

Kluwer Competition Law Blog

Collective Bargaining and Platforms

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The rise and proliferation of the online economy, centred specifically on platforms, has opened new opportunities for private individuals to sell their labour in new and more flexible ways. Either full or part-time or when convenient or requested. However, this has also created conflicts as unions see the increased utilization of freelancers and the self-employed as undercutting adopted collective agreements and the terms agreed to in these particular arrangements. Or at least this is how the unions prefer to present the matter and as always the truth is more complex.

Collective bargaining and platforms

Confronted with gradual migration in the direction of higher reliance on the self-employed, many unions have contemplated extending the coverage of collective agreements to these. As the self-employed normally would qualify as undertakings in EU competition law, this will have to be done with respect for Article 101 and therein lies the problem. Taking into consideration the core object of collective agreements, i.e. the regulation of wages and working hours, replacing the normal competitive process, this would in most situations qualify as anti-competitive by object and thus subject to a strict review. Further, in the process of classification, the form, official purpose, or subjective intent are immaterial (see e.g. case C-209/07 – *Beef Industry*, recital 21) and it's not even relevant if mitigating factors can be identified as condemnation follows mechanically. However, if used to e.g. counter strong bargaining power with the platforms, this might not be warranted as collective agreements can be pro-competitive or at least benign as explained by OECD in *Competition in Labour Markets* (2020). Unfortunately, all of this is irrelevant if caught by the concept of anti-competitive by object. It is possible to invoke different mitigating factors under Article 101 (3), but this would put the parties to the agreement in a rather weak and precarious position.

Collective agreements are not virgin land for Article 101 TFEU

Collective agreements are not virgin land for Article 101 TFEU. In *Albany* (case C-67/96) it was established that employees, defined as subject to instruction, did not qualify as undertakings within Article 101, allowing traditional collective agreements to elude this regardless of their content. In *KNV Kunsten*, (case C-413/13) this was extended to the self-employed performing the same functions as the employed, referred to as the false self-employed. While some flexibility has been

demonstrated the solution can hardly be considered acceptable as *Albany* and *KNV Kunsten* reserve the exemption to employees subject to direct instruction, making it difficult to accommodate the model utilized by many, but not all, platforms.

The matter is contemplated by different Competition Authorities

The European Commission is currently contemplating potential methods to address the problem and the Dutch Competition Authority has e.g. issued *Guidelines – Price arrangement between self-employed workers* (2019). Here it's indicated how some collective agreements covering the self-employed might be able to elude Article 101 (1) by virtue of being *De Minimis*. Alternately, the Agency will waive the option of imposing fines on agreed minimum rates not exceeding what is necessary to safeguard the substance level. While these options might provide for relief in the most obvious cases, this legal position would not be sustainable on a union level. Not only because the *De Minimus* option rests on a creative reading of case law, as the Court of Justice in – *Expedia* (case C-226/11, recital 35-37) precluded by-object-restrictions from its scope, but also because guidelines cannot bind courts. A collective agreement among the self-employed might therefore end up being null and void, and thus unenforceable, and it would be naïve to think this would not be exploited by parties disgruntled with its terms.

Collective bargaining agreements as a by-effect restriction

Rather than twisting concepts and ignoring core case law, a superior solution would be to accept collective agreements among the self-employed as only anti-competitive by effect, if at all. This would allow possible benefits and efficiencies to be vectored into the assessment and provide for a more balanced approach. Granted, case law normally holds horizontal agreements on prices, payment terms and access, as anti-competitive by object, making it plausible that the core of most collective bargaining agreements, i.e. wage levels, would fall into this category. Had it not been for *Albany*, even traditional collective bargaining agreements might be caught, irrespective of the arguments that can be submitted in their favour. Nonetheless, a case can still be made for designating collective agreements among the self-employed as only anti-competitive by effect.

While no operative definition has been provided on the concept of anti-competitive by object, recent cases such as *Budapest Bank* (case C-228/18, recital 82-86) and *Generics* (case C-307/18, recital 87-90) have indicated that it should be reserved to agreements serving no legitimate purpose. Further, the European Commission has e.g. in its *Guidance on restrictions of competition “by object”*, section 1, accepted those agreements seeking to attain objectives that could be considered a legitimate public policy objective might also elude the label as anti-competitive by object. Taking into consideration that a social market economy and safeguarding adequate social protection are now core Union values (see e.g. See Article 3 (3) TEU and Article 9 TFEU), it would be problematic to extend the strict review at large to collective agreements covering the self-employed. It would even be possible to argue that collective bargaining is pro-competitive or benign if used to counterbalance buyer power with the employer.

While the outlook for collective agreements covering the self-employed to elude Article 101 (1) at first glance looks dark, a case can be made for this. Essentially as it appears incorrect to label them as anti-competitive by object, regardless of the naked content (price agreements) as they do not

seek to attain goals incompatible with EU values. On the contrary, they are in principle perfectly aligned with core EU values and can even produce pro-competitive effects. Further, relabeling collective agreements would not be a free pass to restrict competition as they could be still be condemned under Article 101 if anti-competitive by effect. This could be the case if seeking to limit the use of self-employed freelancers or discriminating against these by securing better terms for those traditionally employed.

The ancillary restraints doctrine and collective agreements

An alternative option to secure a more balanced approach to collective agreements involving the self-employed would be to apply the ancillary restraints doctrine to them. Case law has accepted that restrictive elements can be ancillary to the main agreement, and should not be evaluated in isolation. This can even cover hardcore infringements such as horizontal price-fixing, provided it is objectively necessary for the implementation of the main operation and proportionate (see e.g. case T-111/08 *MasterCard*, 77-79 and Case T-112/99 *Metropole*, 106).

While originally developed for the purpose of enabling the successful implementation of beneficial commercial agreements, the concept of ancillary restraints should not be reserved for this. In particular, the doctrine would be relevant to situations in which a traditional collective agreement covering (true) employees is extended to those who are self-employed. Different reasons could be provided to justify this extension. The line between employed and self-employed might, for example, be somewhat blurred (see case C-413/13 – *FNV Kunsten*, recital 32) in practice, making it pragmatic to cover all in a sector regardless of legal status. Under this doctrine, collective agreements covering the self-employed must be: **i)** ancillary to a traditional collective agreement **ii)** necessary for the protection of this and **iii)** confined to the parties without limiting the commercial freedom of third parties. Finally, **vi)** the traditional collective agreement must be permissible under the principles established in *Albany* and *FNV Kunsten*.

A regulatory ancillary restraints doctrine in line with *Wouters*

A third option would involve a revisit of *Wouters* (case C-309/99) where the Court of Justice established a practice allowing some restrictions to elude Article 101 by virtue of being surrogates for regulation. The General Court attempted to develop this further in *Meca-Medina* (Case T-313/02), but was overturned on appeal (case C-519/04) as the Court of Justice held the adopted anti-doping rules as covered by Article 101 TFEU, but not infringing Article 101 (1) TFEU. However, taken together, *Wouters* and *Meca-Medina* establish a doctrine allowing restrictions originating in regulatory obligations to elude Article 101 (1).

This doctrine has direct relevance for collective agreements and the self-employed. Not only because a social market economy and the act of securing adequate social protection are Union objectives, but also because the Member States regularly enjoy a margin of discretion when implementing EU law, e.g. in the case of EU Directives. Member States can thus delegate the implementation of EU law to the representatives of workers and employers through collective agreements (see e.g. case C-143/83 – *Commission v Denmark*). Article 101 (1) should not prevent this, even if involving those who are genuinely self-employed as long as it's: **i)** proportionate and

ii) confined to securing correct and full implementation of the regulatory obligations. A revisit of *Wouters* and *Meca-Medina* for the purpose of developing a more advanced regulatory ancillary restraints doctrine would e.g. allow EU or member states to mandate that adequate protection must be secured for the self-employed. This can be accomplished either by direct regulation or through a collective agreement concluded between the relevant social partners.

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