Italian Labour Law e-Journal
Issue 2, Vol. 18 (2025)
ISSN 1561-8048
https://doi.org/10.6092/issn.1561-8048/22056

Ensuring adequate remuneration for vulnerable solo self-employed through collective bargaining – EU antitrust prohibition as a limit?

Dominik Leist*

1. Problem and course of investigation. 2. The conflict between collective bargaining rights and competition law and its new relevance in the field of solo self-employment. 3. The relationship between national and EU antitrust prohibitions. 3.1. The scope of application of the relevant antitrust prohibitions. 3.2. The legal construct in cases without sufficient effect on trade between Member States. 3.3. The legal construct in cases with sufficient effect on trade between Member States. 3.4. Interim conclusion and consequences for further investigation. 4. Remuneration-related collective agreements in favour of solo self-employed persons vs. Art. 101 TFEU? Options for resolving the conflict. 5. The 'Albany' exemption from the prohibition of cartels developed by the CJEU. 5.1. Content and justification. 5.2. Assumption of intervention via Article 5 of the EU Directive on platform work? 5.3. Extension of the Albany exception to 'genuine' solo self-employed persons? (Cases "Pavlov" and "FNV Kunsten"). 6. A specific exception in favour of vulnerable solo self-employed persons? (Case "FNV Kunsten"). 6.1. The controversial further statements in "FNV Kunsten". 6.2. The interpretations in legal literature. 6.3. Statement. 6.4. Criteria for defining the FNV-Kunsten exception. 6.5. Interim result. 7. The Commission guidelines on the application of the prohibition of cartels to solo self-employed persons: Scope of application. 7.1. The scope of persons covered. 7.2. The scope of agreements covered. 7.3. The Commission guidelines as a suitable concretisation of the 'FNV Kunsten' exception? 8. The Commission's (initial) approach to clarifying the scope of Article 101 TFEU. 8.1. Classification of the Commission's approach. 8.2. Economic dependence (50% test). 8.3. Side-by-side activities with the same service provider and collective agreements covering both categories of workers. 8.4. Digital labour platforms. 8.5. Cumulative valuation. 9. The Commission's (second) approach to its enforcement priorities as an antitrust authority. 9.1. Collective agreements with counterparties who have a certain economic power. 9.2. Collective agreements concluded in accordance with national or EU legislation. 9.3. Cumulative valuation. 10. The guidelines as a suitable instrument for creating legal certainty? 11. Conclusion.

* Research assistant at the Institute for Labor Law and Industrial Relations in the European Union (IAAEU) in Trier, Germany. This essay has been submitted to a double-blind peer review. This article is part of the research project "*Securing the right to adequate remuneration for 'solo-entrepreneurs' as a protection against labour exploitation – an area of conflict between international obligations and mandatory European Union legislation?"* and was funded in whole or in part by Deutsche Forschungsgemeinschaft (DFG), Grant number 461224849.

Italian Labour Law e-Journal
Issue 2, Vol. 18 (2025)
Section: Miscellaneous

Abstract

After the research project "*The right to adequate remuneration for solo-entrepreneurs"* has already shown that the international legal obligations ratified by European States require effective protection of an appropriate level of remuneration for solo self-employed workers, and ways to fulfil these obligations in national law have been identified, the question arises as to whether and to what extent remuneration regulations in favour of solo self-employed workers would be compatible with EU primary law. With regard to the collective negotiation of minimum wages, the extent to which the negotiation process and the agreements reached would be compatible with the prohibition of cartels under Art. 101 TFEU must be analysed. For this purpose, it is necessary to examine the relationship between EU and national antitrust prohibitions, the extent to which a cartel exception in favour of solo self-employed persons can be inferred from the case law of the CJEU and the content and consequences of the current '*Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons'* of the European Commission.

Keywords: Self-employed; Collective Bargaining; Remuneration; Antitrust Law; Competition; Article 101 TFEU.

1. Problem and course of investigation.

After the research project "*Securing the right to adequate remuneration for 'solo-entrepreneurs' as a protection against labour exploitation – an area of conflict between international obligations and mandatory European Union legislation?"* has already shown that the international legal obligations ratified by Germany and Austria require effective protection of an appropriate level of remuneration for solo self-employed workers,[1] and ways to fulfil these obligations in national law have been identified,[2] the question arises as to whether and to what extent remuneration regulations in favour of solo self-employed workers would be compatible with EU primary law.

With regard to the collective negotiation of minimum wages, the extent to which the negotiation process and the agreements reached would be compatible with the prohibition of cartels under Art. 101 TFEU must be analysed. For this purpose, it is necessary to examine the relationship between EU and national antitrust prohibitions, the extent to which a cartel exception in favour of solo self-employed persons can be inferred from the case law of the CJEU and the content and consequences of the current guidelines of the EU Commission. Above these individual aspects hovers the question of whether a consistent understanding of collective rights and competition law in the multi-level system can be achieved.

[1] Pupeter F., Lukas K., *Prekäre Selbstständigkeit: Völker- und europarechtliche Garantien für faire Entlohnung und kollektive Vertretung*, in *Nachhaltigkeitsrecht (NR) – Zeitschrift für das Recht der nachhaltigen Entwicklung*, 4, 4, 2024, 368-377, available at https://doi.org/10.33196/nr202404036801 (last accessed on 10 November 2025).
[2] Leist D., Schlachter M., *Adequate Remuneration for the Self-Employed – Legal framework in Germany,* in *Hungarian Labour Law E-Journal*, 1, 2025 (in appearance).

2. The conflict between collective bargaining rights and competition law and its new relevance in the field of solo self-employment.

In the context of negotiating employment conditions, the structurally weak bargaining position of individual employees has long been compensated for by allowing collective bargaining. Where individual negotiation of contract terms is not to be expected due to structural deficits, national legal systems – in various forms and to varying degrees[3] – allow for collective bargaining of employment conditions, to whom they have also committed themselves under international law.[4] Collective bargaining on terms of remuneration is, however, inextricably linked to a restriction of competition, which legal systems in turn combat in principle in the form of competition law.[5] Guarantees of collective bargaining rights therefore always exist in a tension with competition law prohibitions that needs to be resolved.

With regard to the employment conditions of genuine employees, the question of how to resolve this tension can be considered largely resolved.[6] Particularly in modern work organisations, however, the category of personal dependence, which is predominantly used to define the concept of employee, does not necessarily run parallel to the existence of a weakness in bargaining power that requires compensation when negotiating one's own employment conditions. Accordingly, the obligations of states under international law to enable collective bargaining processes are not limited to the category of employees, but also include vulnerable solo self-employed persons, as demonstrated by the decisions of the supervisory committees responsible for the relevant ILO conventions[7] and Article 6 (2) of

[3] *See*, for example, freedom of association in Article 9(3) of the German *Grundgesetz* and the German *Tarifvertragsgesetz*.

[4] *See* the comprehensive ratification of ILO Conventions No. 87 and 98 and, in Europe, the European Convention on Human Rights and Articles 5 and 6 of the (Revised) European Social Charter.

[5] Kempen O., *Grundlagen*, in Kempen O., Zachert U. (eds.), *Tarifvertragsgesetz (Kommentar für die Praxis)*, 5th edition, Bund-Verlag, Cologne, 2013, para 205 aptly refers to the cartel principle as a basic prerequisite of the collective bargaining system.

[6] *See* the CJEU's Albany exception below under 5.

[7] Regarding Convention No. 87:
Committee on Freedom of Association, *Compilation of decisions*, Art. 3, para. 387-389, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3943847,1 (last accessed on 10 November 2025); Committee of Experts on the Application of Conventions and Recommendations, *ILC 69th Session 1983, General Survey Report III (Part 4 B)*, 30, para. 92, https://webapps.ilo.org/public/libdoc/ilo/P/09661/09661(1983-69-4B).pdf (last accessed on 10 November 2025). Regarding Convention No. 98: Committee on Freedom of Association, *Report No. 374*, Case No. 2602 (Republic of Korea), 2015, 8, para. 31(e), available at https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40relconf/documents/meetingdocument/wcms_357167.pdf (last accessed on 10 November 2025); Committee on Freedom of Association, *Report No. 400*, Case no. 3306 (Government of Peru), 2022, 164, para. 620, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40relconf/documents/meetingdocument/wcms_860246.pdf (last accessed on 10 November 2025); Committee of Experts on the Application of Conventions and Recommendations, *ILC 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work in light of the ILO, Report III (Part 1B)*, para. 209, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40relconf/documents/meetingdocument/wcms_174846.pdf (last accessed on 10 November 2025); based on this, *see* Doherty M., Franca V., *Solving the 'Gig-saw'? Collective Rights and Platform Work,* in *Industrial Law Journal*, 49, 3, 2020, 352, 359.

the (R)ESC.[8] Consequently, the national legal systems of several[9] EU Member States also provide for corresponding options[10] in favour of certain solo self-employed persons. The fundamental conflict between enabling collective negotiation of remuneration and competition law is therefore increasingly also arising in the area of solo self-employed persons. The intervention of antitrust prohibitions would have an impact at several levels. On the one hand, it would generally render agreements null and void under civil law. On the other hand, prosecution by the respective antitrust authorities could also result in fines for the parties involved. Both prospects already significantly complicate the organisation of the workforce, which is a prerequisite for any collective bargaining process.[11]

3. The relationship between national and EU antitrust prohibitions.

Antitrust prohibitions are found in the national law of EU Member States, on the one hand, and in EU primary law in Article 101 TFEU, on the other. This initially raises the questions of which collective agreements are to be assessed against which antitrust prohibition and how the two levels of prohibition interact. As a first step, therefore, the relationship between national and EU antitrust prohibitions must be determined, for which purpose their respective scopes of application must initially be identified (a.), before their interaction in situations without (b.) and with (c.) sufficient EU internal market relevance is outlined.

3.1. The scope of application of the relevant antitrust prohibitions.

While national antitrust prohibitions within a Member State generally apply across the board, Article 101 TFEU only comes into play if there is a "inter-state"-connection. This presupposes that the agreement in question is *capable* of (*significantly*) affecting *trade between Member States*,[12] whereby the term "trade" also includes the provision of services.[13]

[8] ECSR – Complaint No. 123/2016 ICTU v. Ireland, Decision on the Merits of 12 September 2018.
[9] *See* the evaluations by Fuchs M., *Tarifverträge Selbstständiger und europäisches Wettbewerbsrecht*, in *Zeitschrift für Europäisches Sozial- und* Arbeitsrecht, 8, 2016, 297 and 299 ff.; Schubert C. (ed.), *Economically dependent Workers – A Handbook*, C.H. Beck, Munich, 2022, 9-188.
[10] *See*, for example, Section 12a of the German *Tarifvertragsgesetz* and Sections 36 ff. of the German *Urheberrechtsgesetz*.
[11] Schubert C., *Kollektivverträge für Solo-Selbstständige nach dem Entwurf der Leitlinien der Europäischen Kommission – Sozialpartnerschaft für kleine Selbstständige,* in *Zeitschrift für Europäisches Sozial- und* Arbeitsrecht, 8, 2022, 318, and 320. On the effects of impending antitrust fines, *see* also Pennings F., Bekker S., *The Increasing Room for Collective Bargaining on Behalf of Self-Employed Persons*, in *Utrecht Law Review*, 19, 3, 2023, 22, available at https://utrechtlawreview.org/articles/10.36633/ulr.862#8-analysis-of-the-strategies-to-include-self-employment-clauses (last accessed on 10 November 2025).
[12] Meeßen G., *Article 101 TFEU,* in Kellerbauer M., Klamert M., Tomkin J. (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, Oxford, 2019, 1025 ff.
[13] On this characteristic, *see* Kumkar L., *Art. 101 AEUV*, in Gersdorf H., Paal B., *Beck'scher Online-Kommentar Informations- und Medienrecht*, 47th edition, C.H. Beck, Munich, 2024, para. 52 ff.

According to the relevant case law of the CJEU, a (potential) restriction of trade between Member States must be assumed to exist if the agreement in question extends to the entire territory of a Member State.[14] The distinction is less clear in the case of agreements whose scope is limited to part of a single Member State. In such cases, some commentators focus on whether the agreement relates to services that are regularly offered across borders.[15] However, the CJEU in "FNV Kunsten"[16] did not conclude from a remuneration agreement in favour of orchestra musicians that there was a cross-border link within the meaning of Article 101 TFEU,[17] so that the use of this indicator should be treated with caution. In the area of collective wage agreements, the unwritten criterion of "significance" is likely to be of more decisive importance.[18] This criterion establishes a *de minimis* threshold for the required inter-state connection,[19] which is only exceeded if the agreement covers 5-10% of the relevant market. Insofar as an agreement is predominantly limited to a *regional* market, the applicability of Article 101 TFEU is therefore likely to be denied.[20] However, in view of the rather vague criteria for determining the relevant market, the assessment to be made in individual cases remains subject to considerable uncertainty.

3.2. The legal construct in cases without sufficient effect on trade between Member States.

If the necessary capability to affect trade between Member States is missing, Article 101 TFEU is *not applicable* and only national antitrust prohibitions apply. Nevertheless, EU competition law also influences the *content* of antitrust requirements in these cases: on the one hand, national antitrust prohibitions have been harmonized almost word for word with their EU counterparts,[21] which already implies a parallel interpretation. Second, some Member States explicitly provide for their antitrust prohibitions to be interpreted in line with Article 101 TFEU.[22] Indirectly, therefore, the CJEU's case law on Article 101 TFEU also influences antitrust reviews in purely national law contexts.

[14] CJEU – Case C-439/11 P – Ziegler SA v. European Commission [2013] ECLI:EU:C:2013:513, para. 94; based on this Höppner T., *Kollektives Urhebervertragsrecht und das Kartellverbot für Solo-Selbstständige – Teil 1*, in *Archiv für Presserecht – Zeitschrift für das Gesamte Medienrecht (AfP)*, 54, 1, 2023, 9.
[15] For further details, *see* Höppner T., *ibidem*, 9.
[16] CJEU (First Chamber) – Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden [2014] ECLI:EU:C:2014:2411, para. 17; The CJEU considered the request for a preliminary ruling admissible because Dutch law also referred to the scope of the EU antitrust prohibition for purely national matters, para. 18-20.
[17] Bayreuther F., *Sicherung der Leistungsbedingungen von (Solo-)Selbstständigen, Crowdworkern und anderen Plattformbeschäftigten*, HSI-Schriftenreihe, 26, 2018, 103, available at https://www.boeckler.de/fpdf/HBS-006962/p_hsi_schriften_26.pdf (last accessed on 10 November 2025).
[18] Bayreuther F., *ibidem*, 103.
[19] Kumkar L., nt. (13), para. 181 ff.
[20] In this sense, Bayreuther F., nt. (17), 103.
[21] For example, Germany in Section 1 of the *Gesetz gegen Wettbewerbsbeschränkungen* and Austria in its Section 1 of the *Kartellgesetz*.
[22] For example, the German legislature expressly laid down the desired parallelism in the explanatory memorandum to the 7th amendment to the German *Gesetz gegen Wettbewerbsbeschränkungen*, Bundestag Drucksache 15/3640, 22 ff. On Dutch law, *see* CJEU (First Chamber) – Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden [2014] ECLI:EU:C:2014:2411, para. 18-20.

The question of how to resolve the conflict between the prohibition of cartels and collective bargaining rights under national law in the event of a conflict must be distinguished from the question of the content of the prohibition of cartels. If the latter conflict (only) with national prohibitions of cartels in situations not related to the internal market, the question of how to resolve the conflict is a matter of national law. The answer is usually in favour of collective rights, which, as an exception to the general rule of the prohibition of cartels, regularly constitute *lex specialis*[23] and are in some cases also regulated at a higher level.[24]

Insofar as the inter-state connection within the meaning of Article 101 TFEU can be ruled out, Member States therefore have the discretion to allow collective remuneration agreements that also benefit solo self-employed persons. This opens up potential in particular for locally limited collective agreements, such as those in favour of courier drivers or cleaning staff in a specific city or region. Since their actual organization is also more likely to succeed in narrowly defined local areas than nationwide or across state borders, the significance of this option should not be underestimated. However, there remains the risk of unclear boundaries regarding the interstate reference that triggers the applicability of Article 101 TFEU.

3.3. The legal construct in cases with sufficient effect on trade between Member States.

If there is an international connection, the legal situation is significantly different. In principle, the antitrust prohibitions under EU law and the respective Member State law are then *applicable in parallel*. However, Article 3(1) sentence 1 of Regulation 1/2003 requires that the competition authorities at least also apply the prohibition under Article 101 TFEU.[25]

In addition, Article 3(2) sentence 1 of Regulation 1/2003 also stipulates that, in this case, Article 101 TFEU has a *substantive influence* on parallel national antitrust prohibitions in such a way that these may not be interpreted beyond the scope of Article 101 TFEU.[26] As soon as there is a sufficient link to the EU internal market, the antitrust limits are therefore already determined at the level of the substantive definition of the antitrust prohibitions under Article 101 TFEU.

[23] In German law, the *Tarifvertragsgesetz* constitutes the more specific provision in relation to the antitrust prohibition in Section 1 of the *Gesetz gegen Wettbewerbsbeschränkungen,* which is also assumed for the constitutional freedom of association.
[24] This is the case in Germany, where freedom of association under Article 9(3) of the Constitution (*Grundgesetz*) takes primacy over the national prohibition of cartels, *see* Bayreuther F., nt. (17), 92 ff., Kempen O., nt. (5), para. 205.
[25] This provision has its equivalent in national law in Section 22 of the *Gesetz gegen Wettbewerbsbeschränkungen*.
[26] This provision also has its national counterpart in Section 22 of the *Gesetz gegen Wettbewerbsbeschränkungen*.

3.4. Interim conclusion and consequences for further investigation.

In cases with a sufficient connection to the EU internal market, the antitrust review is determined throughout by Article 101 TFEU, which takes precedence over any national collective bargaining options in the event of a conflict. If there is no sufficient connection to the EU internal market, there is scope for national enabling provisions – but in view of the uncertainties surrounding the determination of the connection to the EU internal market that triggers the applicability of Article 101 TFEU, their use in practice is not without risk.

The question of the extent to which Article 101 TFEU prohibits collective remuneration rules in favour of solo self-employed persons is therefore essential for both constellations and shall be clarified below. In the following, possible starting points for resolving the tension within the framework of Article 101 TFEU will first be outlined (*see* par. 4), before the relevant case law of the CJEU is examined (*see* par. 5-6) and it is assessed whether and to what extent the 2022 Commission guidelines result in reliable modifications (*see* par. 7-11).

4. Remuneration-related collective agreements in favour of solo self-employed persons vs. Art. 101 TFEU? Options for resolving the conflict.

Article 101 TFEU opens up several dogmatic approaches to balancing the tension between the prohibition of cartels and collective bargaining. The most comprehensive approach consists of restricting the scope of the prohibition of cartels, as recognised by the CJEU in its 'Albany' doctrine in favour of employees and their collectives (*see* par. 5. below). However, it is controversial whether a similar exception in favour of solo self-employed persons can be inferred from the case law of the Court of Justice, and will be examined below (*see* par. 6. below).

Insofar as an exemption for genuine solo self-employed persons is denied, the fact that this group can also achieve a social protection objective through collective action could at least be taken into account within the application of the prohibition of cartels. The "Wouters" ruling of the CJEU, in which a comparable approach was chosen in favour of non-competitive occupational objectives, was proposed[27] as a model for this. In the meantime, however, the CJEU has restrictively concretized[28] this line of case law in the sense that it is not applicable to restrictions of competition by object, which is likely to prevent its applicability to collective agreements.

Another – more promising - possibility would be to invoke the EU Charter of Fundamental Rights.[29] If vulnerable solo self-employed persons are considered to be covered

[27] Bayreuther F., nt. (17), 104, also recognises this as an option with regard to collective agreements for solo self-employed persons; Bretzigheimer M., Maturana S., *Arbeitsmärkte und Kartellrecht – Der Leitlinienentwurf der Kommission zu Tarifverträgen von Solo-Selbstständigen,* in *Neue Zeitschrift für Kartellrecht*, 2022, 246, and Höppner T., nt. (14), 10, disagree.

[28] CJEU (Second Chamber) – Case C-438/22 Em akaunt BG EOOD v. Zastrahovatelno aktsionerno druzhestvo Armeets AD [2024] ECLI:EU:C:2024:71, para. 32 ff.

[29] Mair A., *Kartellrechtliche Freistellung für kollv Regelungen zugunsten Scheinselbständiger*, in *Zeitschrift für Arbeits- und Sozialrecht*, 45, 2015, 283-285; Bayreuther F., nt. (17), 98.

by the scope of protection of Article 28 of the Charter[30] or if Article 12 of the Charter is interpreted as granting them a right to collective bargaining,[31] this could also constitute an exception to the prohibition contained in Article 101 TFEU or a reason for justifying a violation.[32] If both an exemption from the prohibition of cartels and a corresponding effect of Article 28 or 12 of the EU Charter of Fundamental Rights are rejected, a violation could still fail in some cases due to the criterion of the 'appreciability'[33] of the restriction of competition.[34] Only in rare individual cases, however, is the option of an individual exemption under Article 101(3) TFEU likely to be helpful.[35]

It must therefore first be clarified whether certain self-employed persons can also benefit from a sectoral exemption from the prohibition of cartels. This includes questions regarding the scope of the recognised Albany exception (*see* par. 5.) and whether a separate exception was established in the subsequent FNV Kunsten decision (*see* par. 6.).

5. The 'Albany' exemption from the prohibition of cartels developed by the CJEU.
5.1. Content and justification.

In 1999, the CJEU, in its parallel[36] rulings in the Albany, Brentjens and Drijvende Bokken cases, had already accepted an unwritten exemption from the EU antitrust prohibition[37] in favour of collective agreements relating to employees. The CJEU justified this by stating that the EU Treaties not only formulate competition-related objectives but also numerous social policy objectives[38] and, in this context, also provide for a dialogue between the social partners

[30] Klein T., *§ 2 Normative Grundlagen und Grundprinzipien des Arbeitskampfrechts*, in Frieling T., Jacobs M., Krois C. (eds.), *Arbeitskampfrecht*, C.H. Beck, Munich, 2021, para. 74; Leist D., *Art. 28 CFREU*, in Hiessl C. (ed.), *EU Labour Law: A Commentary*, Wolters Kluwer, Alphen aan den Rijn, 2025, 141; similarly Bayreuther F., nt. (17), 98; critically Schubert C., *GRC Art. 28 Recht auf Kollektivverhandlungen und Kollektivmaßnahmen*, in Franzen M., Gallner I., Oetker H. (eds.), *Kommentar zum europäischen Arbeitsrecht*, 5th edition, C.H. Beck, Munich, 2024, para. 18 ff.

[31] On the approach that makes this possible, *see* Klein T., *ibidem*, para 60.

[32] *See* Brameshuber E., *Kollektivverträge für Arbeitnehmerähnliche,* in Brameshuber E., Friedrich M., Karl B. (eds), *Festschrift Franz Marhold*, Manz-Verlag, Wien, 2020, 433 and 438, with further references.

[33] CJEU – Cases C-180/98 to C-184/98 Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten [2000] ECLI:EU:C:2000:428, para. 95, 97.

[34] For further details, *see* Brameshuber E., *(Ein Grundrecht auf) Tarifverhandlungen für wirtschaftlich abhängige Arbeitnehmerähnliche*, in Brameshuber E., Brockmann J., Marhold F., Miranda Boto J. (eds.), *Kollektive Arbeitsbeziehungen in der Gig Economy*, Manz-Verlag, Wien, 2023, 275 and 286 with further references.

[35] Critically also Bourazeri K., *Neue Beschäftigungsformen in der digitalen Wirtschaft am Beispiel soloselbstständiger Crowdworker*, in *Neue Zeitschrift für Arbeitsrecht*, 11, 2019, 741 and 745; Höppner T., nt. (14), 9; more optimistic Mohr J., Mey P., *Kollektivverträge über die Tätigkeitsbedingungen von Solo-Selbständigen nach den neuen Leitlinien der Kommission*, in *Neue Zeitschrift für Kartellrecht,* 2022, 665 and 674.

[36] An overview of the background to the respective decisions is provided by Jurkowska-Gomulka A., Piszcz A., Oliveira Pais S., *Collective agreements on working conditions of solo self-employed persons: perspective of EU competition law*, in *Bialystok Legal* Studies, 29, 2, 2024, 69-70, available at the following link https://reference-global.com/article/10.15290/bsp.2024.29.02.06 (last accessed on 10 November 2025).

[37] At the time of the decisions, the prohibition of cartels was still regulated in Article 85 EC and was incorporated into Article 101 TFEU when the TFEU entered into force.

[38] CJEU – Case C-67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECLI:EU:C:1999:430, para. 54, 57.

which may lead to contractual relations.[39] Since the achievement of the social policy objectives pursued by such agreements would be seriously undermined if the prohibition of cartels also applied to them,[40] the Court considered an exception to the scope of the EU antitrust prohibition necessary.[41] It should therefore be emphasised that, in its landmark decision on the scope of the prohibition of cartels, the CJEU already went beyond the narrow interpretation prevailing in antitrust literature, according to which the limits of competition law are to be determined solely on the basis of the objective of consumer welfare in the narrow sense.

In accordance with the abovementioned derivation, the 'Albany' exception to the prohibition of cartels requires that an agreement of this kind is the result of a dialogue between employee and employer organisations in the form of a collective agreement and (cumulatively)[42] that its object is to improve the working and employment conditions of employees.[43] On this basis, it therefore only applies if the agreement in question was concluded in favour of employees within the meaning of EU law.

5.2. Assumption of intervention via Article 5 of the EU Directive on platform work?

The Albany exception could also take on additional significance in cases of unclear employee status in the future in the area of platform-organised services: The EU Directive on platform work,[44] which came into force on 1 December 2024, requires in Art. 5(1) that there is a presumption that an employment relationship exists between a person working on a digital labour platform within the meaning of the Directive and the platform "*when facts indicating control and direction, according to national law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice, are found*".[45]

The strict "2 out of 5" test provided for in the draft version, according to which the presumption would have applied even in the case of an actual unilateral determination of remuneration in conjunction with electronic monitoring of the activity[46], was abandoned in the final version of the Directive in favour of greater leeway for Member States.[47]

[39] CJEU, *ibidem,* para. 55, 56.
[40] CJEU, *ibidem,* para. 59.
[41] CJEU, *ibidem,* para. 60.
[42] Fuchs, nt. (9), 299; Mohr J., *Soloselbständige zwischen Wettbewerbsrecht und Arbeitsrecht,* in Hanau H., Matiaske W. (eds.), *Entgrenzung von Arbeitsverhältnissen*, Nomos Verlagsgesellschaft, Baden-Baden, 2019, 99 and 114.
[43] CJEU - Case C-67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECLI:EU:C:1999:430, para. 62 et seq.
[44] Directive no. 2024/2831 of 23 October 2024 on improving working conditions in platform work.
[45] *See* the following in-depth analyses of this regulation: Polajžar A., *Analysis of the criteria for establishing the existence of an employment relationship of platform workers under the Platform Work Directive – high expectations and limited outcome?,* in *Revista Jurídica Portucalense*, 38, 1, 2025, 106-122, https://doi.org/10.34625/issn.2183-2705(38)2025.ic-6 (last accessed on 10 November 2025); Prugberger T., Solymosi-Szekeres B., *Legal Doctrinal and Sectoral Problems of Digital Platform Contracts in the European Union Resulting in Conflicts Between Workers and Platforms,* in *Merits*, 5, 3, 16, 2025, https://doi.org/10.3390/merits5030016 (last accessed on 10 November 2025).
[46] Critical of the draft version containing this feature: Mohr J., Mey P., nt. (35), 670.
[47] Critical of the softening: Polajžar A., nt. (45), 117; Prugberger T., Solymosi-Szekeres B., nt. (45), 8-9.

Nevertheless, even in its current form, the presumption is likely to benefit quite a few workers in the grey area between dependent and self-employed work.

If the platform cannot disprove the presumption, its effect also extends to the antitrust assessment, as can be inferred from Article 5(3) of the Directive, because unlike other areas of law, competition law was not excluded from the presumption in the second subparagraph of that provision. In this way, the 'Albany' exception could in future apply in the platform economy in favour of some workers who have tended to be regarded as self-employed up to now.[48]

5.3. Extension of the Albany exception to 'genuine' solo self-employed persons? (Cases "Pavlov" and "FNV Kunsten").

Apart from the platform economy, there have been numerous general discussions as to whether collective agreements concluded in favour of vulnerable solo self-employed persons could be covered by the Albany exception. However, the question can be considered settled. After the CJEU had already rejected a direct extension of the Albany exception to members of the liberal professions, in this case medical specialists, in the Pavlov[49] decision, it also expressly rejected a direct extension to "small" self-employed workers, in this case orchestra musicians, in the FNV Kunsten[50] decision.

In both cases, the CJEU stated that the underlying agreements could not be regarded as the result of collective bargaining between the social partners[51] and were therefore not exempt from the scope of the prohibition of cartels within the meaning of the 'Albany' exception.[52] In contrast to the 'Albany' case, the Court of Justice considered the medical specialists at issue in the 'Pavlov' case to be entrepreneurs and their association to be an association of undertakings within the meaning of the prohibition of cartels.[53]

In the FNV Kunsten decision, the CJEU initially confirmed this line of reasoning in principle.[54] The case concerned a collective agreement concluded by a trade union representing both employed and self-employed orchestra musicians, which provided for

[48] With the same assessment regarding the (stricter) draft version: Mohr J., Mey P., nt. (35), 670; agreeing with the necessity, but with a different view on the status quo: Jurkowska-Gomułka A., Piszcz A., Oliveira Pais S., nt. (36), 79.
[49] CJEU – Cases C-180/98 to C-184/98 Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten [2000] ECLI:EU:C:2000:428, para. 68.
[50] CJEU (First Chamber) – Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden [2014] ECLI:EU:C:2014:2411, para. 28-30.
[51] CJEU – Cases C-180/98 to C-184/98 Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten [2000] ECLI:EU:C:2000:428, para. 68; CJEU (First Chamber) – Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden [2014] ECLI:EU:C:2014:2411, para. 30.
[52] CJEU – Cases C-180/98 to C-184/98 Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten [2000] ECLI:EU:C:2000:428, para. 70; CJEU (First Chamber) – Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden [2014] ECLI:EU:C:2014:2411, para. 30.
[53] *See* the analysis by Countouris N., De Stefano V., Lianos I., *The EU, Competition and Worker's Rights*, in *CLES Research Paper Series,* 2, 2021, 10, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812153 (last accessed on 10 November 2025).
[54] CJEU (First Chamber) – Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden [2014] ECLI:EU:C:2014:2411, para. 22, 29, 30.

minimum wages for both groups. The CJEU upheld that the temporary musicians in question, if they offer their services for remuneration on a specific market and carry out their activities as independent economic operators vis-à-vis their clients, are in principle "undertakings" within the meaning of antitrust law, even if they perform the same activities as employees.[55] At the collective level, the CJEU concluded that even a trade union representing employees and self-employed persons acts as an association of undertakings and not as a social partner within the meaning of the Albany exception when it negotiates on behalf of and in the interests of its self-employed members.[56]

6. A specific exception in favour of vulnerable solo self-employed persons? (Case "FNV Kunsten").

6.1. The controversial further statements in "FNV Kunsten".

Highly controversial to this day, however, is how the part of the FNV Kunsten judgment (paras. 31-41) following the above-mentioned statements is to be understood. Following the rejection of the application of the Albany exception, the CJEU continues with the much-discussed wording:

> *That finding cannot, however, prevent such a provision of a collective labour agreement from being regarded also as the result of dialogue between management and labour if the service providers, in the name and on behalf of whom the trade union negotiated, are in fact 'false self-employed', that is to say, service providers in a situation comparable to that of employees.*[57]

The CJEU initially justified this statement by stating that it is 'not always easy'[58] to determine whether self-employed service providers have the status of an undertaking, and then referred to its case law on the concepts of undertaking and worker under EU law.[59] Finally, it returned to the collective agreement at issue[60] and the aforementioned category of 'false self-employed' and stated:

> *Accordingly, a provision of a collective labour agreement, in so far as it sets minimum fees for service providers who are 'false self-employed', cannot, by reason of its nature and purpose, be subject to the scope of Article 101(1) TFEU.*[61]

[55] CJEU (First Chamber), *ibidem*, para. 27.
[56] CJEU (First Chamber), *ibidem*, para. 28.
[57] CJEU (First Chamber), *ibidem*, para. 31; confirmed in the operative part in para. 42.
[58] CJEU (First Chamber), *ibidem*, para. 32.
[59] CJEU (First Chamber), *ibidem*, para. 33-36.
[60] CJEU (First Chamber), *ibidem*, para. 38-40.
[61] CJEU (First Chamber), *ibidem*, para. 41.

6.2. The interpretations in legal literature.

The reception of the decision in literature can essentially be divided into two contrasting interpretations.

One school of thought does not see any exception to the prohibition of cartels beyond the Albany case law in paragraphs 31-41 and the concluding statement of the judgment. This view is based on an understanding of the category of 'false self-employed' referred to in FNV Kunsten as meaning 'persons who are classified as self-employed but who are in fact employees within the meaning of EU law'.[62] On this basis, the content of paragraphs 31-41 of the judgment is limited to clarifying that the assessment already made in the Allonby judgment[63] for the principle of equal pay that the status of 'employee' within the meaning of EU law is not determined by the formal designation or categorisation in national law, but by substantive criteria of EU law, also applies to the conditions for the Albany exception to the prohibition of cartels. The Albany exception would therefore remain the only exception to Article 101 TFEU relating to the conditions of employment and would remain limited to the area of employees within the meaning of EU law.

The opposing view interprets paragraphs 31-41 as establishing a separate exception to the prohibition of cartels in favour of certain self-employed persons, going beyond the previous 'Albany' case law.[64] This interpretation is based on an understanding of the new category of 'false self-employed' as persons who are in fact self-employed but who are comparable to employees in terms of their need for protection.[65] On this basis, paras. 31-41 of the FNV-Kunsten decision serve to establish and initially define the content of a new exemption from the prohibition of cartels in favour of self-employed persons covered by the new category.

---

[62] Based on this, *see*, for example, Bretzigheimer M., Maturana S., nt. (27), 247; Goldmann J., *Tarifverträge für selbständige Dienstleistungsanbieter als Verstoß gegen EU-Kartellrecht?,* in *Europäische Zeitschrift Für Arbeitsrecht*, 2015, 509 and 517; Grosheide E., ter Haar B., *Employee-like worker: Competitive entrepreneur or submissive employee? Reflections on ECJ, C-413/13, FNV Kunsten Informatie*, in Bellomo S., Gundt N., Łaga M., Miranda Boto J. (eds.), *Labour Law and Social Rights in Europe: The Jurisprudence of International Courts. Selected Judgements*, Gdansk University Press, Gdansk, 2018, available at https://scholarlypublications.universiteitleiden.nl/access/item%3A2973842/view (last accessed on 10 November 2025); Latzel C., Serr S., *Kartellkontrollprivileg für Tarifverträge als formeller Rahmen eines Unionstarifrechts*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2014, 410; Mohr J., nt. (42), 114; Schubert C., nt. (11), 319. Also pointing in this direction: Risak M., Dullinger T., *The concept of 'worker' in EU law – Status quo and potential for change*, Report No. 140, European Trade Union Institute (ETUI), Brussels, 2018, 23, https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3190912_code1950811.pdf?abstractid=3190912&mirid=1&type=2 (last accessed on 10 November 2025).

[63] CJEU – Case C-256/01 Debra Allonby v. Accrington & Rossendale College and others [2004] ECLI:EU:C:2004:18, para. 71, the assessment there concerned the principle of equal pay.

[64] In this sense, Bayreuther F., nt. (17), 96; Countouris N., De Stefano V., Lianos I., nt. (53), 10 ff.; García-Muñoz Alhambra A., *Collective bargaining of self-employed workers and competition law in the EU*, in *Lavoro Diritti Europa*, 3, 2023, 5-6, https://www.lavorodirittieuropa.it/images/GARCIA_MUNOZ.pdf (last accessed on 10 November 2025); Giampà G., *An Inquiry into the Guidelines on the Application of EU Competition Law to Collective Agreements concerning the Working Conditions of the Solo Self-Employed,* in *Ljubljana Law Review*, 83, 2023, 106, http://www.pf.uni-lj.si/media/zzr.2023.05.giampa.pdf (last accessed on 10 November 2025); Jurkowska-Gomulka A., Piszcz A., Oliveira Pais S., nt. (36), 78; Höppner T., nt. (14), 6; Waltermann R., *Kann Plattformarbeit Selbständiger durch Tarifvertrag gestaltet werden?*, in Gallner I., Henssler M., Eckhoff F., Reufels M. (eds.), *Dynamisches Recht - Festschrift für Wilhelm Moll*, C.H. Beck, Munich, 2019, 727 and 736.

[65] Bayreuther F., nt. (17), 96.

6.3. Statement.

The first interpretation, according to which the category of *'false self-employed'* refers exclusively to actual employees within the meaning of EU law who have merely been formally (incorrectly) classified as self-employed, is not convincing.

Admittedly, it can be argued in favour of this interpretation that the statement of reasons in paragraphs 35-37 contains passages suggesting that the category of 'false self-employed' also presupposes personal dependence, as would already be constitutive for a position as an employee within the meaning of EU law.[66] If this is placed in the foreground, the FNV Kunsten decision could be explained in the sense that the CJEU initially defined the category of 'false self-employed' in a misleadingly broad manner (para. 31) in order to then clarify this definition in the following paragraphs (paras. 35-37) by requiring a necessary *actual* employee status.

But this is contradicted by the fact that the CJEU had already described the situation of merely mislabelling an actual employment relationship in its 'Allonby' decision with the much more precise wording '*if his independence is merely notional, thereby disguising an employment relationship'*.[67] When drafting 'FNV Kunsten', the CJEU also had this 'Allonby' formula in mind, as evidenced by its explicit citation.[68] Nevertheless, the CJEU did not define the category of 'false self-employed' by reference to this formula, but rather with the significantly wider phrase '*that is to say, service providers in a situation comparable to that of employees*'.[69] Conversely, this shows that the CJEU did not intend the 'false self-employed' exception to merely clarify the applicability of the 'Allonby' formula in antitrust law.[70]

This interpretation is also supported by the two-part structure of the court's reasoning. If the CJEU in paragraphs 31-41 had merely wanted to apply the 'Allonby' formula to the scope of the prohibition of cartels, it is difficult to understand why it should have opened a 'second branch of the decision' consisting of a total of 10 paragraphs.[71] The CJEU could have clarified this point alone in the context of its examination of the concept of an 'association of undertakings',[72] which would have required only a single additional sentence and, due to its location, would also have avoided potential misunderstandings.

The decisive argument in favour of the exception for 'false self-employed' persons not referring to employees within the meaning of EU law, but rather to certain 'genuine' self-employed persons, lies in the logical structure of the category definition provided by the CJEU: The comparative analysis to be made in accordance with the "*service providers in a situation comparable to that of employees"* formula can only be carried out in a meaningful way if

[66] Bayreuther F., nt. (17), 96.
[67] CJEU – Case C-256/01 Debra Allonby v. Accrington & Rossendale College and others [2004] ECLI:EU:C:2004:18, para. 71.
[68] CJEU (First Chamber) – Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden [2014] ECLI:EU:C:2014:2411, para. 35.
[69] CJEU (First Chamber), *ibidem*, para. 31.
[70] Heuschmid J., Hlava D., *Keine Anwendung des europäischen Kartellrechts auf Tarifverträge, die Regelungen für Selbstständige* enthalten, in *Arbeit und Recht (AuR)*, 2015, 193-194; Höppner T., nt. (14), 6.
[71] Similarly, Bayreuther F., nt. (17), 97.
[72] Also hinted at by Bayreuther F., *ibidem*, 97.

it refers to persons *outside the* scope of the concept of employee under EU law. In the case of persons *within* the definition of 'employee', the formula would be conceptually meaningless, as they would have to constitute both the standard and the subject of the comparison. The situation of persons who *are* employees cannot be meaningfully *compared* with that of employees.

Based on this, the impression remains that the reasoning behind the decision is not entirely consistent, as the CJEU also refers to the Allonby decision and thus to employee status in the subsequent paragraphs 35-37. Contrary to the first view, however, this cannot be understood as a 'subsequent correction' of the previous broad definition of 'false self-employed'. This is confirmed in particular by the operative part of the judgment, which fully incorporates the formula *"service providers in a situation comparable to that of employees*" from para. 31 without mentioning its - alleged - subsequent correction in paragraph 35-37. The CJEU thus saw the central message of its decision in this broad formula and obviously chose its wording deliberately.

Overall, there is therefore much to suggest that the FNV Kunsten decision should not be understood in terms of an 'either/or' situation, but rather that the CJEU intended to make *both* statements and merely combined them, possibly as a compromise. This is the only way to explain all the statements made in FNV Kunsten and minimise inconsistencies in content.

On this basis, both basic approaches are to be partially agreed with: In FNV Kunsten, the CJEU extended the 'Allonby' case law to the 'Albany' exception in Article 101 TFEU, thereby clarifying that the 'Albany' exception applies to all employees within the meaning of EU law, regardless of their designation or categorisation under national law. This clarification is convincing in terms of content, but would have been more appropriate in the context of the preliminary consideration of the requirements of Article 101 TFEU.

In addition, however, 'FNV Kunsten' contains a second – significantly more important – statement, as the direct definition of 'false self-employed' persons exempt from the prohibition of cartels refers to persons *outside* an employment relationship. This appears to be a conscious decision which, in conjunction with the complete inclusion of this broad formula in the operative part, its rhetorical introduction[73] and the structure of the decision, clearly indicates that the CJEU additionally wanted to establish an exception to Article 101 TFEU in favour of certain solo self-employed persons.

6.4. Criteria for defining the FNV-Kunsten exception.

Assuming that the CJEU established an exception in FNV Kunsten that goes beyond the Albany case law in favour of certain 'genuine' self-employed persons, the question arises as to the scope of this exception.

Irrespective of whether the 'FNV-Kunsten' exception is classified dogmatically (as here) as a separate sectoral exception or as an extension of the 'Albany' exception, there can be no doubt that the restriction known from 'Albany' to an intended improvement of working and

[73] Bayreuther F., nt. (17), 97.

employment conditions applies accordingly.[74] This is confirmed not least by paragraphs 39 and 40 of the judgment, in which the CJEU explicitly states that this condition is met.

The decisive factor for distinguishing the personnel covered by the 'FNV-Kunsten' exception is the relevant basis for comparison to be used in accordance with the '*service providers in a situation comparable to that of employees'* formula. If the 'false self-employed' exception – as justified in point 3 – is understood as not being limited to the 'Allonby' reference, but rather as standing alongside it, then this comparison cannot refer to the existence of a relationship of authority, despite the passages in paragraphs 34 and 35 of the decision that point in this direction.

A more convincing interpretation would be to understand the term 'situation comparable to that of an employee' in the sense of a comparable need for protection.[75] This is also suggested by a passage in the judgment (para. 33) following the formula, in which the CJEU focuses on whether the worker *'[…] does not determine his conduct on the market independently, but is completely dependent on his principal […]'*.[76] In legal literature, this is predominantly interpreted as meaning that economic dependence[77] is decisive, as Advocate General Wahl also formulated as a criterion in his Opinion.[78] In this respect, a distinction is proposed, similar to that laid down in Section 12a of the *German Tarifvertragsgesetz*, which is based on the proportion of the self-employed person's total income that is attributable to individual clients.

However, it also seems possible to relate the CJEU's wording in para. 33 directly to the negotiation situation, because *'its conduct on the market'* 'does not determine' *'independently'* (and is also '*entirely dependent on its principal')* who actually has no influence on its own contractual terms. In terms of content, the more appropriate criterion is likely to be a reference to a weakness in the negotiation of the terms of a contract that requires compensation, as this specifically addresses the problem that makes collective negotiation of terms necessary in the first place. Although economic dependence in the sense of a definition based on share of earnings may be an indication of this,[79] the two categories are not automatically equivalent. Just as it is conceivable that there are markets in which highly qualified self-employed individuals work predominantly for one client but regularly hold a strong bargaining position vis-à-vis that client, it is also conceivable that individual bargaining weakness that excludes any influence on the content of one's own contract exists, particularly in mass markets, even

[74] *See* also the Commission's assessment in the Guidelines on the application of the antitrust rules to agreements between solo self-employed persons, bullet point 2.1.(15).
[75] Bayreuther F., nt. (17), 97; Heuschmid J., Hlava D., nt. (70), 194; similarly, also Höppner T., nt. (14), 6.
[76] CJEU (First Chamber) – Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden [2014] ECLI:EU:C:2014:2411, para. 33; based on this, *see* also: Bayreuther F., nt. (17), 97; Countouris N., De Stefano V., Lianos I., nt. (53), 11; Eufinger A., *Zur Anwendbarkeit des Kartellrechts bei Tarifverträgen*, in *Der Betrieb*, 2015, 192-193.
[77] Eufinger A., *ibidem*, 193; Höppner T., nt. (14), 6; evaluating the recent Commission guidelines in this sense, Schubert C., nt. (9), 324.
[78] Advocate General Wahl, Opinion of 11 September 2014 – Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden [2014] ECLI:EU:C:2014:2215, para. 52.
[79] For the current state of opinion on the relationship between the two categories, *see* Schubert C., nt. (11), 324 with further references.

vis-à-vis a large number of clients, although there would be no economic dependence on these clients within the meaning of the conventional definition.[80]

Relying on a negotiating weakness requiring compensation would also be consistent with the ECSR's assessment of Article 6(2) (R)ESC,[81] which, in accordance with the intersectional clauses of the Charter of Fundamental Rights – whether directly or indirectly via Article 11 ECHR – must also be taken into account when interpreting Articles 28 and 12 CFREU. Such an understanding would therefore not only directly address the underlying problem, but also represent a step towards a more consistent overall solution in the multi-level system.[82]

Contrary to concerns expressed in legal literature, there is also no compelling counterargument in the fact that the CJEU did not base its fundamental approach to exceptions to Article 101 TFEU on considerations of the necessary formation of countervailing power in the negotiation situation, but on the conflict between competition policy and social policy objectives under primary law, and has so far[83] regarded the latter as being established in the Treaties with regard to collective bargaining of employment conditions only in favour of genuine employees.[84]

On the one hand, based on the influence of relevant developments in international law to be taken into account when interpreting the Charter of Fundamental Rights pursuant to Articles 52 and 53 of the Charter, there is already much to suggest that in future either Article 28[85] or Article 12[86] of the Charter will be recognised as a primary law provision which includes the objective of a collective bargaining option for working conditions also for solo self-employed persons who are in need of protection in this respect.

Even if one rejects this view, the core statement of the FNV-Kunsten decision still applies insofar as *nevertheless* (*'That finding cannot, however, prevent...'*)[87] the agreements reached in favour of 'false self-employed' persons *can be regarded* as the result of a dialogue between the social partners.[88] The decisive factor in this respect would therefore be the scope of the category of 'false self-employed' persons, which, as shown, addresses persons outside the employment relationship and is to be determined on the basis of a comparable need for protection.

---

[80] *See* already in this direction Georgiou D., *An Assessment of the EU's draft Guidelines on the application of EU competition Law to collective agreements of the "solo self-employed",* in Competition Policy International - TechReg Chronicle, July 2022, 30, available at the following link: https://www.competitionpolicyinternational.com/wp-content/uploads/2022/07/TechREG-Gig-Economy-July-2022.pdf (last accessed on 10 November 2025).

[81] ECSR – Complaint No. 123/2016 ICTU v. Ireland, Decision on the Merits of 12 September 2018; based on this, *see* Countouris N., De Stefano V., Lianos I., nt. (53); Schlachter M., *The Self-employed Persons under the European Social Charter*, in Schubert C. (ed.), *Economically dependent Workers – A Handbook*, C.H. Beck, Munich, 2022, Part. II B. para 26.

[82] Pointing in a similar direction: García-Muñoz Alhambra A., nt. (64), 6 and 9; with regard to the EU level, *see* also Giampà G., nt. (64), 115.

[83] CJEU – Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden [2014] ECLI:EU:C:2014:2411, para. 29.

[84] However, this is the view of Höppner T., nt. (14), 7.

[85] Heuschmid J., *Art. 28 GrCh*, in Boecken W., Düwell F., Diller M., Hanau H. (eds.), *Gesamtes Arbeitsrecht*, Vol. 2, 2nd edition, Nomos Verlagsgesellschaft, Baden-Baden, 2023, para 28; Leist D., nt. (30), 141; open in this respect also Schubert C., nt. (11), 325.

[86] Klein T., nt. (30), para 60.

[87] CJEU (First Chamber) – Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden [2014] ECLI:EU:C:2014:2411, para. 31.

[88] CJEU (First Chamber), ibidem, para. 31.

6.5. Interim result.

In the opinion expressed here, the CJEU in FNV Kunsten established a separate exception to the prohibition of cartels in favour of vulnerable solo self-employed persons, the largely open definition of which can most convincingly be determined directly on the basis of the question of whether there is a structural weakness in bargaining power on the relevant market that requires compensation. Nevertheless, it should be noted that the legal situation remains highly controversial, both at the level of whether an exception covering self-employed persons has been established and at the level of its potential specification.

As no subsequent decision has been issued by the CJEU, the question arises as to whether clarification could be provided by other means. The Commission's guidelines on the application of the prohibition of cartels to solo self-employed persons, which reflect the understanding of the Commission and thus of the competent antitrust authority, appear to be a possible source of clarification.

7. The Commission guidelines on the application of the prohibition of cartels to solo self-employed persons: Scope of application.

On 29 September 2022, the EU Commission, in its capacity as antitrust authority, published its '*Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons*'.[89] In these guidelines, it sets out its legal opinion on relevant exemptions from Article 101 TFEU and defines further categories of cases in which it will not intervene as an antitrust authority.

The following examines the scope of these guidelines (*see* par. 7.1), the extent to which they contain suitable specifications regarding the scope of the antitrust exemption (*see* par. 7.2), and whether they are suitable as a regulatory instrument for creating the necessary legal certainty (*see* par. 7.3).

7.1. The scope of persons covered.

The scope of the guidelines is limited to 'solo self-employed persons', who are defined as:

[a] person who does not have an employment contract or who is not in an employment relationship, and who relies primarily on his or her own personal labour for the provision of the services concerned.[90]

[89] European Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons*, 29.9.2022, C(2022) 6846 final, available at https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=PI_COM:C(2022)6846 (last accessed on 10 November 2025).
[90] European Commission, *ibidem*, bullet point 1.(2)(a).

Firstly, it should be noted that the guidelines expressly do not refer to employees within the meaning of EU law,[91] but to genuinely self-employed persons. According to the explanatory notes,[92] the prerequisite of dependence on one's own labour is not excluded by the fact that objects such as musical instruments or cleaning equipment are used in the provision of services.[93] However, there is no 'solo self-employment' within the meaning of the guidelines if the sharing, exploitation or resale of the items constitutes the activity owed, as is the case, for example, with the provision of accommodation alone.[94]

7.2. The scope of agreements covered.

In objective terms, the guidelines apply to collective agreements, which are defined 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.[95]

The guidelines therefore only apply to agreements concluded with the counterparty. They do not cover agreements 'on the same side of the negotiation', such as agreements between several clients on the activities of solo self-employed persons (e.g. minimum remuneration per trip)[96] or agreements between several solo self-employed persons on coordinated behaviour towards joint contractors.

The latter is particularly problematic because the successful conclusion of a collective agreement is inconceivable without prior internal (cartel) agreements on common demands and joint pressure,[97] which is why protection under international law and fundamental rights does not only apply to the actual negotiations, but also to preparatory measures[98] – not least the formation of the association itself. The Commission addresses this issue, which was already criticised[99] for the draft version, with a reverse exception: agreements concluded within the same negotiating party for the purpose of preliminary coordination are treated as collective agreements within the meaning of the guidelines if they are necessary and proportionate for the conclusion of a collective agreement.[100]

Regarding the form, the definition of the 'collective agreements' covered is broad in order to take account of the diverging practices in the Member States.[101] In accordance with the

[91] This is also emphasized by Giampà G., nt. (64), 108.
[92] European Commission, nt. (89), bullet point 2.2.(18).
[93] *See* Heinemann A., *Tarifverträge für Solo-Selbstständige: Zum Verhältnis von Wettbewerbs- und Sozialpolitik,* in *Wirtschaft und Wettbewerb*, 2023, 257-259.
[94] *See* also Mohr J., Mey P., nt. (35), 670 (on the draft version).
[95] European Commission, nt. (89), bullet point 1.(2)(c).
[96] Heinemann A., nt. (93), 259.
[97] The cartel principle is therefore a basic prerequisite for collective bargaining and collective agreements, as correctly stated by Kempen O., nt. (5), para. 205.
[98] Schubert C., nt. (11), (still in draft form).
[99] Georgiou D., nt. (80), 31-32.
[100] European Commission, nt. (89), bullet point 2.1.(16).
[101] Schubert C., nt. (11), 321 (still on the draft version).

explanatory notes,[102] this therefore expressly includes the extension of existing agreement content, e.g. through references.

With regard to the content of the agreement, only agreements that relate to the working conditions of solo self-employed persons are covered. This feature transfers the basic approach regarding the privileged content of agreements already pursued by the CJEU in Albany to the situation of solo self-employment, which is associated with conceptual ambiguities due to its special characteristics.[103]

The term 'working conditions' should also be understood broadly[104] within the meaning of the guidelines. In addition to remuneration, including bonuses and other payments, it also covers issues such as working hours, termination of contracts, the working environment, health and safety at work and social benefits.[105] By contrast, the guidelines do not apply to agreements that are aimed at the behaviour of the client on its target market, such as those concerning its business hours[106] or minimum prices to be charged to its end customers.[107]

7.3. The Commission guidelines as a suitable concretisation of the 'FNV Kunsten' exception?

Within this scope, the Commission is pursuing a dual approach. In a first step, it sets out which collective agreements it considers to already fall outside the scope of Article 101 TFEU (*see* par. 8). In a second step, the Commission then defines groups of collective agreements against which it will at least not take action in its role as antitrust authority (*see* par. 9).[108]

8. The Commission's (initial) approach to clarifying the scope of Article 101 TFEU.

8.1. Classification of the Commission's approach.

The Commission itself classifies[109] the constellations for which it considers Article 101 TFEU to be inapplicable as (separate)[110] sub-cases of '*being in a situation comparable to that of employees'*, as formulated by the CJEU in 'FNV Kunsten' as the basic definition of the 'false self-employed' category. In the following, the Commission proceeds on the basis of this broad definition and expressly does not consider itself limited by the CJEU's reference to the 'Allonby' formula in the subsequent paragraphs of the reasoning of the judgment.[111]

[102] European Commission, nt. (89), bullet point 2.1.(14).
[103] Heinemann A., nt. (93), 260.
[104] This corresponds to the broad understanding of the term in Article 45(2) TFEU.
[105] *See* the comprehensive list in European Commission, nt. (89), bullet point 2.1.(15).
[106] Heinemann A., nt. (93), 260.
[107] European Commission, nt. (89), bullet point 2.1.(17); Bretzigheimer M., Maturana S., nt. (27), 248 (on the draft version).
[108] García-Muñoz Alhambra A., nt. (64), 7; Jurkowska-Gomułka A., Piszcz A., Oliveira Pais S., nt. (36), 75.
[109] European Commission, nt. (89), bullet point 3.(21, 22).
[110] Jurkowska-Gomułka A., Piszcz A., Oliveira Pais S., nt. (36), 75.
[111] European Commission, nt. (89), bullet point 3.(20).

This corresponds in essence to the interpretation of the FNV Kunsten decision proposed above, on the basis of which the Commission's approach must be classified as a concretisation of the exception to the EU antitrust prohibition established therein. At the same time, this starting point explains why those voices in the literature that do not see the FNV Kunsten decision as establishing an exception in favour of genuine self-employed persons also consider the Commission's approach to be outside the scope of the CJEU's case law.[112]

8.2. Economic dependence (50% test).

According to the Commission, the first group not covered by Article 101 TFEU consists of self-employed persons in economic dependence. This situation is deemed to exist if, over a period of one or two years, the self-employed persons derive on average at least 50% of their total income from one counterparty.[113]

The approach based on economic dependence corresponds to the 'employee-like persons' included in the collective agreement system under German law by Section 12a of the German *Tarifvertragsgesetz*[114], to which the Commission also expressly refers. In terms of content, this 50% approach can, on the one hand, cover self-employed persons who are also in a particularly vulnerable position in relation to negotiations with their employer. However, as already shown above in the comments on 'FNV-Kunsten', a weakness in bargaining power requiring compensation is not necessarily equivalent to economic dependence in this sense and, depending on the market situation, may also exist in relation to far more than two clients at the same time. The approach pursued therefore covers some, but by no means all, self-employed persons who, in this respect, are in a situation comparable to that of an employee.[115]

The experience of the German collective bargaining system, in which the (in the basic case) parallel provision of Section 12a (1) *Tarifvertragsgesetz* has had very little practical relevance, is further evidence that the hurdle set is high.[116] The German legislature also concluded that there was a need for protection beyond this solution and has already made collective agreements possible for certain sectors if the protected self-employed persons receive on average only *one third* of their income from one client (Section 12a (3) *Tarifvertragsgesetz*). These cases, in turn, are not covered by the economic dependence within the meaning of the Commission's exception.

[112] In this sense, *see* Bretzigheimer M., Maturana S., nt. (27), 246; Mohr J., Mey P., nt. (35), 671 (each for the draft version); mediating in the sense of going beyond the decision in a manner consistent with its reasoning, Heinemann A., nt. (93), 261.
[113] European Commission, nt. (89), bullet point 3.1(23).
[114] Heinemann A., nt. (93), 260.
[115] In a similar direction Georgiou D., nt. (80), 30.
[116] For further information, *see* Leist D., Schlachter M., nt. (2).

8.3. Side-by-side activities with the same service provider and collective agreements covering both categories of workers.

The guidelines define the second group exempted from Article 101 TFEU as *"solo self-employed persons who perform the same or similar tasks 'side-by-side' with workers for the same counterparty".*[117]

This case group is inspired by the situation of temporary musicians in 'FNV Kunsten'[118] and a guideline issued by the Dutch competition authority ACM.[119] The Commission justifies the exception with the bold[120] assessment that self-employed persons working 'side-by-side' with employees provide their services in accordance with the instructions of their counterparty and neither bear the commercial risks associated with the counterparty's activities nor have sufficient independence in the performance of their activities.[121]

This is not convincing, because if 'side-by-side' workers really perform their services based on one-sided instructions, they already qualify as employees under EU law.[122] But then the 'Albany' exception already applies to them anyway,[123] at the latest since the clarification in 'FNV Kunsten' that, in this respect, classification under national law is not decisive in antitrust law either. On this basis, there would be no contradiction with the CJEU's explicit rejection[124] of an exception linked to the 'side-by-side' criterion in favour of solo self-employed persons.[125] However, since the guidelines, according to their introduction, do not refer to employees but to genuine self-employed persons, the exception category – insofar as it is defined in the sense of its explanation – appears to be contradictory.

At the end of its explanatory statement, however, the Commission introduces a further exception, according to which collective agreements that are wholly or partly applicable *both* to employees *and* to self-employed persons working in the same sector in accordance with national law are also exempt from the prohibition of cartels.[126] In this respect, the previously activity-based 'side-by-side' criterion is extended to the type of regulation in the collective agreement, which, based on the wording chosen ('*The same applies...*')[127], is to be understood as an independent category of exception. Such an exception, which is conceptually based on

[117] European Commission, nt. (89), bullet point 3.2(26).
[118] Pennings F., Bekker S., nt. (11), 22.
[119] *See* Mohr J., Mey P., nt. (35), 671 (on the draft version).
[120] Krause R., *Auf dem Weg zur unionsrechtlichen Regelung von Plattformtätigkeiten,* in *Neue Zeitschrift für Arbeitsrecht*, 2022, 521 and 533, speaks of a "kühne These", which could be translated as 'audacious thesis'.
[121] European Commission, nt. (89), bullet point 3.2 (26).
[122] Krause R., nt. (120), 533.
[123] Giampà G, nt. (64), 111.
[124] CJEU (First Chamber) – Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden [2014] ECLI:EU:C:2014:2411, para. 27.
[125] Assuming a contradiction, however, Bretzigheimer M., Maturana S., nt. (27), 249.
[126] European Commission, nt. (89), bullet point 3.2(26) at the end.
[127] European Commission, nt. (89), bullet point 3.2(27).

collective agreements in the Netherlands[128] and Slovenia,[129] would represent a significant simplification for the borderline area between dependent and independent work, as it would avoid the risk of a collective agreement conflicting with Article 101 TFEU if the CJEU assesses the categorisation of the workers covered differently. In practice, this would be particularly relevant for areas where the presumption under Article 5 of the Platform Directive, as described in the investigation of the 'Albany' exception, does not apply.

8.4. Digital labour platforms.

It is also in the area of the platform economy that the Commission links its latest exception to the prohibition of cartels, which is intended to apply to (working conditions-related) collective agreements between solo self-employed persons and digital labour platforms. The latter are defined in the guidelines as:

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 performed by individuals, irrespective of whether that work is performed online or in a certain location.[130]

This definition corresponds to the draft version of the Platform Directive current at the time the guidelines were adopted, with which the Commission intends to ensure consistency.[131] Since the final version of the Platform Directive (in addition to other minor adjustments) includes the cumulative requirement *"it involves the use of automated monitoring systems or automated decision-making systems"*,[132] it is to be expected that the definition in the guidelines will be adjusted accordingly in the medium term.[133] Based on the current status, the decisive factor for the distinction is expected to be the necessary work organisation by the platform, which excludes intermediary platforms in the sense of purely establishing contact.[134]

[128] Article 14 of the collective agreement in the theatre and dance sector in the Netherlands between the Kunstenbond (artists' union) and the Nederlandse Associatie voor Podiumkunsten (Dutch Stage Association) for the period from 1 January 2022 to 31 December 2023, available at https://napk.nl/wp-content/uploads/2022/03/Cao-TD-2022-2023-V1_ENG_v.2.pdf (last accessed on 10 November 2025); cited in European Commission, nt. (89), bullet point 3.2 (27), footnote 25.
[129] Article 2 of the collective agreement for professional journalists between the Gospodarska zbornica Slovenije (Slovenian Chamber of Commerce and Industry), the Svet RTV Slovenija (Council of RTV Slovenia) and the Združenje radijskih postaj Slovenije ter (Slovenian Radio Station Association) and the Sindikat novinarjev Slovenije (Trade Union of Slovenian Journalists), available at the following link: http://www.pisrs.si/Pis.web/pregledPredpisa?id=KOLP49 (last accessed on 10 November 2025); cited in Guidelines, (87), bullet point 3.2 (27), footnote 25.
[130] European Commission, nt. (89), bullet point 1. (2) (d).
[131] European Commission, nt. (89), bullet point 1. (2) (d), footnote 2.
[132] Art. 2 (1) Directive (EU) 2024/2831 on improving working conditions in platform work.
[133] Jurkowska-Gomułka A., Piszcz A., Oliveira Pais S., nt. (36), 77.
[134] Similarly, Schubert C., nt. (11), 324; for further details, *see* Heinemann A., nt. (93), 261.

That exception to the cartel ban is mainly justified by the fact that even solo self-employed people might depend on those platforms to get customers and might be faced with offers where they have little or no room to negotiate working conditions and pay, since those platforms usually set one-sided contract terms.[135] Based on this analysis, which accurately addresses the core problem of the need to compensate for weak bargaining power, the exemption category appears convincing.[136] If one focuses on this line of reasoning, the existing overlap[137] with the category of economic dependence does not constitute a decisive point of criticism.

The literature rightly criticises, however, that the blanket link to digital work platforms means that solo self-employed persons working there are covered without distinction.[138] This also includes groups of self-employed persons for whom the activity in question is only a minor secondary activity,[139] which should at least limit the need for compensation for a lack of bargaining power.[140] However, this partially excessive approach does not lead to any practical changes, as collective agreements are not to be expected for these individuals anyway due to a lack of realistic organisational opportunities.[141]

8.5. Cumulative valuation.

Viewed individually, the categories exempted from the prohibition of cartels under the guidelines only cover a portion of the self-employed persons in need of protection. However, if they are understood as auxiliary criteria which, only when considered in combination, are intended to identify those persons who are in a 'situation comparable to that of an employee' in relevant respects, the approach appears to be at least partially successful. Overall, based on the guidelines, a relevant proportion of self-employed persons who are in a position requiring protection in this respect should be excluded from the scope of Article 101 TFEU. At the same time, the exceptions undoubtedly do not cover all solo self-employed persons who are in a weak bargaining position requiring compensation and whom the Member States must therefore allow to negotiate collectively on the basis of their international law obligation under Article 6(2) (R)ESC.[142]

135 European Commission, nt. (89), bullet point 3.3(28).
136 Rejected by Mohr J., Mey P., nt. (35), 672 (on the draft version).
137 Emphasised by Schubert C., nt. (11), 324; Heinemann A., nt. (93), 264.
138 Schubert C., nt. (11), 324; also emphasising this, but taking a more fundamental approach in their criticism Mohr J., Mey P., nt. (35), 672 (on the draft version).
139 Schubert C., nt. (11), 324.
140 In line with her basic approach arguing in parallel for the criterion of economic dependence, Schubert C., nt. (11), 324.
141 Schubert C., nt. (11), 324.
142 Georgiou D., nt. (80), 31; with a similar assessment, but arguing closer to economic dependence, García-Muñoz Alhambra A., nt. (64), 8.

9. The Commission's (second) approach to its enforcement priorities as an antitrust authority.

As the second part of its guidelines, the Commission names several categories of agreements for which it does not consider the application of Article 101 TFEU to be regularly excluded, but against which it will not intervene in its role as a competition authority in future. In terms of regulation, this part of the guidelines is about the Commission limiting its own discretion.[143] In substance, these cases are described as those in which self-employed individuals are not in a situation comparable to that of employees but are in fact faced with similar difficulties.[144]

9.1. Collective agreements with counterparties who have a certain economic power.

It is only in this context that the Commission directly refers to the fact that solo self-employed persons in many cases do not have sufficient bargaining power to influence their working conditions and considers collective agreements to be a legitimate means of correcting these imbalances.[145] Although this approach is convincing in substance, as shown, it would already have been compatible with the 'FNV Kunsten' case law, and would therefore have been better placed within the scope of the categories of exceptions.

The fact that the Commission did not take this route may have been due not only to a different interpretation of the FNV Kunsten decision, but also to practical considerations. This is because research is still in its infancy when it comes to identifying generalisable indicators of a need for compensation due to the weak bargaining position of solo self-employed persons, which would allow for a practical assessment beyond a case-by-case examination of the bargaining situations. In its ICTU vs. Ireland decision, the ECSR also left the relevant criteria open.[146] In this regard, some authors refer to the ratio of earnings achieved compared to average values or social benefit thresholds, while others use economic dependence as an auxiliary criterion for negotiating weakness.[147]

The Commission brings up two pieces of evidence of its own in this context. First, an imbalance requiring compensation is assumed if one or more of the counterparties represent the entire sector or industry. While this conclusion cannot be criticised in terms of content, the criterion established is likely to be rarely met in practice and, moreover, requires further clarification in terms of its scope.[148]

On the other hand, the Commission concludes that there is an imbalance in bargaining power requiring compensation if the other party has a total annual turnover and/or balance sheet total of at least EUR 2 million or employs at least 10 people. In addition, for the

[143] Schubert C., nt. (11), 324 (on the draft version).
[144] European Commission, nt. (89), bullet point 4.(32), *see* Georgiou D., nt. (80), 29.
[145] European Commission, nt. (89), bullet point 4.1(33).
[146] This is also emphasised by Schubert C., nt. (11), 324.
[147] For the state of the discussion, see Schubert C., nt. (11), 324 with further references.
[148] Mohr J., Mey P., nt. (35), 672.

purposes of this assessment, several counterparties negotiating jointly are to be added together.[149]

Based on this approach, almost all situations in which the conclusion of a collective agreement in favour of solo self-employed persons can realistically be expected in practice should be covered, which is certainly welcome in view of the predictability of the Commission's actions as a competition authority. Although basing the threshold on the total annual turnover or the number of employees of the counterparty also seems worth considering due to its high practicality, the proposed thresholds are likely to be too low to regularly conclude that solo self-employed contractors have a bargaining weakness that requires compensation.[150]

9.2. Collective agreements concluded in accordance with national or EU legislation.

Finally, the Commission does not intend to take action against collective agreements concluded on the basis of national or EU law. In relation to national law, this refers to both positive guarantees of a right to collective bargaining and negative provisions in the sense of an exception to national antitrust rules.[151] Collective agreements that do not already fall under one of the Commission's exceptions to the antitrust rules would therefore at least not be subject to the risk of fine-based enforcement. In this way, collective agreements under Section 12a(3) of the German *Tarifvertragsgesetz* would, for example, be granted at least partial protection in the sense of protection against practical prosecution by the antitrust authority, which would not, however, include the civil law consequences of a prohibition violation.
With regard to EU law, the Commission refers to the Copyright Directive adopted in 2019,[152] which recognises the weak bargaining position of authors and performers when concluding exploitation contracts and provides for the possibility of strengthening this position in order to ensure fair remuneration.[153] If Member States make use of the leeway they have been given in this respect by allowing collective agreements, the Commission does not intend to take action against this either.[154]
The fact that this group of cases was only provided for in the form of a restriction on the Commission's discretion as a competition authority can be explained by the fact that the CJEU has not yet indicated, either in the context of Article 101 TFEU or in the context of Article 28 CFREU, that it considers national provisions allowing collective agreements to be a justification for divergent interpretations of EU law between Member States. Against this

[149] European Commission, nt. (89), bullet point 4.1(34, 35).
[150] Criticising the thresholds in this regard: Feuerborn A., *Initiative der EU-Kommission zur Unterstützung der kollektiven Selbsthilfe von Solo-Selbstständigen durch Tarifverträge*, in *Recht der internationalen Wirtschaft*, 5, 2023; Heinemann A., nt. (93), 262; Mohr J., Mey P., nt. (35), 672; Schubert C., nt. (11), 325.
[151] European Commission, nt. (89), bullet point 4.2 (36).
[152] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
[153] European Commission, nt. (89), bullet point 4.2(37-39); Giampà G., nt. (64), 113.
[154] This protects, for example, agreements under Section 36 of the German *Urheberrechtsgesetz* from prosecution by the EU Commission.

background, it is already remarkable that the Commission has opened the door to one such possibility, at least within the scope of its discretion to take up cases.[155]

9.3. Cumulative valuation.

The case groups for adjusting the Commission's own enforcement priorities appear convincing overall. In terms of content, it is particularly noteworthy that the Commission is harmonising its discretionary powers as a competition authority with the established national protection systems and the international law requirements that are binding not on the EU as such but on the individual Member States.

While the approach based on the weakness of the negotiating position, as interpreted here, is already compatible with the FNV Kunsten exception itself, the Commission's de facto tolerance of collective agreements concluded on the basis of national provisions points to a path that has not yet been taken in the CJEU's case law to date, but which, from the perspective of fundamental and international law, provides a valuable[156] impetus. Since the international law obligations of the Member States exist independently of the primacy of EU law, it seems logical for the EU to address this conflict and to strike a balance that preserves interests as far as possible.

10. The guidelines as a suitable instrument for creating legal certainty?

Although the Commission's guidelines pursue a largely convincing approach that at least offers partial protection to self-employed individuals with limited bargaining power, this does not mean that this protection is sufficiently effective in practice and, in particular, that it actually ensures legal certainty.

This is countered in the literature by the argument that the guidelines are largely ineffective due to their substantive violation of higher-ranking EU law.[157] It is undisputed that the Commission, as an EU institution, is bound by mandatory EU law[158] and that it is not the Commission itself but the CJEU that has the final authority on the scope of the relevant Article 101 TFEU. However, this criticism is only partially valid: according to the above interpretation of the FNV Kunsten decision, the exceptional circumstances set out in the guidelines[159] appear to be largely compatible with the position of the CJEU. The same applies, logically, to the adjustment of the Commission's own discretion in cases of negotiating weakness requiring compensation, so that there is no violation of EU law in this respect either.

[155] *See* also Mohr J., Mey P., nt. (35), 673.
[156] Dissenting opinion Mohr J., Mey P., nt. (35), 673.
[157] Bretzigheimer M., Maturana S., nt. (27), 249; also implied by Mohr J., Mey P., nt. (35), 670-671.
[158] See GCEU – Case T-405/08 Spar Österreichische Warenhandels AG v. Commission [2013] ECLI:EU:T:2013:306, para. 58, regarding earlier guidelines.
[159] In this respect agreeing Heinemann A., nt. (93), 261.

Insofar as the guidelines are to be regarded as valid, the question of their suitability for creating legal certainty must, however, be answered in the negative for the most part. Due to the regulatory instrument chosen, the guidelines can only be binding on the Commission itself and therefore only have direct effect at the level of its activity as a competition authority. The self-employed groups benefiting from the guidelines are therefore protected from prosecution by the Commission and the threat of fines, which is likely to have significant practical implications.[160] However, this protection does not extend to the civil law level, which is at least as important. This is because the consequence of nullity provided for in Article 101(2) TFEU does not only apply in the event of prosecution by the Commission, but 'ipso iure',[161] i.e. as soon as the conditions for the prohibition of cartels are met, the scope of which is determined by the interpretation of the CJEU.

The exceptions provided for in the guidelines therefore merely reflect the Commission's legal opinion and make it self-binding. Although it is to be expected that the CJEU will address this input from the Commission in future decisions, it is not certain that it will agree with its substantive assessments.[162]

The guidelines also cannot decisively influence the question of *whether* the CJEU will again deal with this issue, as corresponding cases cannot find their way to the CJEU merely as a result of being taken up by the Commission. In particular, a request for a preliminary ruling would suffice, which, given the continuing uncertainty under EU law, would have to be made by any court of a Member State if a contracting party in civil proceedings invokes the invalidity of a collective agreement in favour of self-employed persons under Article 101(2) TFEU as a ground for its claim.[163] Of course, this also presupposes the actual existence of a corresponding collective agreement which either has a sufficient effect on trade between Member States or for whose assessment under antitrust law the relevant national law – such as the Dutch law in the case underlying the FNV Kunsten decision – refers to EU antitrust law.

11. Conclusion.

In conclusion, it can be assumed that in FNV Kunsten, the CJEU has opened up an exception to Article 101 TFEU in favour of certain vulnerable solo self-employed persons, whereby it is not decisive whether this is an extension of the Albany exception or – more convincingly – a separate exception. However, the legal situation remains highly controversial, both with regard to the "whether" of this exception and its scope.

[160] *See* the investigation of the impact of a similar approach by the Dutch antitrust authority: Pennings F., Bekker S., nt. (11), 20.

[161] Recently confirmed in CJEU (Second Chamber) – Case C-438/22 Em akaunt BG EOOD v. Zastrahovatelno aktsionerno druzhestvo Armeets AD [2024] ECLI:EU:C:2024:71, para. 57, 58; previously emphasised by Bretzigheimer M., Maturana S., nt. (27), 249.

[162] García-Muñoz Alhambra A., nt. (64), 8; Giampà G., nt. (64), 108.

[163] Similarly, a Member State could also initiate infringement proceedings against another Member State under Article 259 TFEU, but this is likely to be less relevant in practice.

The Commission's guidelines do point to some suitable ways of resolving the tension between the prohibition of cartels and collective bargaining rights. However, due to the limited effect of the regulatory instrument chosen, they effectively only protect against the threat of fines without having any impact at the civil law level. In this respect, a relevant gap in protection remains, as the remaining risk of civil law invalidity of collective agreements is likely to make it significantly more difficult to establish the actual organisation of self-employed persons, which is a necessary precondition for any agreement.

Only a further ruling by the CJEU can provide the necessary legal clarity. It would be convincing if the CJEU expressly referred the '*situation comparable to that of an employee'* to the bargaining position of the solo self-employed persons concerned, which is not only the most appropriate starting point in terms of content, but also offers the possibility of finding a consistent solution in the multi-level system. Since the international law obligations of the EU Member States linked to this criterion exist independently of the primacy of EU law, it seems necessary to address corresponding conflicts at the level of EU antitrust law. The statement of reasons for the FNV-Kunsten decision already provides points of departure in this regard.

This approach would also be desirable from a long-term perspective, as it seems counterproductive to interpret the prohibition of cartels solely on the basis of the narrow understanding prevailing in competition law literature, which serves the short-term consumer welfare,[164] if this leads to means that solo self-employed persons with little bargaining power have to be supported in the long term by tax-financed social benefits due to the lack of effective wage negotiation structures. A perspective in which competition – as already formulated by Krause – is not an 'end in itself'[165] but is embedded in an overall[166] welfare-related approach that also takes social rights into account therefore appears preferable.

Bibliography

Bayreuther F., *Sicherung der Leistungsbedingungen von (Solo-)Selbstständigen, Crowdworkern und anderen Plattformbeschäftigten*, in *HSI-Schriftenreihe*, 26, 2018;

Bourazeri K., *Neue Beschäftigungsformen in der digitalen Wirtschaft am Beispiel soloselbstständiger Crowdworker*, in *Neue Zeitschrift für Arbeitsrecht*, 11, 2019;

Brameshuber E., *(Ein Grundrecht auf) Tarifverhandlungen für wirtschaftlich abhängige Arbeitnehmerähnliche,* in Brameshuber E., Brockmann J., Marhold F., Miranda Boto J. (eds.), *Kollektive Arbeitsbeziehungen in der Gig Economy*, Manz-Verlag, Wien, 2023;

Brameshuber E., *Kollektivverträge für Arbeitnehmerähnliche*, in Brameshuber E., Friedrich M., Karl B. (eds), *Festschrift Franz Marhold*, Manz-Verlag, Wien, 2020;

Bretzigheimer M., Maturana S., *Arbeitsmärkte und Kartellrecht – Der Leitlinienentwurf der Kommission zu Tarifverträgen von Solo-Selbstständigen,* in *Neue Zeitschrift für Kartellrecht*, 2022;

[164] On the fundamental dispute in this regard, *see* Bretzigheimer M., Maturana S., nt. (27), 251.
[165] Krause R., nt. (120), 533.
[166] Krause R., nt. (120), 533, critical: Bretzigheimer M., Maturana S., nt. (27), 251.

Countouris N., De Stefano V., Lianos I., *The EU, Competition and Worker's Rights*, in *CLES Research Paper Series*, 2, 2021;
Doherty M., Franca V., *Solving the 'Gig-saw'? Collective Rights and Platform Work,* in *Industrial Law Journal*, 49, 3, 2020;
Eufinger A., *Zur Anwendbarkeit des Kartellrechts bei Tarifverträgen*, in *Der Betrieb*, 2015;
Feuerborn A., *Initiative der EU-Kommission zur Unterstützung der kollektiven Selbsthilfe von Solo-Selbstständigen durch Tarifverträge*, in *Recht der internationalen Wirtschaft*, 5, 2023;
Fuchs M., *Tarifverträge Selbstständiger und europäisches Wettbewerbsrecht*, in *Zeitschrift für Europäisches Sozial- und Arbeitsrecht*, 8, 2016;
García-Muñoz Alhambra A., *Collective bargaining of self-employed workers and competition law in the EU*, in *Lavoro Diritti Europa*, 3, 2023;
Georgiou D., *An Assessment of the EU's draft Guidelines on the application of EU competition Law to collective agreements of the "solo self-employed",* in *Competition Policy International – TechReg Chronicle*, July 2022;
Giampà G., *An Inquiry into the Guidelines on the Application of EU Competition Law to Collective Agreements concerning the Working Conditions of the Solo Self-Employed,* in *Ljubljana Law* Review, 83, 2023;
Goldmann J., *Tarifverträge für selbständige Dienstleistungsanbieter als Verstoß gegen EU-Kartellrecht?,* in Europäische Zeitschrift Für Arbeitsrecht, 2015;
Grosheide E., ter Haar B., *Employee-like worker: Competitive entrepreneur or submissive employee? Reflections on ECJ, C-413/13, FNV Kunsten Informatie*, in Bellomo S., Gundt N., Łaga M., Miranda Boto J. (eds.), *Labour Law and Social Rights in Europe: The Jurisprudence of International Courts. Selected Judgements*, Gdansk University Press, Gdansk, 2018;
Heinemann A., *Tarifverträge für Solo-Selbstständige: Zum Verhältnis von Wettbewerbs- und Sozialpolitik,* in *Wirtschaft und Wettbewerb*, 2023;
Heuschmid J., *Art. 28 GrCh*, in Boecken W., Düwell F., Diller M., Hanau H. (eds.), *Gesamtes Arbeitsrecht,* Vol. 2, 2nd edition, Verlagsgesellschaft, Baden-Baden, 2023;
Heuschmid J., Hlava D., *Keine Anwendung des europäischen Kartellrechts auf Tarifverträge, die Regelungen für Selbstständige* enthalten, in *Arbeit und Recht (AuR),* 2015;
Höppner T., *Kollektives Urhebervertragsrecht und das Kartellverbot für Solo-Selbstständige – Teil 1*, in *Archiv für Presserecht – Zeitschrift für das Gesamte Medienrecht (AfP)*, 54, 1, 2023;
Jurkowska-Gomułka A., Piszcz A., Oliveira Pais S., *Collective agreements on working conditions of solo self-employed persons: perspective of EU competition law*, in *Bialystok Legal Studies*, 29, 2, 2024;
Kempen O., *Grundlagen*, in Kempen O., Zachert U. (eds.), *Tarifvertragsgesetz (Kommentar für die Praxis)*, Bund-Verlag, Cologne, 5th edition, 2013;
Klein T., *§ 2 Normative Grundlagen und Grundprinzipien des Arbeitskampfrechts*, in Frieling T., Jacobs M., Krois C. (eds.), *Arbeitskampfrecht*, C.H. Beck, Munich, 2021;
Krause R., *Auf dem Weg zur unionsrechtlichen Regelung von Plattformtätigkeiten,* in *Neue Zeitschrift für Arbeitsrecht*, 2022;
Kumkar L., *Art. 101 AEUV*, in Gersdorf H., Paal B., *Beck'scher Online-Kommentar Informations- und Medienrecht*, 47th edition, C.H. Beck, Munich, 2024;
Latzel C., Serr S., *Kartellkontrollprivileg für Tarifverträge als formeller Rahmen eines Unionstarifrechts*, in *Europäische Zeitschrift für Wirtschaftsrecht,* 2014;

Leist D., *Art. 28 CFREU*, in Hiessl C. (ed.), *EU Labour Law: A Commentary*, Wolters Kluwer, Alphen aan den Rijn, 2025;
Leist D., Schlachter M., *Adequate Remuneration for the Self-Employed – Legal framework in Germany,* in *Hungarian Labour Law E-Journal*, 1, 2025 (in appearance);
Mair A., *Kartellrechtliche Freistellung für kollv Regelungen zugunsten Scheinselbständiger*, in *Zeitschrift für Arbeits- und Sozialrecht*, 45, 2015;
Meeßen G., *Article 101 TFEU*, in Kellerbauer M., Klamert M., Tomkin J. (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, Oxford, 2019;
Mohr J., Mey P., *Kollektivverträge über die Tätigkeitsbedingungen von Solo-Selbständigen nach den neuen Leitlinien der Kommission,* in *Neue Zeitschrift für Kartellrecht,* 2022;
Mohr J., *Soloselbständige zwischen Wettbewerbsrecht und Arbeitsrecht,* in Hanau H., Matiaske W. (eds.), *Entgrenzung von Arbeitsverhältnissen*, Nomos Verlagsgesellschaft, Baden-Baden, 2019;
Pennings F., Bekker S., *The Increasing Room for Collective Bargaining on Behalf of Self-Employed Persons,* in *Utrecht Law Review*, 19, 3, 2023;
Polajžar, A., *Analysis of the criteria for establishing the existence of an employment relationship of platform workers under the Platform Work Directive – high expectations and limited outcome?*, in *Revista Jurídica Portucalense*, 38, 1, 2025;
Prugberger T., Solymosi-Szekeres B., *Legal Doctrinal and Sectoral Problems of Digital Platform Contracts in the European Union Resulting in Conflicts Between Workers and Platforms,* in *Merits*, 16, 5, 3, 2025;
Pupeter F., Lukas K., *Prekäre Selbstständigkeit: Völker- und europarechtliche Garantien für faire Entlohnung und kollektive Vertretung,* in *Nachhaltigkeitsrecht (NR) – Zeitschrift für das Recht der nachhaltigen Entwicklung*, 4, 4, 2024;
Risak M., Dullinger T., *The concept of ‚worker' in EU law – Status quo and npotential for change,* ETUI Research Paper - Report No. 140, 2018;
Schlachter M., *The Self-employed Persons under the European Social Charter*, in Schubert C. (ed.), *Economically dependent Workers – A Handbook*, C.H. Beck, Munich, 2022;
Schubert C., *GRC Art. 28 Recht auf Kollektivverhandlungen und Kollektivmaßnahmen*, in Franzen M., Gallner I., Oetker H. (eds.), *Kommentar zum europäischen Arbeitsrecht*, 5th edition, C.H. Beck, Munich, 2024;
Schubert C., *Kollektivverträge für Solo-Selbstständige nach dem Entwurf der Leitlinien der Europäischen Kommission – Sozialpartnerschaft für kleine Selbstständige,* in *Zeitschrift für Europäisches Sozial- und* Arbeitsrecht, 8, 2022;
Waltermann R., *Kann Plattformarbeit Selbständiger durch Tarifvertrag gestaltet werden?*, in Gallner I., Henssler M., Eckhoff F., Reufels M. (eds.), *Dynamisches Recht - Festschrift für Wilhelm Moll*, C.H. Beck, Munich, 2019.