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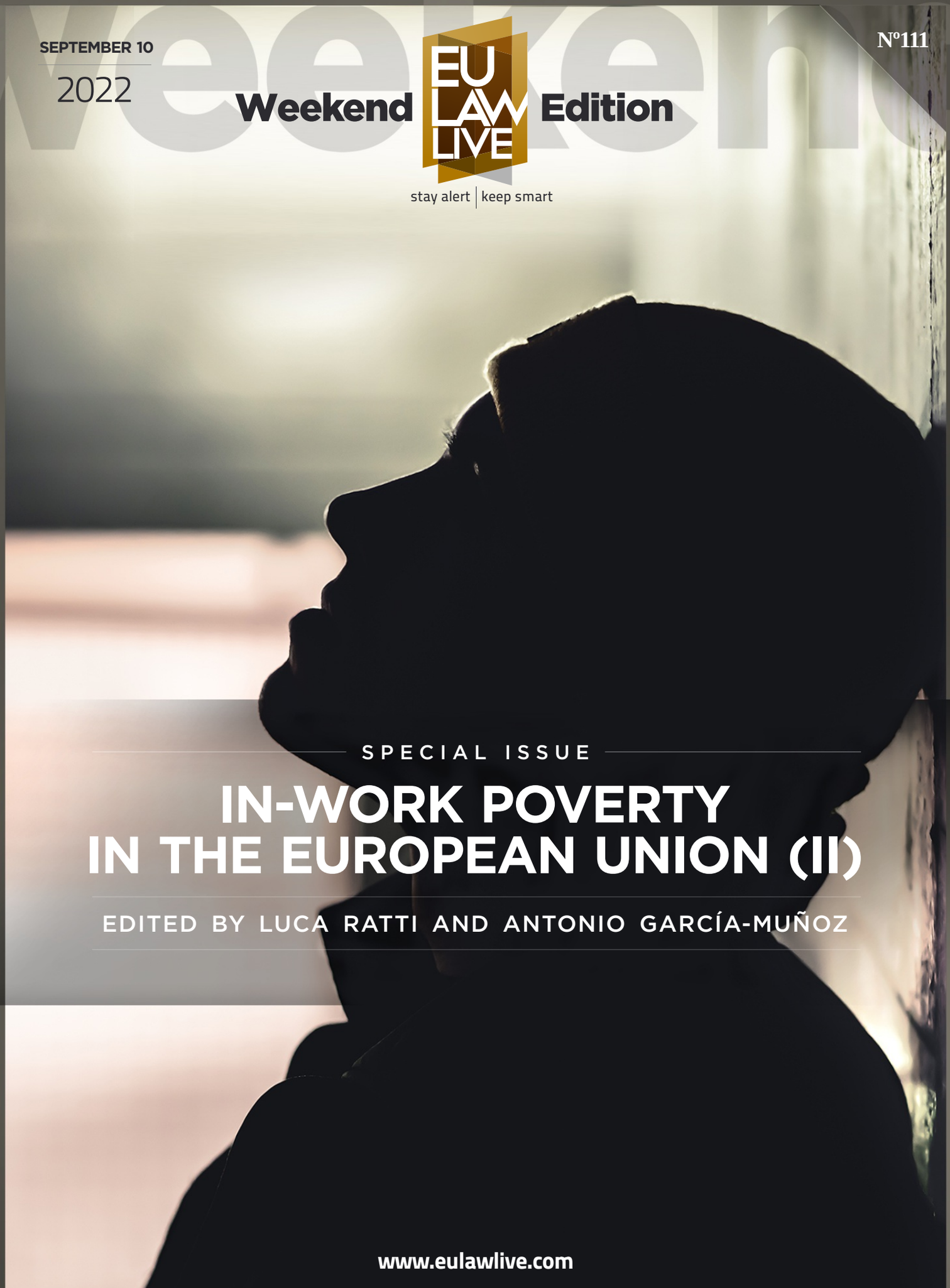

SPECIAL ISSUE

IN-WORK POVERTY IN THE EUROPEAN UNION (II)

EDITED BY LUCA RATTI AND ANTONIO GARCÍA-MUÑOZ

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Luca Ratti[2] and Antonio Garcia-Muñoz[3]

1. A Special Issue on In-work Poverty (II)

We are delighted to present the second part of the Special Issue on in-work poverty in the EU. We continue (and conclude) here the conversation which was opened last December in EU Law Live's Weekend Edition (No. 82, 3 December 2021) (4). In the first part of the Special Issue we discussed the proposal for a Directive on adequate minimum wages and the debates on minimum income at EU level as relevant topics in connection to in-work poverty. In this second part we present two contributions: one dealing with the regulation of platform work at EU level and the other with collective bargaining of the self-employed. Both topics are relevant from an in-work poverty perspective.

But before we present more in detail the topics addressed and how they are connected to in-work poverty, a short recapitulation of what is in-work poverty and why it is a relevant topic in the EU is in order.

First of all, in-work poverty continues to be a reality for too many European workers. Statistical data show that, in 2019, 9% of all employed persons (almost 1 in ten workers) aged 18-64 in the EU-27 were in work but at risk of poverty (5). What does it mean to be in-work poor? In-work poverty refers to a person who is 'in-work' and lives in a household with an equivalent disposable income (i.e., income after taxes and social transfers) below 60% of the median of the national equivalised household in-

In-work poverty refers to a person who is 'in-work' and lives in a household with an equivalent disposable income below 60% of the median of the national equivalised household income

1. This Special Issue reflects only the authors' view and the Research Executive Agency is not responsible for any use that may be made of the information it contains. The WorkYP Project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870619.

2. Associate Professor in European and Comparative Labour Law at the University of Luxembourg.
3. Postdoctoral Researcher at the University of Luxembourg.

4. Available here.

5. Eurostat. In-work at-risk-of-poverty rate by age and sex - EU-SILC survey.

come. In-work poverty is therefore a relative measure of poverty, relative to other people earning work-related income in a given national territory and economy. This explains the existence of large differences in the levels of in-work poverty across EU Member States (6), as well as the different meaning which being in-work poor may have (7). In work-poverty is a complex reality and many drivers have an influence in its formation. The role of law in regulating the labour market is just one factor among many others, but nonetheless remains important for it has an influence on the working conditions of the working poor.

Second, in-work poverty is a relevant topic, and features high on the EU agenda because of its potential negative impact on European societies. In-work poverty weakens social justice and the social pact on which functional democracies are based, may fuel political instability (in times of increasing populism), affects the content and concept of EU citizenship and the trust of EU citizens in the Union and, no less important, causes unnecessary suffering to millions of persons that contribute with their work to the functioning and well-being of our societies and, yet, are not adequately rewarded for their efforts.

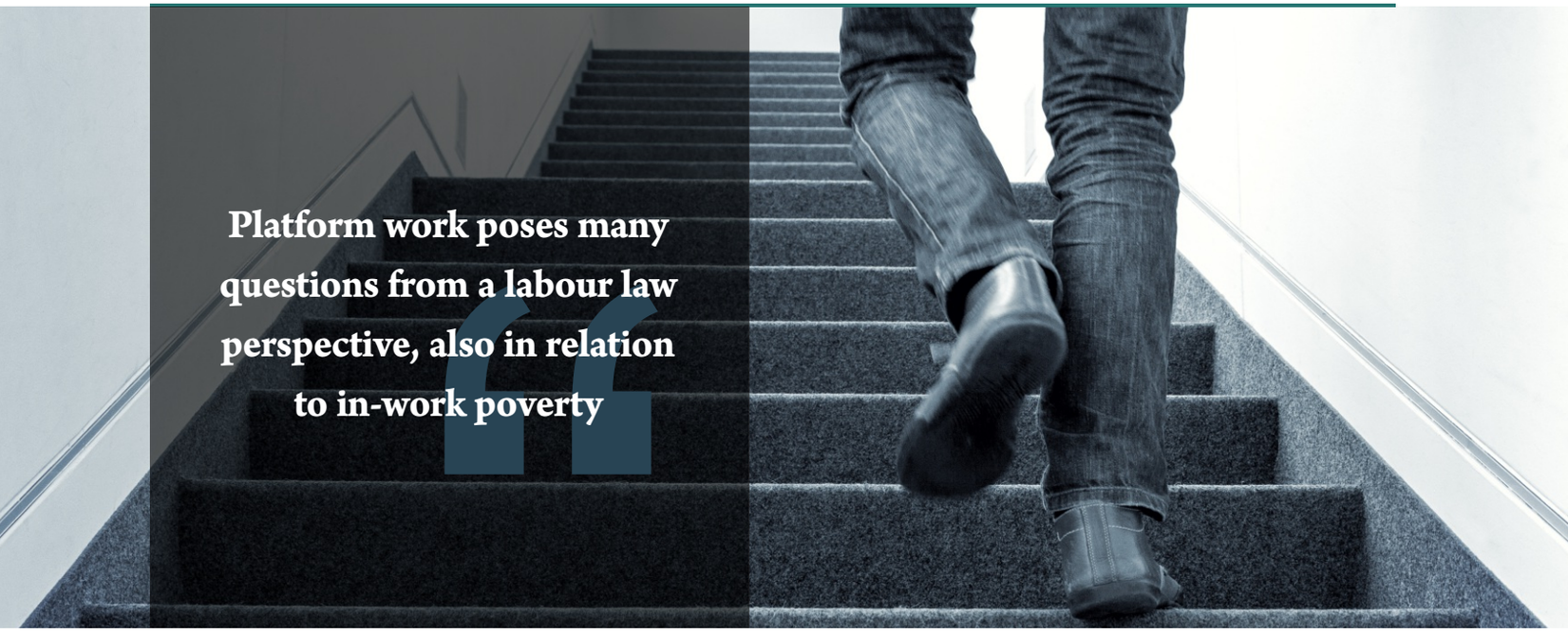
We also need to briefly remind the reader that the contributors to this Special Issue are part of the Horizon2020 Project 'Working, Yet Poor' (WorkYP) (8), coordinated by the University of Luxembourg, which seeks to gain a better understanding of the role of regulation in setting the conditions that produce (and reproduce) in-work poverty, in order to propose regulatory strategies that may help to tackle it. This Project is coming close to its end and has already produced important results, including an edited collection on in-work poverty in seven EU countries (9). In January 2023, the final results of the Project and a programme of policy proposals to fight in-work poverty from a regulatory perspective will be presented at a Conference in Brussels.

2. The topics addressed in this second Special Issue

As promised, this second Special Issue addresses two highly topical issues of EU law that are pivotal in the analysis of in-work poverty: on the one hand, the regulation of platform work at EU level and, on the other hand, the difficult question of collective bargaining for the self-employed in the EU.

The megatrend of digitalisation, which is changing the world in many ways, is also impacting the realm of work. It has given rise to new possibilities and challenges that are visible in new forms of organising production and services. Platform work poses many questions from a labour law perspective, also in relation to in-work poverty. Although there are no statistics on in-work poverty for this group of ever-increasing workers, the fact that most of them face precarious conditions in terms of work stability, work intensity and wages points towards a high inci-

6. In-work poverty levels range from a minimum of 2.9% in Finland to a maximum of 15.7% in Romania (for the year 2019).
7. In some countries, such as Luxembourg, high levels of in-work poverty are compatible with very low levels of material deprivation, which is an objective measurement of poverty, whereas in other countries being a poor worker may imply material deprivation.
8. The website of the WorkYP Project can be consulted here.
9. L. Ratti (ed), *In-Work Poverty in Europe. Vulnerable and Under-Represented Persons in a Comparative Perspective*, Bulletin of Comparative Labour Relations, Vol. 111, Wolters Kluwer, 2022.



dence of in-work poverty in this group. Furthermore, many of these workers are formally qualified as self-employed, that is one of the groups for which statistics show higher levels of in-work poverty (10). As with any other group of workers, multiple and complex factors may explain the levels of in-work poverty of the self-employed, but the obstacles to organise, through organisation and collective bargaining, are certainly part of the picture. On this point labour law faces a clash in the EU with the rules of competition law, as interpreted by the Court of Justice. It is precisely to some of these issues that the two contributions we are presenting are devoted.

The regulation of platform work at EU level and its relation to in-work poverty is the topic of the contribution by Vincenzo Pietrogiovanni. His contribution departs from a reflection on the meaning of vulnerability as a structural characteristic of contemporary labour markets and how digitalisation may exacerbate this trend. This provides the context to understand the impact of platform work and its social consequences, which partly explains the recent attempts to regulate platform work at the EU and national level. The author describes the main problems that labour law has encountered (and created) in its efforts to regulate platform work and how this regulatory attempt has evolved, mainly through case law, at the national level. In the last part of his contribution, the focus is on regulatory proposals at EU level dealing with platform work (11), namely the proposal for a Directive on improving working conditions in platform work and the proposal for a Directive on adequate minimum wages, recently endorsed by an agreement in the Council (12). The author discusses the most relevant contents of these proposals, highlighting the limitations that in his opinion remain important.

10. Solo self-employed workers have a much higher risk of in-work poverty than the employed population, reaching a worrying 23.7% (whereas for the employed population the percentage is at 9%) in 2019. This makes solo self-employed the group of workers at a highest risk of in-work poverty in the EU.
11. COM(2021) 762 final.
12. Available here.

Christina Hiessl addresses the topic of collective bargaining for the self-employed in Europe. Departing from a tantalising comparison between how the topic has been approached by the EU at home and beyond European borders, she structures her intervention by analysing two sides to the problem: the labour law and the competition law sides. In presenting the labour law side of the issue she builds on the comparative work done in the book she recently co-edited on the topic (13) to illustrate the different approaches at national level to include (or exclude) self-employed workers from collective bargaining in some European countries. From this side, however, what is more problematic is the lack of regulation or doctrine on how the rights under labour law interact with potential limitations under competition law. When discussing the competition law side of the issue, she turns to the EU level, discussing in detail the implications of relevant landmark cases such as *Albany* and *FNV Kunsten*, that are key to the understanding of the relation between labour and competition law in the EU. In the last part of her contribution, the author turns to the analysis of the 2021 Guidelines issued by the European Commission (14) on the topic to try to solve some of the problems made visible by *FNV Kunsten* and to the interesting critical issues raised by stakeholders. Finally, she closes by offering some interesting conclusions that show potential problems ahead as well as some thoughts on how to balance the conflicting relation between competition and labour law.

Happy reading!

Luxembourg, July 2022

The editors

13. B.Waas and C. Hiessl (eds.), *Collective bargaining for Self-employed workers in Europe*, Bulletin of Comparative Labour Relations, Vol. 109, Wolters Kluwer, 2021.
14. Available here.

Vulnerabilities and the Avatar of Employment Protection:

Platform Work and In-work Poverty in the EU

Vincenzo Pietrogiovanni [1]

1. Vulnerabilities in the Digitalised Labour Market

The vulnerability of workers is often considered a structural element of contemporary economies, which are driven by globalised markets where companies are meant to act as monistic entities, constantly exposed to the pressure of competitiveness.

Often the terms 'vulnerable workers' and 'precarious workers' can be used synonymously, but in reality they refer to phenomena that are not entirely identical (2). According to the definition given by the UK Government, vulnerable workers are defined as 'someone working in an environment where the risk of being denied employment rights is high and who does not have the capacity or means to protect themselves from that abuse' (3).

Worker vulnerability is linked to uncertainty and insecurity about terms and conditions of work (not only in terms of health and safety), continuity of employment and income. Vulnerability at work might also be related to anti-social working hours that adversely impact the well-being of workers and their family.

Moreover, the vulnerability of workers may be linked to their specific characteristics, such as gender, disability, being unskilled, young or old workers, long-term unemployed, a migrant, or belonging to an ethnic minority. Vulnerability may also be the result

1. Associate Professor in Labour Law at the Department of Business Law, Lund University
2. Anthony Forsyth, Martina Ori, Malcolm Sargeant (eds.), *Vulnerable workers and precarious working*, Cambridge Scholars Publishing, 2013.
3. UK Government, Department of Trade and Industry, *Success at Work. Protecting Vulnerable Workers, Supporting Good Employers. A policy statement for this Parliament*, March 2006, p. 25.

of working in a dangerous or unregulated environment. Precariousness, instead, refers to an employment relationship that involves a risk of job loss or other worsening of employment. Being a so-called 'atypical' worker increases the risk of vulnerability, of course, but there is no automatism. Vulnerability can also be detected through high unemployment rates, short-term jobs, low pay and limited career development.

The more recent cycles of crises and restorations of production of goods and services that accompany the persisting transformations of modern labour markets have been accelerated by the digitalisation of work. The COVID-19 pandemic, in turn, has catalysed the process of more and more traditional tasks drifting to the remote-working online domain.

The digitalisation of work is a macrophenomenon behind which many different factors are interplaying: algorithmic management, artificial intelligence, telework or platform work, just to name a few. Without doubt platform work represents the factor that has received more attention so far in all fora, from academia to public debate. Not surprisingly, as the digitalisation of work unfolds, its social effects have become so urgent, especially for platform workers, that the legislatures and social partners at domestic and EU level have already conducted a series of initiatives.

Being a so-called 'atypical' worker increases the risk of vulnerability, of course, but there is no automatism. Vulnerability can also be detected through high unemployment rates, short-term jobs, low pay and limited career development

On 9 December 2021, the European Commission presented a Proposal for a Directive on improving working conditions in platform work (4), which aims to improve the working conditions of persons performing platform work by ensuring the correct determination of their employment status, by promoting transparency, fairness and accountability in algorithmic management in platform work, and by improving transparency in platform work, including in cross-border situations.

According to the preamble of the proposal, the platform economy in the EU is estimated to have grown by around 500% since 2015. There are more than 28 million platform workers, and in 2025, there could be 43 million. Moreover, it seems that nine out of ten platforms active in the EU classify people working through them as self-employed. But even though most of those people are genuinely self-employed, up to five and a half million platform workers could be at risk of an incorrectly classified employment status. According to the Impact Assessment accompanying the proposal, as a result of implementation of the instrument, between 1.72 million and 4.1 million people are expected to be reclassified as workers.

4. Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work COM(2021) 762 final, 2021/0414 (COD), Brussels, 9.12.2021.

This contribution aims to present some connections between platform work and vulnerability at work considering the results of the current investigation on in-work poverty undertaken in the project WorkYP (5) – which focuses on the EU as well as Sweden, Italy, the Netherlands, Belgium, Luxembourg, Germany, and Poland. These connections will be then used for developing some critical reflections on the recent proposals of social directives from the European Commission, namely the proposals for Directives on improving working conditions in platform work and on adequate minimum wages.

2. The Role of (Labour) Law

This section analyses the interactions of (labour) law with the vulnerability of platform workers. Labour law is traditionally meant to protect workers, especially the weaker ones, however in this section the perspective is also (or mainly) to highlight the adverse effects of the law on platform workers.

Being an employee is not necessarily enough to escape poverty or vulnerability, as seen above, but there are two main legal issues regarding platform workers that increase this risk: anomie (the lack of an appropriate legal regulation) and misclassification – and in many ways these two issues are intertwined.

Among the many factors that make some categories of workers to be vulnerable (in absolute or relative terms) from a legal perspective, anomie is usually one of the most relevant ones. Nonetheless, the law usually has a trend to spread, so what appears to be unregulated might fall within the scope of application of statutory legislation by virtue of judicial interpretation. Moreover, anomie increases the chances for a group of workers as such to be at a higher risk of being misclassified, as the evidence from all seven countries show. It is not by chance, indeed, that anomie on platform workers is addressed in labour law first and foremost in cases regarding precisely the employment classification, which presents the test for validating the effectiveness of protection rights afforded by labour law vis-à-vis such a new phenomenon, on the one side, and an *actio finium regundorum* of the scope of application of labour law.

5. All deliverables of the Working, Yet Poor project are accessible at its webpage.

For this reason, it has been of high importance to follow the developments of the case-law in national courts handling cases of qualification of platform workers as employees or self-employed (or of any other intermediate category, where existent). The pattern emerging from the rulings is not necessarily solving all doubts, although it is clear that the general trend is to classify many platform workers as employees (or similar).

Besides Germany, national courts have ruled exclusively on on-demand work via apps, namely food delivery workers, who have been declared employees in the Netherlands and Italy. In the latter country, however, different courts (including the Court of Cassation) have declared platform workers as 'hetero-organised' workers (who are entitled to similar rights of employees regardless their employment status). Uber drivers have been declared employees by a Dutch court and a Belgian social security body.

As for crowdwork, a single case of on-location microtask performance has been found to constitute an employment contract by the German Supreme Court. The self-employed status has been declared by a Belgian court and the Luxembourgish labour inspectorate. Workers providing cleaning services via an app have been declared temporary agency workers by a Dutch court, whereas for a Swedish administrative court workers providing private household-related small-scale services were to be considered self-employed.

The inconsistencies of the pattern emerging from these decisions are even more problematic since many of the cases concerned are not yet res judicata.

However, many rulings are extremely interesting because they seem to resort to innovative arguments on the classification: for instance, traditional indices of subordination such as the duty to accept the offer to work, the non-replacement option or the use of employee's instruments of work have been reconsidered. The possible evolution of the concepts of employment, ultimately, can benefit all workers, also the casual or intermittent ones that do not perform their work on or via a platform (6).

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6. The literature on the topic of classification of platform workers is already vast. See *inter alia 'A European & Comparative Legal Approach on Digital Workers'*, Special issue of the *Comparative Labor Law and Policy Journal*, I Daugareilh (guest editor), Vol. 41, issue 2, 2021; V De Stefano, I Durri, C Stylogiannis, M Wouters, *'Platform work and the employment relationship'*, International Labour Organization, Working Paper, 31 March 2021; V Pietrogiovanni, 7. 'Between Sein and Sollen of Labour Law: Civil (and Constitutional) Law Perspectives on Platform Workers', King's Law Journal, 31.2 (2020), p. 313.

Falling within the scope of labour law does not automatically bring about wage justice but it definitely makes protections more accessible

Among the jurisdictions of reference in the WorkYP project, only in the Italian one has the legislature established the status of delivery workers framed as 'hetero-organised' workers, which opens, for some, fundamental collective rights as well as the prohibition of piecemeal remuneration, entitlements to accident insurance and wage supplements for work on weekends and in adverse weather conditions. On classification, an important role has been played also by labour inspectorates and/or social security bodies in all countries studied, Poland excluded.

Falling within the scope of labour law does not automatically bring about wage justice but it definitely makes protections more accessible. Considering the different jurisdictions, platform workers can invoke collective agreements, statutory laws or, as a last resort, a general principle of fairness in court to make sure their wages are not too low. But these actions are not always easy, and the results can still mean wages that are not high enough to keep workers free from the risk of poverty.

Another way (labour) law can impact on vulnerability of platform workers can be by introducing legal provisions that create incentives and advantages for platform work: one good example is a Belgian law passed in 2016, which expressly excludes platform work performed as a side job for up to 3,255 euros per year from social security coverage. Also, in Germany and Italy there are schemes for small-scale intermittent work. If the purpose of such schemes is to make 'gigs' more accessible for both workers and customers, it is also evident that many workers might be exposed to abusive situations in which customers resort to these schemes only in order to avoid labour law obligations.

Platform workers who are classified as employees can be covered by minimum wage protection, at least in countries where minimum wages are set by statutory legislation. For countries that set minimum wages in collective agreements, it is necessary to consider whether collective agreements are generally applicable, otherwise the coverage depends on different factors (presence of an applicable agreement, possible extension mechanisms, levels of trade union and employers' membership, etc.).

Platform workers who are classified as employees can be covered by minimum wage protection, at least in countries where minimum wages are set by statutory legislation

Precise data on trade union membership of platform workers are not available, but it is almost certain that these are likely lower than the unionisation of atypical workers.

Nevertheless, it is evident in five countries (thus, excluding Luxembourg and Poland) that trade unions – both traditional confederations and new and autonomous organisations – have increased the number of activities in which they represent and organise platform workers. In the area of crowdwork, there have also been initiatives of cross-border cooperation between unions. In Sweden, Italy and Germany, platform and umbrella companies have joined associations for sector-level negotiation with unions. In Belgium and the Netherlands, collective agreements being universally applicable, platform workers are covered by collective agreements insofar as they are defined as employees. In Germany, the employment status of some platform workers has been established by works council agreements.

Italy and Sweden are the only two countries in which platform workers – namely food delivery workers – are clearly covered by collective agreements, as it is only in these two countries that there have been collective agreements dedicated expressly to such workers: these agreements regulate wages and supplements, collective insurance, and the duty to provide workers with equipment. In Italy, such agreements expressly cover platform workers although they are defined as self-employed. In both countries, some platform workers are covered by general sectoral collective agreements.

Collective agreements that cover also self-employed may be subject to disputes for possible infringements of anti-competition laws

In the Netherlands, the pivotal problem has been detected of unions with platform workers, that is, the lack of interest in representing the interest of a group of workers which is not highly organised, and which usually ends up in examples of derogation clauses for intermittent and platform workers in company agreements. In this regard, a Dutch collective agreement excluded vacation workers from the scope of some collective agreements or specific benefits stipulated therein.

Furthermore, it must be noted that collective agreements that cover also self-employed may be subject to disputes for possible infringements of anti-competition laws.

In Belgium and Sweden, the new initiatives of intermediation between platforms and workers seem to be promising for some of the problems at stake: Belgian SMart cooperatives (which at the same time act as a trade union for its workers vis-à-vis the delivery platform) and umbrella companies in Sweden ensure that platform workers are employees who enjoy all employments rights.

One of the major problems with all forms of casual or intermittent workers seems to be the actual number of hours worked.

As is extremely clear in the Swedish context, the problem of in-work poverty is not related to low or very low wages as such, but rather to the low number of hours worked, which directly or indirectly has adverse effects towards different forms of social security benefits that are calculated exactly on the working time performed. From this perspective, platform work has finally shed a light on a common problem with atypical and precarious work in many sectors: access to a decent amount of work per week or month.

3. The European Commission's Initiatives: Another Lost Opportunity?

What we can learn from the evidence collected in the seven countries of the WorkYP project is that platform workers are at risk of poverty for two major reasons: misclassification and the lack of a decent amount of work.

As for the first problem, the European Commission has adopted the proposal mentioned above, the core normative aspect of which is enshrined in its Article 4, which – as we will see – introduces the legal presumption of employment for some platform workers.

This proposal is in line with the existing legal framework on matters of labour (such as the 2019 Directive on transparent and predictable working conditions (7), the 2002 Directive establishing a general framework for informing and consulting employees (8) along with the 2021 proposal for a Directive on pay transparency (9)) and more in general on matters of digitalisation (first of all the General Data Protection Regulation and, when approved, the proposed Artificial Intelligence Act).

Moreover, the proposed directive is also connected to the proposal of a directive on adequate minimum wage insofar the presumption of employment for platform workers is confirmed.

The Commission's proposal establishes that 'the contractual relationship between a digital labour platform that controls the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship'. Such controlling shall be understood as fulfilling at least two of the following:

(a) effectively determining, or setting upper limits for the level of remuneration;

(b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;

7. Directive 2019/1152 on transparent and predictable working conditions (OJ 2019 L 186, p. 105).
8. Directive 2002/14/EC establishing a general framework for informing and consulting employees (OJ 2002 L80, p. 29).
9. Proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM/2021/93 final.

(c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;

(d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;

(e) effectively restricting the possibility to build a client base or to perform work for any third party.

So, the proposed Directive does not introduce a statutory definition of platform worker (it would have been politically very difficult to do so). Instead it introduces a definition of control power.

This technique would be fascinating if it was not necessarily appropriate for different reasons, namely the possibility of platforms to readjust their controlling power in a very flexible way in order to escape at least four of the above-mentioned characteristics. This technique does not mirror one of the main purposes of the proposed Directive, that is, ensuring correct determination of platform workers' employment status. It is likely that many problems with misclassified workers will not be solved. So, besides all other considerations on the proposal concerned, the main point for the sake of this contribution lies in the asymmetry between the goal of classification and the tools defined for such goal.

Moreover, it seems almost certain that the Directive on adequate minimum wages will be adopted fairly soon, now that the so-called Trilogue (European Parliament, European Commission and the Council of the EU) has reached an agreement (10). It is not possible to foresee the impact of the Directive before considering the final text, but it is likely that some provisions will not be amended. Among them, there is Article 3 that sets out some basic definitions. This article defines 'minimum wage' as 'the minimum remuneration (…) that an employer is required to pay to workers for the work performed during a given period'.

Such a definition is problematic because it confines the right to a minimum wage only within the restriction of the work that is actually performed. And this is exactly the trap in which many casual or intermittent workers find themselves, regardless of whether their work is performed on a platform or not.

In a context of extensive social exclusion and exploitation as we have witnessed constantly in the last decade in the platform economy, any initiative that aims to improve the working and living conditions of millions of workers is always welcome. Especially if the initiatives stem from the EU level, which is definitely the most suitable one. However, it is clear that if such initiatives miss the major problems of in-work poverty and vulnerability of platform workers, the effectiveness of the results is dramatically compromised.

The promise of employment status (or its avatar) for millions of workers who struggle everyday with issues of misclassification is a decisive progress towards social just transitions in the digitalisation of labour markets

The promise of employment status (or its avatar) for millions of workers who struggle everyday with issues of misclassification is a decisive progress towards social just transitions in the digitalisation of labour markets. However, it is not a sufficient step. More changes need to come, namely revising the Working Time Directive in order to foster the right of workers to a decent amount of work. A thorough revision of the concept of working time is necessary, and it seems that, on this subject, although from different perspectives, the Court of Justice of the EU is keener to adopt a more dynamic approach than the EU legislature (11).

10. See here.
11. The reference is clearly to the ground-breaking Judgment of the Court of Justice of 14 May 2019, *Federación de Servicios de Comisiones Obreras (CCOO)* (Case C-55/18, EU:C:2019:402).

Collective Bargaining for the Self-Employed: How to Square EU Competition Law with Fundamental Labour Rights?

Christina Hiessl [1]

Intrduction

Back in 2012, the ILO (International Labour Organisation) dealt with the year-long struggle of South Korean self-employed truck drivers for the right to unionise. The drivers owned their trucks, were hired for assignments without specific supervision or oversight by the companies, and bore the risks connected to the operation. Yet, they faced an overwhelming imbalance of bargaining power in relation to the corporations that hired them, fuelling their push to unionise, and demonstrated readiness to engage in strike action to demand an improvement of their working conditions. In an unusually clearly worded decision, the ILO's competent committee (2) found that '[t]he criterion for determining the persons covered by that right [of freedom to association] is not based on the existence of an employment relationship, which is often non-existent, [and] that this principle equally applies to heavy goods vehicle drivers'. Accordingly, ILO Conventions Nos 87 and 98 (3) were found to preclude the Korean government from denying unions which organised those drivers the full array of rights and protections envisaged for trade unions under national law.

The EU, committed to championing the ILO's Fundamental Principles and Rights at Work (4) in its international trade policy, was quick to point to the truckers' case as evidence of a breach of the 'sustainable development obligation' in the EU-Korea Free Trade Agreement. In fact, the exclusion of 'certain self-employed persons' from the scope of freedom of association under Korean law was the first claimed breach listed in proceedings brought by the EU against Korea under that Agreement (5), leading to Korea's condemnation in January 2021 (6).

1. Researcher at Goethe University Frankfurt and Yonsei University Seoul.
2. Committee of Freedom of Association (CFA), Case No. 2602, Report No. 363, March 2012, para 460 et seq. See also Case No 2829, Report No 365, November 2012, brought by trade unions to take that matter up in more detail.
3. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).
4. See the 1998 ILO Declaration on Fundamental Principles and Rights at Work.
5. Panel of Experts Proceedings under Article 13.15 of the EU-Korea Free Trade Agreement, notably pp. 11, 22 et seq.
6. Report of the Panel of Experts, p. 53.

It was actions like these which have increasingly caused raised eyebrows, and at times scathing criticism, in view of what could not but appear as double standards. For, indeed, assuming the truckers' case had taken place in the EU: would they have been ensured the right to unionise? And would their organisations have been enabled to pursue an improvement of their working conditions the way unions usually do – by bargaining for collectively agreed minimum standards and, if necessary, by staging industrial action? And would *EU law* have contributed to ensuring such rights – or more likely have done the very opposite?

The answer to these questions is complex, and in essence there is a labour law side and a competition law side to the issue. Regarding the latter, the European Commission has recently come forward with a set of Guidelines with the ambition to put the EU beyond reproaches of hypocrisy in respect of its own record of respecting the fundamental labour rights of self-employed workers.

The Labour Law side of the matter

The just described case-law of the ILO is based on Conventions Nos 87 and 98 – two out of eight fundamental (7) conventions, which have been ratified by all EU Member States. The same is true for the core part of Article 6 of the European Social Charter (the right to bargain collectively) (8).

Such obligations under international law to grant freedom of association and collective bargaining rights to self-employed workers (9) have been heeded by national labour law to different degrees and in different ways. In a book published in 2021 (10), we took a closer look at this diversity in the law and practices of 11 European countries.

Our comparative analysis (11) illustrates that national law may reserve collective bargaining rights to rather narrowly defined subgroups of the self-employed (as in Austria and France) or extend them to more broadly conceived generic groups (as in Germany, Poland or Sweden) or basically all self-employed persons (as Italy). The statutes or case law on which the extension of collective bargaining rights to the self-employed is based may have been in place for half a century (as in Germany, Italy or Sweden), or created just a couple of years ago (as in Poland, where a constitutional judgment of 2015 made a reform in 2018 necessary).

Usually, such provisions envisage the inclusion of self-employed persons under the same system as employees. Depending on the national framework for collective bargaining, this may imply that collective agreements are automatically binding for individual contractual relationships between members of the concluding organisations, and perhaps even include non-organised self-employed workers hired by affiliated companies. It may also mean that collective agreements can be declared universally applicable for an entire sector. Spain stands out for subjecting collective bargaining for the self-employed to a separate, more restrictive system, but certain differences compared to collective bargaining for employees are also found in other countries. In some cases, collective bargaining practices for the self-employed have developed without any express basis in statutory or case law – which may be met with doubts (as in Belgium), or an express assumption of its permissibility (even with express reference to international law, for example in Slovenia) (12).

Our comparative research also illustrates the key importance of the inclusiveness of the concept of worker/employee under national law (which is particularly extensive, for example in France). One of the most striking results is that, even in those countries where comparably broad rights have existed for many decades, collec-

7. See supra n. 3.
8. See the charts of ratifications of C087, C098, Treaty 035 and Treaty 163.
9. This is also the interpretation of the European Committee of Social Rights. See Anthony Kerr in Waas/Hiessl (eds), *Collective Bargaining for Self-Employed Workers in Europe*: *Approaches to Reconcile Competition Law and Labour Rights*. Kluwer 2021, pp. 150 et seq.
10. Waas/Hiessl 2021, supra n. 9.
11. Ibid., pp. 275 et seq.
12. Ibid., pp. 273 et seq.

Even in those countries where comparably broad rights have existed for many decades, collective bargaining for the self-employed has in practice usually been restricted to individual sectors and occupations

tive bargaining for the self-employed has in practice usually been restricted to individual sectors and occupations – although a certain revival appears to emerge in the context of the platform economy. What is missing in almost all countries (with the notable exception of Ireland and the Netherlands after recent developments) is any clearly spelled out regulation or doctrine of how the rights under labour law interact with potential limitations under competition law (13).

The Competition Law side of the matter

The Treaty, the Court, and national practice in legal limbo

EU law does not easily condone agreements or concerted practices among undertakings in the sense of Article 101 TFEU. Paragraph 2 of that Article declares such agreements automatically void if they restrict competition in the internal market, and the exceptions allowed by paragraph 3 are all conditional on 'allowing consumers a fair share of the resulting benefit'. An exception which tolerates a negative impact (higher prices) for consumers for the sake of securing the workers involved a decent wage level is not envisaged in that provision.

In respect of collective agreements benefitting employees which involve several undertakings on the employers' side, the Court of Justice has developed a specific exemption in its case-law, starting with *Albany* (14) back in 1999. This approach relies on the fact that the Treaty itself (under the then Article 118 TEC, now Articles 153 and 155 TFEU) encourages dialogue between employers and workers. Fifteen years later, the Court in *FNV Kunsten* refused to extend the Albany doctrine to self-employed workers in general, but found that it included those who were 'false self-employed' or 'in a situation comparable to that of employees' (15).

EU law does not easily condone agreements or concerted practices among undertakings in the sense of Article 101 TFEU

13. See Christina Hiessl in Waas/Hiessl 2021, supra n. 9., pp. 268 et seq.
14. Judgment of the Court of Justice of 21 September 1999, *Albany International BV* (C-67/96).
15. Judgment of the Court of Justice of 4 December 2014, *FNV Kunsten Informatie en Media* (C-413/13, para. 31).

The interpretation of the ambiguously framed judgment was disputed from the start. While the term 'comparable' and some elements of the reasoning indicate that the group to be exempted should include at least certain cases of genuinely self-employed workers, others indicate that the Court merely refers to those misclassified as self-employed, or who would generally fall under the notion of employee/worker (16) for the purposes of EU law. This latter view is supported by the later Yodel ruling, in which the Court of Justice expressly refers to *FNV Kunsten* and literally replicates the key part of the formula used for the definition of the 'false self-employed' to test whether an individual has the status of worker under the Working Time Directive (17).

The Commission's Guidelines (as described below (18)) indicate an understanding according to which *FNV Kunsten* meant to exempt two groups from the concept of an 'undertaking' under EU competition law. One is the 'false self-employed', who is apparently a worker under EU law (but may be classified as self-employed for purposes of national law), defined as someone who:

- acts under the direction of their employer as regards, in particular, their freedom to choose the time, place and content of his work;
- does not share the employer's commercial risks; and
- for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking.

The second type ('in a situation comparable to that of workers') constitutes an actual tertium genus – a person who is neither a worker under EU labour law nor an undertaking under EU competition law. This is the case for someone who 'does not determine independently his [sic] own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary organ within the principal's undertaking' (19).

Conspicuously absent from all these definitions is any reference to the purpose of collective bargaining – which is essentially to give the inherently weaker party in a contractual relationship the option of teaming up with those who are in an equivalent situation, so that collectively they can bargain at eye level with the inherently stronger party. Whether this is the case has arguably little to do with whether a self-employed person is integrated in a principal's business to the degree that they appear as an 'auxiliary organ'. In principle, a gross imbalance of bargaining power may be faced even by those working genuinely independently to the degree that they hire their own employees – such as franchisees, who could potentially benefit greatly from negotiating the conditions of their relationship with the franchisor as a collective.

16. The two terms are effectively synonyms, and used interchangeably in different Directives.
17. Order of the Court of Justice of 22 April 2020, *B v Yodel Delivery Network Ltd* (C-692/19, para 30 et seq.).
18. Communication from the Commission — Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons, C/2021/8838 final, recitals 5, 21.
19. See recitals 21 et seq. of the Guidelines and para 33 of *FNV Kunsten*. Note that this 'split' interpretation of the *FNV Kunsten* judgment sits somewhat uneasily with the operational part of the latter, which indicates that only the 'false self-employed' should be excluded from the application of EU competition law. Still, the Commission's approach may be the most reasonable option to make sense of the Court's use of terminology.

This could arguably also alleviate the problem that, in business models involving the outsourcing of tasks to SMEs forced to work with very tight margins, there may be literally no scope for employees of such SMEs to bargain for decent wages with their direct employer.

European countries have been left sandwiched between an apparently very far-reaching obligation to grant collective labour rights to the self-employed stemming from international labour law such as the ILO's convention and the apparently very limited possibilities to escape the prohibition of collective bargaining by and for them under EU law

In short, European countries have been left sandwiched between an apparently very far-reaching *obligation* to grant collective labour rights to the self-employed stemming from international labour law such as the ILO's convention and the apparently very limited possibilities to escape the *prohibition* of collective bargaining by and for them under EU law. A situation further complicated by the scarcity of cases in which either of those legal standards has been applied in practice. In fact, the number of instances in which concrete collective agreements have come under fire for violating competition law is very limited. This is evidently owed to the fact that, in most countries, collective bargaining involving self-employed workers is rarely even attempted – precisely because it is riddled with legal uncertainties, but also regularly confronted with a myriad of practical difficulties (20).

20. See Hiessl, supra n. 9, pp. 279 et seq.

Notable examples of these rare instances, all of which have drawn considerable international attention, include the Dutch case prompting the *FNV Kunsten* judgment as well as competition authorities' decisions in Ireland (which led to the European Committee of Social Rights condemning Ireland) and Denmark (which was probably the first ever regulatory assessment of a collective agreement with a digital labour platform). In all these cases, national actors have intervened to preserve collective bargaining options within the constraints of competition law. Courts in the Netherlands have reclassified *FNV Kunsten's* orchestra musicians as workers (21); the Irish legislature has passed a competition law exemption referring to 'false' and 'fully dependent' self-employed workers (22); and the Danish social partners have renegotiated the collective agreement concerning cleaners placed by the platform Hilfr. (23) In all cases, this has involved difficult compromises and/or remaining legal uncertainties (24).

No contemporary comparative overview seems to exist for cases of collective action which were sanctioned as concerted action in breach of Article 101 TFEU

No contemporary comparative overview seems to exist for cases of collective action which were sanctioned as concerted action in breach of Article 101 TFEU. In Germany, for instance, the issue briefly prompted discussions among labour lawyers after competition authorities intervened against a collective boycott by dairy farmers of a factory to pressure it to pay more for their milk (25).

21. See Femke Laagland in Waas/Hiessl, supra n. 8, p. 186.
22. See Kerr, supra n. 9, pp. 151 et seq.
23. See Natalie Videbaek Munkholm, Multiparty work relationships, Denmark – the active role of social partners, in *European Labour Law Journal*, 2022 (forthcoming).
24. See notably Kerr, supra n.9, p. 152.
25. See e.g. Frank Bayreuther, Selbständige im Tarif- und Koalitionsrecht, *in Soziales Recht Sonderausgabe* 2019, p. 6.

Member States and their institutions are not the only ones left in a pretty pickle when trying to square their legal obligations under international and EU law. The same applies to some extent to the European Commission

The Commission's new Guidelines

Member States and their institutions are not the only ones left in a pretty pickle when trying to square their legal obligations under international and EU law. The same applies to some extent to the European Commission, which functions as the EU's central competition authority pursuant to Article 105 TFEU. Last December 2021, the Commission came forward with a commitment to address the conundrum by a two-pronged approach.

The Guidelines on the application of EU competition law to collective agreements regarding the working conditions of 'solo self-employed persons' (26) are to apply to collective agreements regarding the contractual relationship between self-employed persons and 'their counterparties', whether or not these agreements also cover workers. These agreements may concern a broad array of working conditions (remuneration, working time, leave, health and safety, social insurance, termination of contract etc.) (27).

The Commission first clarifies its interpretation of the Court of Justice's case-law as described above and reiterates that it does not consider people who are either 'false self-employed' or at least 'in a situation comparable to that of workers' as undertakings. It then specifies that, for the Commission, this includes notably three types of 'solo self-employed workers', namely those who are:

- economically dependent (in the sense of earning at least 50% of their total annual work-related income from a single counterparty);
- working 'side-by-side' with workers for the same counterparty, or covered by a collective agreement together with workers;
- or working through digital platforms (28).

Thereby, the Commission is (expressly) taking up criteria which already play a role for the assessment of collective bargaining rights in some Member States as described above.

The perhaps even more intriguing part of the Guidelines refers to cases which could barely be exempt from the application of competition law even under a very far-stretched interpretation of the Court's case law. For those,

26. See supra n. 18.
27. See recitals 15 et seq.
28. See recitals 24 et seq.

the Commission uses the construct of 'enforcement priorities' (29). This effectively amounts to a promise that at least the Commission in its function as a competition authority will not go after collective agreements which conform to certain criteria. Thereby, it enables Member States to do the same in respect of their national competition authorities, and thus give such agreements a pass along the lines of 'no plaintiff, no judge' .

This concerns collective agreements which 'aim to correct a clear imbalance in the bargaining power of solo self-employed persons relative to their counterparties and are intended, by their nature and purpose, to improve working conditions' (30). The Commission considers this to include agreements concluded either:

- by solo self-employed persons with counterparties of a certain economic strength (especially those representing the whole sector or industry, or with an annual aggregate turnover above 2 million euros or with 10 or more employees)
- or by self-employed persons pursuant to national or EU legislation (as exemplified by agreements for authors and performers under the Copyright Directive (31)) (32).

The second option therefore comprehensively shields all forms of collective bargaining allowed by national labour law as described above from intervention by the Commission.

Critical issues, as raised by stakeholders

The stakeholder consultation organised by the Commission ahead of the publication of the Guidelines evidenced an urgent interest in a clarification of the legal uncertainties emerging in the wake of the *FNV Kunsten* ruling, which have made it excruciatingly difficult for the actors concerned to foresee how potential collective bargaining initiatives will be assessed legally.

An issue criticised by social partners on both sides, though, is the scope of the Guidelines, notably their personal scope. Most provisions concern collective bargaining for the solo self-employed, defined as those who 'rely primarily on their own personal labour', and expressly excluding economic activities consisting 'merely in the sharing or exploitation [or resale] of goods or assets' (33). In this respect, business associations (34) have voiced concerns over the implied distortion of competition law if the solo self-employed are exempt from a restriction that remains applicable to competing other SMEs, while trade union associations (35) see a restriction of collective bargaining rights which exempts many vulnerable self-employed workers.

29. This regulatory strategy is as such not new – see e.g. the 2009 Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, pp. 7–20.
30. See recital 32 of the Guidelines.
31. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1 OJ L 130, 17.5.2019, p. 92–125.
32. See recitals 34 et seqq. of the Guidelines.
33. See recital 19.
34. See e.g. statements by SMEunited, The Federation of International Employers, World Employment Confederation-Europe.
35. E.g. statements by the European Trade Union Confederation – ETUC, European Confederation of Independent Trade Unions (CESI), European Federation of Journalists, industriAll European Trade Union, European Arts and Entertainment Alliance (EAEA).

This illustrates that the aims of both competition law and collective labour law might basically be better served by criteria to identify *situations* involving a gross imbalance of bargaining power between one or few undertakings on the one side and a multitude of self-employed workers providing similar services on the other – and to ensure that collective agreements cover all competing self-employed individuals equally. The fact that the Guidelines instead focus on characteristics of the self-employed workers to be covered is largely mandated by the decision of the Court of Justice to make the *FNV Kunsten* ruling all about the personal scope of the competition rules. The Commission in turn doubled down by also making the applicability of its enforcement priorities at least partly dependent on the exclusive coverage of solo self-employed individuals.

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Another issue of concern mainly for trade unions is that the Guidelines remain deliberately vague regarding what they carefully frame as 'self-employed persons collectively decid[ing] not to provide services to particular counterparties, for example because the counterparty is not willing to enter into an agreement on working conditions'. Regarding collective action, all the guidelines have to say is that it ' require[s] an individual assessment', but should be treated in the same way as the intended agreement to which it is linked '[t]o the extent that it can be shown that such a coordinated refusal to supply labour is necessary and proportionate for the negotiation or conclusion of the collective agreement' (36).

Arguably, since some solo self-employed individuals are meant to be exempt from the very concept of an undertaking, decisions which they take among themselves cannot per se violate competition law. The same would not apply to strike/boycott decisions agreed among those who are only declared outside the Commission's 'enforcement priorities', though. Given that there is no European-level case law on the necessity and proportionality of collective action (apart from two judgments of limited helpfulness on its compatibility with the free movement of services (37)), this leaves workers with little to go on when considering to do as the Korean truckers mentioned in the introduction – who eventually succeeded in making their concerns heard after many months of strike and traffic blockades (38).

36. See recital 16 of the Guidelines.
37. Judgments of the Court of Justice of 18 December 2007, *Laval un Partneri Ltd* (C-341/05) and *International Transport Workers' Federationand Finnish Seamen's Union v Viking Line ABP* (C-438/05).
38. See Aelim Yun, Curbing precarious informal employment: A case study of precarious workers in the South Korean construction industry. *Global Labour University Working Paper*, No. 49, 2017; Jihye Chun, The Struggles of Irregularly-Employed Workers in South Korea, 1999-2012. 2013, pp. 15 et seq.

Conclusions

The Commission's strategy of transparent self-restraint via 'enforcement priorities' may arguably be all it is able to do for the time being

The COVID-19 crisis, which in many countries has hit the self-employed particularly hard, has let the debate about their vulnerabilities and social protection needs resurface in many respects (39). Apart from social security rights, a particularly salient issue are regulatory strategies to address dependencies resulting from excessive imbalances of bargaining power – for which collective bargaining emerged more than a century ago as a right protected by labour standards at international level.

The Commission's strategy of transparent self-restraint via 'enforcement priorities' may arguably be all it is able to do for the time being. It ensures that collective agreements for solo self-employed individuals fulfilling concrete criteria (which are illustrated by examples throughout the text of the Guidelines) enjoy at least the 'relative security' that they will not be challenged by authorities ex officio. Yet, as soon as companies hiring self-employed workers are either unwilling to enter into an agreement in the first place or (as in the *FNV Kunsten* case) back out of an existing agreement, workers may still find themselves in legal limbo. Whether they bring a lawsuit themselves or engage in industrial action susceptible to charges under competition law, the case is likely to end up before a court – which is bound to assess the situation under the strict standards of Article 101 TFEU and the Court's case law.

This legal limbo is most likely here to stay until one of these cases is eventually brought before the Court of Justice

This legal limbo is most likely here to stay until one of these cases is eventually brought before the Court of Justice, forcing it to address the question it was carefully tiptoeing around in *FNV Kunsten*. Namely, whether there may be a way around the seemingly unambiguous wording of Article 101, based on an imperative principle on the same legal level – that is, EU primary law. This could either be constructed via Article 28 of the EU Charter of Fundamental Rights (right of collective bargaining and action) or a general principle in accordance with Article 6 TEU – considering that every single EU Member State has ratified the ILO's pertinent conventions and is subject to scrutiny of its compliance with requirements as developed by the ILO's quasi-judicial bodies.

Needless to say, this alone would not eliminate the conflict of interests between the aims of competition law (protecting consumers from price-inflating concerted practices) and labour law (ensuring decent wages and conditions for the workers involved). Yet, it would at least ensure that those two interests could be considered and balanced in a legal framework which does not mandate the superiority of one over the other and disregards whether and how both of them are at stake in the individual case.

39. See Hiessl et al., *International Journal of Comparative Labour Law and Industrial Relations*, Special Issue: income protection for self-employed workers in the wake of the pandemic (forthcoming).