargaining agenda for the self-employed
  - **AT**, **BE**, **DE**, **FR**, **SE**: legal advice, collective insurance, counselling…
- Usually no legal limits
  - **AT**: legal requirement of independence from bargaining partner

Representation & representing organisations

No comparable data unionisation

- DE: largest union ver.di: 30,000
  - 80% of journalists organised
- NL: 20% organised in some form
  - 20,000 out of 800,000 FNV members
- SE: 10,000 out of 500,000 sole traders unionised
  - Large sectoral differences
- DK: 25% of unionised journalists are self-employed
- General observation: low / “exceptional” (SI)
  - Focus on former employees / involuntary / bogus self-employed

Representation & representing organisations

Specific union sections

- AT, DE, IT, NL
  - FNV: 140 occupational groups

Tripartite dialogue

- IT, NL, SI

Cooperation unions & other interest associations

- AT, BE, FR, IT, NL
  - Potentially fruitful, practically difficult

Recent / current developments

Few noteworthy changes

- IT: increase since Covid
- IE: collapse after competition authority intervention
- SI: collapse after failure of forcing platforms to the bargaining table
- FI: both pull & push factors

Important: share of (bogus) self-employment in labour market

- Overall decrease
  - BE, FI: increase; DK: stable
- Legislative / administrative measures (NL, PL, SI) / court cases (AT, DE)

Challenges

Legal

- **BE, PL, SI**: misclassification
- **AT, BE, DE**: industrial relations
  - → motivation to join union?
- **IE, PL**: issues concerning also employees
- **DK, SI, FR**: other legal changes (social security) potentially more effective

Practical

- Generally more important
  - Reluctance to unionise / lacking solidarity (**IT, NL, PL, SI**)
  - Union movement needs to step up efforts (**BE, DK, FI, FR, DE, NL, PL**)

Collective bargaining for the self-employed

Before the Guidelines: some activity in all countries studied

- Successfully negotiated collective agreements
  - **AT, DE, FI, IE, SE, SI**: journalists (sometimes not on income: FI, SE, SI)
  - **AT, DE, IE**: media, television and broadcasting professionals
  - Film crew (**IE**), musicians (**IE, NL**), designers (**DE**)
  - Lecturers (**AT**), kiosk owners (**PL**)
  - Language professionals (**IT**), home workers (**AT**), forest workers (**SE**), construction workers (**IE**), architects (**NL**), platform workers (**FR**)
- Usually integrated in / systematically connected to collective agreements for employees
  - Target of 140%-150% of wages (**IT, NL**)

Collective bargaining for the self-employed

Before the Guidelines: some activity in all countries studied

- "Alternatives"
  - Collectively bargained compensation rules for publishers (DE) / fee recommendations for journalists & performing artists (SE)
  - Reclassification (construction & call centre workers in IT; platform workers in DK & SE)
  - Umbrella companies (multi-sectoral in FR; designers in DK; for theatre, dance & music performers in SE)
- Not all bargaining attempts successful
  - Discontinued e.g. for platform workers in BE, journalists in FI, municipal teaching professions in DE)

Changes since the Guidelines?

Almost no noteworthy developments

- First collective agreement: **FI**
- Legal change: **AT**
- Continuation of vital collective bargaining activity: **IT**
  - New collective agreements: actors, athletes, or supermarket delivery riders
  - Legislative change: consultation of associations when determining minimum

Outlook & potential

Almost no noteworthy developments

- Potentially (very) useful tool (except **SE**)
- Plans / preparations / discussions to “test” in practice
  - Identification of potential target groups
  - **DK**, **DE**: awaiting reaction competition authority
- No panacea
  - Lack of experience (**DE**, **FI**, **SI**)
  - Main focus on reclassification (**NL**, **SE**)
  - Non-compliance (**AT**, **SE**)
  - Willingness of “employers”/principals (**FI**)

Discussion

EU level

- Few options of improvement beyond Guidelines
  - Would require change of primary law or CJEU case law

National level

- Focus on industrial relations law
  - Personal scope (incl. collective action) & issues concerning also collective bargaining for employees

Social partners

- Common strategy to achieve more for all workers

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Many thanks for your attention.

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