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Collective Bargaining and Platforms – Draft guidance is out

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After deliberating on the matter for a year, DG COMP on the 9th of December published its draft guidance on the application of Article 101 on collective bargaining of the self-employed. This is done in response to the rise and proliferation of the online economy, centred specifically on platforms and greater reliance on freelancers and the self-employed. On the one hand, this opened new opportunities for private individuals to sell their labour in new and more flexible ways; on the other hand, it created conflicts as unions progressively view the increased utilization of freelancers and the self-employed as undercutting adopted collective agreements. Or at least this is how the unions prefer to present the matter, and as always, the truth is more complex. However, it remains undeniable that collective bargaining of the self-employed is regulated by Article 101, which is why unions and others must take competition law into consideration before entering into such agreements.

DG COMP's draft guidelines

In its draft guidelines, DG COMP recognizes how collective agreements can serve as an essential tool to improve working conditions. In general, and in the online economy, they should be welcomed and viewed positively. However, as the self-employed are in principle considered as "undertakings," due respect for Article 101 must be paid, including how this typically would preclude agreements touching upon matters like pricing and remuneration, and thus, the core of most collective agreements. Moreover, under Article 101, agreements touching upon pricing would typically be considered restrictive by object and subject to a very strict review with few exemptions. By this, DG COMP accepts the premise of a potential conflict but then tries to offer some principles to mitigate concerns that the transformation to a digital economy will undermine workers' rights as voiced by unions.

DG COMP offers two essential observations that provide guidance

First and foremost, DG COMP recites the fundamental principles of not applying

Article 101 to the relationship between the employee and employer as this does not qualify as an economic activity. Moreover, collective bargaining can address the asymmetric relationship between the employee and employer where the latter is perceived to have a much stronger bargaining position, adding a salient social element. By virtue of the same line of argumentation, this "worker exemption" also covers collective agreements concluded on behalf of these groups. In its guidelines, DG COMP describes circumstances in which solo self-employed are comparable to workers and thus not subject to Article 101. Case law (case C-413/13 – *FNV Kunsten*) has developed the concept "false self-employed," covering situations where a self-employed person serves the same functions and is subject to the same conditions in terms of instruction and supervision as an employee, making it artificial to treat them materially different under Article 101. In its guidelines, DG COMP expands on this, offering some operatives tests, including if the "worker" only, or predominantly (>50 %), has one employer and relies on the selling of his/her own personal labour rather than services or goods.

Secondly, DG COMP explains that only matters pertaining to working conditions will elude Article 101 under the outlined "worker-exemption". Not only when it comes to what the above is referred to as "false self-employed", but also, in general, as the worker-exemption should be applied narrowly. While agreements on remuneration and working time would escape Article 101 because of this, allocation of territories would not as this does not relate to worker conditions. In contrast, an organized boycott could escape Article 101 if directed at enforcing or negotiating a collective agreement and necessary and proportionate to this.

DG COMP also establishes a priority rule

While the two first observations essentially recite established case law and principles, DG COMP does, as a novelty, announce a priority rule directed at the asymmetric power relationship between the employee and employer. Under this priority rule, DG COMP will not pursue cases where **a**) the solo self-employed are in a weak bargaining position or when **b**) national laws mandate collective bargaining, waiving national competition law. In order to make the first more operative, DG COMP expands on the concept of an imbalance in bargaining power. This will, e.g., be considered if the solo self-employed must negotiate with a counterpart representing the whole sector or industry or if the employer has more than ten employees or an annual turnover exceeding EUR two million.

DG COMP's priority rules do not address the elephant in the room

Turning a blind eye to infringements might provide temporary relief, but hardly solve the problem, as the guidelines would not prevent National Enforcers or courts from intervening or declaring a concluded collective agreement null and void. Moreover, the latter can make it difficult to enforce a collective agreement against an unwilling employer making the risk real and substantial. It would thus be more prudent if DG

COMP had addressed the elephant in the room. 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, void of the "worker exemption", qualify as anti-competitive by object, and thus, subject to a strict review as outlined initially. However, this need not be like this as options are available. The Dutch Competition Authority has, e.g., issued *Guidelines – Price arrangement between self-employed workers* (2019), suggesting that collective agreements covering the self-employed might be able to elude Article 101 (1) by virtue of being *De Minimis and a revisit on the concept of a by object restriction might provide a more permanent solution.*

Redefining the concept of a by object restriction would be a better solution

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 and might also elude the label as anti-competitive by object. Taking into consideration (1) a social market economy and (2) that 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. Unfortunately, DG COMP does not use the guidelines to expand on this opportunity, and thus, provides a more permanent solution. However, the matter has been developed in the literature jointly with other options.

The next step

The guidelines are issued as a draft and will thus be finalized in the second half of 2022. For this purpose, DG COMP will take comments until 24 February 2022. Moreover, the guidelines are linked to a draft directive on working conditions in platform work but are not limited to the online platform economy.

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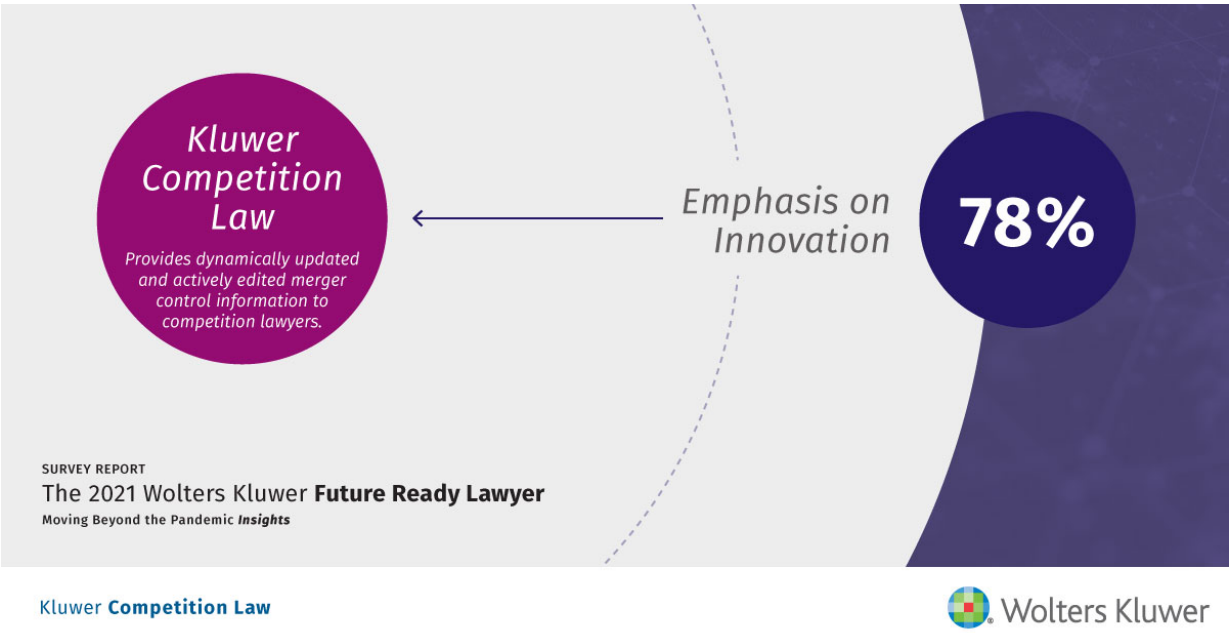

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