EMPOWERING PLATFORM WORKERS: GRANTING COLLECTIVE BARGAINING RIGHTS

AUTHOR BIO

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ABSTRACT

The rise of digital labour platforms has exposed the vulnerable position of platform workers in today's economy. These workers, such as Uber drivers or Deliveroo bikers, lack insurance coverage, paid leave and pension contribution. Traditionally, labour unions have played a crucial role in protecting workers' rights, but solo self-employed platform workers have faced obstacles due to competition law. In response, the European Commission introduced the EU Platform Work Package in 2021 to improve the working conditions of platform workers. This article questions how the Commission aims to enable collective bargaining for self-employed workers, particularly those affiliated with digital labour platforms. It explores the limitations imposed by the relationship between labour law and competition law, which has been hindering collective bargaining for self-employed workers. The article argues that the Commission's approach signifies a departure from previous practices and the direction developed by the European Court of Justice. The Commission decouples the right to collective bargaining from a worker's labour law status, thus breaking away from the binary distinction between workers and undertakings.

KEY-WORDS

collective bargaining, platform workers, competition law

1. Introduction

As digital platforms increasingly dominate the economy, it has become clear that platform workers (such as drivers for Uber, bikers for Deliveroo) bear the burden of this expanding techno-economic society. Platforms generally do not employ workers, so they are at risk of ending up in worrisome working conditions since they are not covered by any sort of insurance policy, are not entitled to paid holiday and sick leave and are not building up their pension.[1]

Historically, labour unions have functioned as a crucial mechanism for workers to exert pressure and secure improved working conditions and wages.[2] Workers that unionize serve as a counterbalance to powerful employers. However, self-employed workers that seek to unionize have been struggling with European competition law. Self-employed workers are classified as undertakings and their teaming up has been considered a cartel under Article 101 TFEU.[3] Competition law has prevented self-employed workers from improving their working conditions through a collective bargaining position.

In 2019, Commissioner Vestager stated that 'platform workers should be able to team up, to defend their rights. (…) So we may need to make clear that nothing in the competition rules stops those platform workers from forming a union.' The European Commission launched a set of measures in December 2021 called the 'EU Platform Work Package' to improve the working conditions of platform workers. This package is a key initiative of the Commission's European Pillar of Social Rights Action Plan and includes a proposal for a Directive on improving the working conditions in platform work and draft Guidelines that should help clarify the relationship between EU competition law and solo self-employed people.[4] This article questions how the European Commission aims to enable collective bargaining for self-employed workers, particularly those affiliated with digital labour platforms.

Section 2 explores the bargaining position of solo self-employed workers prior to the publication of the EU Package. This section considers how the relationship between labour law and competition law restricted collective bargaining to workers under Article 45 TFEU. However, this binary distinction does not align with an evolving labour market where certain self-employed workers lack sufficient protection.

Section 3 focuses on the Platform Work Package and its implications for the bargaining position of self-employed workers particularly those working for a digital labour platform. It discusses the European Commission's efforts to improve the working conditions of self-employed workers through the provision of collective bargaining rights. This section argues that the Commission's approach

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[1] Homa Khaleeli, 'The Truth about Working for Deliveroo, Uber and the on-Demand Economy' (*The Guardian*, 15 June 2016) <https://www.theguardian.com/money/2016/jun/15/he-truth-about-working-for-deliveroo-uber-and-the-on-demand-economy> accessed 26 June 2023, as journalist Khaleeli quoted a platform worker: 'We are employed as 'independent contractors' but that's just ridiculous legal mumbo-jumbo, to allow the company to duck its responsibilities.'

[2] Victoria Daskalova, 'Regulating the New Self-Employed in the Uber Economy: What Role for EU Competition Law?' (2018) 19 German Law Journal 461.

[3] Nicola Countouris, Valerio De Stefano and Ioannis Lianos , 'The EU, Competition Law and Workers Rights' in Sanjukta Paul, Shae McCrystal and Ewan McGaughey (eds), *The Cambridge Handbook of Labor in Competition Law* (Cambridge University Press 2022).

[4] Given that no final act has been adopted yet, it is important to note that this contribution primarily analyses the draft Guidelines. The three parties mainly differ in their opinions regarding the content of the proposal for the Directive.

signifies a departure from previous practices and the direction developed by the European Court of Justice. The Commission decouples the right to collective bargaining from a worker's labour law status, thus breaking away from the binary distinction between workers and undertakings.

Section 4 highlights three reservations about the potential success of the European Commission's Platform Work Package. These reservations involve the non-binding nature of the Guidelines, concerns about the definition of digital labour platforms and the broader question whether the right to collective bargaining will sufficiently address the power imbalance in the platform economy.

2. Collective bargaining in the context of competition law

2.1 Self-employed workers as undertaking

The relevant provision from competition law that prohibits cartel formation is enshrined in Article 101(1) TFEU: 'All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market.' In essence, this implies that negotiations between self-employed workers would be considered unlawful if two questions are answered positively. The first question, discussed in this section, is whether a self-employed worker qualifies as an undertaking. The second question, discussed in Section 3.3, is to what extent every agreement between self-employed workers is anticompetitive in the sense of Article 101 TFEU.

In most legal systems, including the EU, the concept of an undertaking is broadly interpreted as 'an entity engaged in economic activity'.[5] Economic activity consists of three essential elements: the provision of goods or services, the assumption of economic or financial risk and the potential to generate profit.[6] Any individual who meets the legal requirements for engaging in 'economic activity' is considered an undertaking by default.[7] Within this framework, competition law has long been deemed applicable to self-employed individuals. The first cases which dealt with the tension between self-employment and competition law dates back to the 1970s. Self-employed individuals usually carry out economic activities as they provide services and goods on the market in exchange for payment. This has been recognized in several court cases over the years. For instance, self-employed opera singers, inventors, individuals purchasing a company, farmers, chartered accountants, self-employed medical professionals, lawyers and substitute orchestra musicians have all been found to be undertakings for the purposes of applying EU competition law.[8]

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[5] Case C-41/90 *Höfner and Elser v Macotron GmbH* [1991] ECR I-1979.

[6] Okeoghene Odudu, 'The Meaning of Undertaking within 81 EC' (2005) 7 Cambridge Yearbook of European Legal Studies 211, 215.

[7] See for example Case C-35/96) *Commission v Italy* [1998] ECR I-0851, para 37: '(…) if they offer goods or services on a market and bear "the financial risks involved in the exercise of that activity'.

[8] Victoria Daskalova, 'The Competition Law Framework and Collective Bargaining Agreements for Self-Employed: Analysing Restrictions and Mapping Exemption Opportunities' in B Waas, C Hießl, and N Countouris (eds), *Collective Bargaining for Self-employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (Wolters Kluwer 2021) 20, 23.

2.2 The boundary between the solo self-employed worker and employee

While self-employed workers fall within the concept of undertaking, the situation is different for traditional workers.[9] According to EU law, an employee cannot be considered an undertaking since it does not engage in independent economic activities by offering goods or services in a market and assuming the financial risks associated with such activities.[10] Even an association of employees falls outside the scope of Article 101 TFEU (see Figure 1) although they act collectively.[11] The *Becu* case shed light on the distinction between worker and undertaking.[12] The Court was presented with a case involving the organization of dockworkers in Belgium. The Belgian government had enacted a law prohibiting employees from hiring nonregistered workers. However, some individuals, including Becu and others, chose to ignore this law in order to reduce their labour costs. As a result, they faced criminal charges. During the criminal proceedings, the defendants argued that the national law in question violated EU competition rules. The central issue at hand was whether workers could be considered 'undertakings' as individuals who sell their labour in the market, thereby competing with other workers. In its ruling, the Court directly addressed this question and concluded that workers did not fall under the definition of undertakings. Therefore, they could not be subject to EU competition rules.

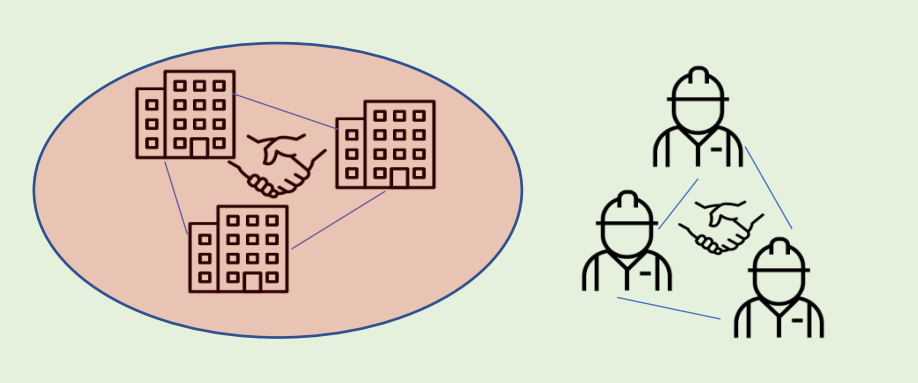

Figure 1: workers fall outside the scope of Article 101 TFEU

In the same judgment, when deciding who qualifies as a 'worker', the Court emphasized the element of control employers have over workers. The Court ruled that dockers' employment relationship with the undertakings for which they work is defined by the fact that they perform work for and under the direction of each undertaking. Consequently, they are considered 'workers' according to Article 45 TFEU, as interpreted by the Court's case law. During this relationship, dockers are integrated into the concerned undertakings and form an economic unit with each of them, rather than being separate

[9] Case C-179/90 *Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli* [1991] ECR I-05889, para 13.
[10] Countouris, De Stefano and Lianos (n 3) 281.
[11] *Merci* (n 9) para 13.
[12] Case C-22/98 *Becu* [1999] ECR I-05665.

undertakings themselves.[13] In doing so, the CJEU's decision aligned the concept of 'employee' with the broad definition of 'worker' in the sense of Article 45 TFEU.[14]

In this way, labour law and competition law were gradually turned into each other opposites. See Figure 2, where the colour green signifies the opportunity for collective bargaining, while red indicates that the entity is subject to competition law regulations. On the one hand, labour law distinguishes between 'employees' and 'self-employed'. Various factors, such as the level of subordination and integration within a company, are considered to determine the appropriate classification for a person. The central objective of labour law revolves around ensuring fairness and addressing power imbalances that may arise between employers and employees.[15] In this regard, engaging in collective bargaining processes is justified on the grounds of promoting fairness and combating subordination. On the other hand, competition law distinguishes between 'worker' and 'undertaking'. Or at least, competition law applies to undertakings and not to workers which means that a self-employed worker necessarily falls within the scope of an undertaking. The aim of competition law in this light is the prevention of collective negotiations between undertakings that can lead to distorting markets and harming business and consumers.[16] When a 'worker', concept from competition law, is aligned with an 'employee', concept from labour law, the two disciplines become contradictory. An individual in an employment relationship is classified as a worker according to Article 45 TFEU and thus subject to regulation under domestic labour laws. As noted, workers fall outside the scope of competition law provisions. If a person is not in an employment relationship, this person is for competition law rules an undertaking. According to Figure 2, a self-employed worker would indeed fall under the category of an undertaking (on the right side). As a result, they would not have the right to engage in collective bargaining.

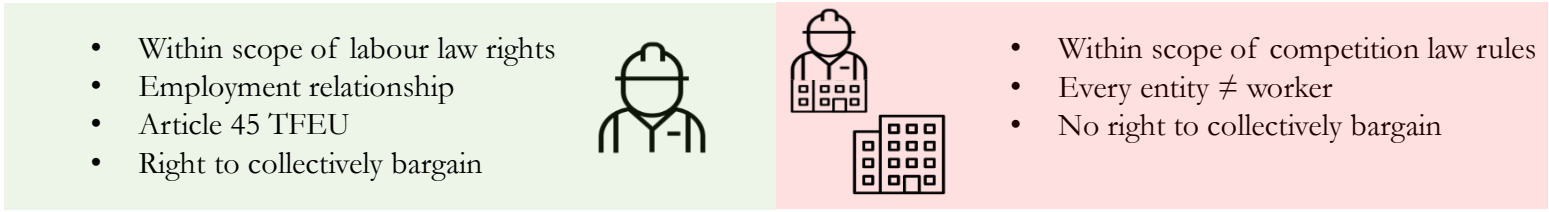

Figure 2: labour law and competition law as each other opposites

[13] The Court adds in para 27 that '(…) even taken collectively, the recognized dockers in a port area cannot be regarded as constituting as undertaking'.
[14] Countouris, De Stefano and Lianos (n 3) 283; see also the Opinion of AG Wahl in Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411 (discussed in Section 2.5) in which he uses the term 'employee' and 'worker' interchangeably (footnote 4).
[15] Ioannis Lianos, Nicola Countouris and Valerio De Stefano, 'Re-Thinking the Competition Law/Labour Law Interaction: Promoting a Fairer Labour Market' (2019) 10 European Labour Law Journal 291, 300.
[16] Ibid 305.

2.3 Undertaking or worker in today's economy

The preceding paragraph shows that prior to the publication of the European Commission self-employed workers were not able to collectively bargain.[17] Consequently, competition law hampered platform workers seeking to improve their working conditions. The relationship between labour law and competition law, described as 'antagonistic' by some authors, does not align with the dynamic nature of the evolving labour market and the challenges it entails.[18] Labour law is increasingly recognizing the importance of including self-employed workers in collective bargaining processes.[19] This is because, in recent years, more and more economic transactions in the labour market involve self-employed individuals working with clients or customers, rather than being in traditional employee-employer relationships. An example of this is of course the platform worker who operates as an independent contractor for a digital platform.

The distinction described in section 2.2 between employee versus employer/self-employed has long functioned as an indication of power distribution. The employee could be in a weaker position compared to the powerful employer and therefore needed protection through labour law. A self-employed worker has been often associated with the employer's side. Given the historical context, this makes sense. Professions such as doctors, lawyers, and accountants were considered liberal professions that did not require protection.[20] However, the concept of a strong self-employed worker has become outdated in light of recent developments on the labour market. In recent decades, the number of self-employed individuals in the EU has increased.[21] These so-called new self-employed are not as independent and financially stable as the traditional self-employed.[22] This demonstrates that the distinction shown in Figure 2 between employees on one side and employers/self-employed on the other side no longer aligns with today's economy. A group of self-employed workers has emerged who require some form of protection, such as a strong bargaining position.

In 2014, the Court of Justice examined how this could be provided for. The *FNV/Kiem* Case sheds light on the question how the ECJ attempted to reconcile the demands of the evolving labour market with relationship between labour law and competition law discussed earlier. The Courts was asked how we could interpret collective agreements concluded by trade unions for subordinate workers which also contain minimum labour costs provisions that apply to self-employed workers.

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[17] This subject has therefore been stirring the academic debate the past years. See for example in addition to the aforementioned literature: Alessio Bertolini and Ruth Dukes, 'Trade Unions and Platform Workers in the UK: Worker Representation in the Shadow of the Law' (2021) 50 Industrial Law Journal 662; Christoph Busch, Inge Graef, Jeanette Hofmann and Annabelle Gawer, 'Uncovering blindspots in the policy debate on platform power' (2021) European Commission; Anna Ilsøe, 'The Hilfr agreement. Negotiating the platform economy in Denmark' (2020) 176 FAOS Research paper 1; Marina Lao, 'Workers in the gig economy: The case for extending the antitrust labor exemption' (2017) 51 UC Davis L. Rev. 1543; Silvia Rainone, 'Labour Rights Beyond Employment Status: Insights from the Competition Law Guidelines on Collective Bargaining' (2022) Defining and Protecting Autonomous Work 167; Dagmar Schiek and Andrea Gideon, 'Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier to smart cities?' (2018) 32 International Review of Law, Computers & Technology 275; Marshall Steinbaum, 'Antitrust, the gig economy, and labor market power' (2019) 82 Law & Contemp. Probs. 45.

[18] Lianos, Countouris and De Stefano (n 15).

[19] Ibid 304.

[20] Daskalova (n 2) 466.

[21] Mies Westerveld, 'The 'New' Self-Employed: an issue for social policy?' (2012) 14 European Journal of Social Security 156.

[22] Ibid 158.

The background of this ruling can be traced back to 2007 when the Dutch competition authority released a reflection document stating that agreements made on behalf of self-employed workers were not excluded from the application of competition law. The publication of the document had a significant impact on the collective bargaining negotiations representing workers in the arts, information, and media sectors. The trade union involved aimed to establish minimum tariffs[23] not only for employees but also for self-employed substitute musicians.[24] However, the release of the reflection document by the competition authority disrupted the negotiations, leading to their breakdown. Consequently, the union initiated legal proceedings at the national level, challenging the validity of the reflection document.

The Court's ruling primarily focused on the concept of undertaking.[25] The Court held that 'in so far as an organization representing workers carries out negotiations acting in the name, and on behalf, of those self-employed persons (…), it does not act as a trade union association (…), but, in reality, acts as an association of undertakings',[26] and is therefore also exposed to the full application of EU competition law rules. An exception to these rules, the Court said in FNV Kunsten, is only possible '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'.[27]

2.4 Protecting the false self-employed workers

The Court made clear that a service provider can lose his status of an undertaking, 'if he does not determine independently his own conduct on the market, but is entirely dependent on his principal'.[28] The service provider does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking. For the purpose of EU law, the term 'employee' must be defined according to objective criteria that characterize the employment relationship. The Court states that it is settled case-law 'that the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration'.[29] That means that the classification of a self-employed person under national law not prevents that this person is classified as an employee within the meaning of EU law.[30]

The Court, therefore, upheld the dynamic between labour law and competition law, as outlined in section 2.2. If a self-employed individual meets the objective criteria stated in Article 45 TFEU, EU

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[23] The agreement set a minimum fee for self-employed substitutes, which was calculated by adding 16% to the combined rehearsal and concert fees negotiated for employed substitutes.

[24] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411, para. 9.

[25] Daskalova (n 8) 5-6.

[26] *FNV Kunsten Informatie en Media* (n 24) para 28.

[27] Ibid para 31.

[28] Ibid para 33.

[29] Ibid para 34.

[30] *FNV Kunsten Informatie en Media* (n 24) para 35; The Court refers for this conclusion to Case C-256/01 *Allonby Case* [2004] ECR I-00873 para 71 in which the judge noted that the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC if 'his independence is merely notional, thereby disguising an employment relationship within the meaning of that article'.

law will regard them as an employee. Consequently, they will not be classified as an undertaking under EU provisions and will fall outside the scope of Article 101 TFEU. By doing so, the Court aims to safeguard false self-employed and ensure their protection under labour law, specifically the right to collective bargaining. This expands the group protected by labour law. Not only traditional employees are allowed to engage in collective bargaining, but now also the false self-employed individuals. See Figure 3 in which the traditional worker and the false self-employed worker (indicated with a moustache) have the right to collectively bargain, but the genuine self-employed worker is still hindered by competition law rules. The clear distinction between false self-employed individuals and genuine self-employed individuals parallels the binary distinction between workers and undertakings (compare Figure 2). The Court seems to refer to the concept of false self-employment when describing a situation in which a worker, from the perspective of European law, is not legitimately engaged as a self-employed individual.[31] A false self-employed worker is, therefore, not so much an intermediate category as part of the worker category.[32]

The notion that a false self-employed worker is equivalent to a worker under European law is also reflected in the *Yodel* ruling from 2020.[33] This case centered on whether an English courier with a service agreement could be considered an employee under the Working Time Directive. The CJEU stated that it was up to the referring national court to determine if the Yodel courier should be classified as a worker, as it requires an assessment of all the circumstances. However, the Court does indicate that the classification of an independent contractor under national law does not prevent that person from being classified as an employee under EU Law. To designate a worker in the EU context, the Court refers to the aspects that point to false self-employment as outlined in the FNV Kiem case.[34]

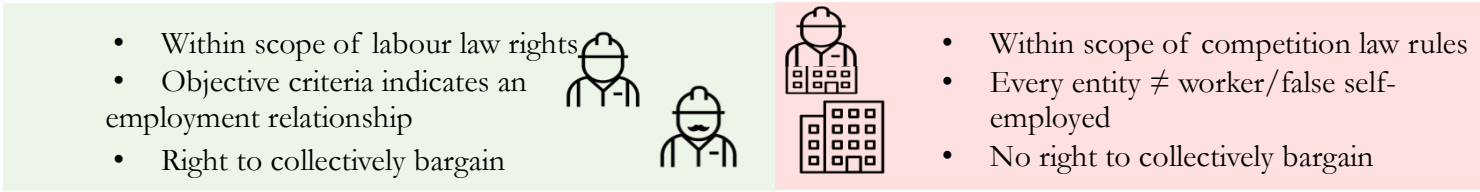

Figure 3: false self-employed workers fall outside the scope of Article 101 TFEU

The European Court of Justice has provided a solution for false self-employed individuals, but it has not provided a seamless continuum of legal protection for the diverse spectrum of labour arrangements.[35] You are either a worker (including the false self-employed) with the possibility for collective bargaining under Article 101 TFEU, or you are an undertaking and cannot invoke the collective agreement exception. This raises the question how to handle genuine self-employed individuals who also seek to engage in negotiations for improved working conditions. It is evident that for the European Commission to alter the existing framework and safeguard the bargaining position

[31] Jorn Kloostra, 'De relatie tussen het mededingingsrecht en platformarbeid: effent de Europese Commissie de weg naar meer onderhandelingsmacht voor platformwerkers?' (2023) 1 Arbeidsrechtelijke Annotaties 1, 9.
[32] Eva Grosheide, 'Overheid en sociale partners op wenkbrauwgesprek bij Europa' 2023 7 TRA 3.
[33] Case C-692/19 *B v Yodel Delivery Network Ltd.*[2020] ECLI:EU:C:2020:288.
[34] Ibid paras 30-31.
[35] Countouris, De Stefano and Lianos (n 3) 283-284: the absence of a clear coherent legal framework is labeled as a 'casuistic approach' of the European Court of Justice. The authors consider this case-by-case approach the source of legal uncertainty and they would propose a 'more principled labour exclusion' by minimizing 'ad hoc decisions'.

of self-employed individuals, there is a need for better alignment between labour law and competition law.

3. The European Commission changes course

3.1 Identifying a first category of precarious self-employed persons as false self-employed

In December 2021, the European Commission launched the EU Platform Work Package to improve the working conditions of platform workers. This package is a key initiative of the Commission's European Pillar of Social Rights Action Plan and includes a proposal for a Directive[36] on improving the working conditions in platform work and draft Guidelines[37] that should help clarify the relationship between EU competition law and solo self-employed people.

In the proposal for a Directive, the Commission follows the path that the European Court of Justice took with the FNV Kiem case. The Commission's aim is to address false self-employment: platform workers should have the legal employment status that corresponds to their actual working arrangement. The proposal thus provides a framework that should reduce the uncertainty surrounding the status of platform work. Additionally, the directive proposal includes other significant aspects, such as the rights of workers concerning algorithmic management. This article does not delve into that, as it is not relevant for determining whether a platform worker may engage in collective bargaining.[38]

The Directive includes measures to correctly determine the employment status of people working through digital labour platforms.[39] Nine out of ten platforms active in the EU currently are estimated to classify people working through them as self-employed.[40] The Commission estimates that among the 28 million people who work through digital labour platforms, most people are genuinely self-employed. However, there may be up to 5.5 million people who are false self-employed.[41] According to the settled case law (such as *FNV Kiem* Case) of the European Court of Justice, the essential feature of the employment relationship is that 'for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration'. The Commission indicates that it is indeed possible for a platform worker to prove

[36] Commission, 'Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work' COM(2021) 762 final.

[37] Commission, 'Approval of the content of a draft for a communication from the Commission - Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons C(2021) 8838 final.

[38] The directive proposal aims to enhance transparency in the use of algorithms by digital labour platforms and seeks to increase human oversight in ensuring compliance with labour conditions. Platform workers are also granted the right to challenge automated decisions.

[39] Prior to the publication of the Platform Work Package, academic authors have put forward different proposals to address the issue of self-employed (platform) workers lacking collective bargaining rights. An approach that aligns with the Directive proposal is to expand the scope of the employee category and provide a clear legal framework for its boundaries. See for example the notion of 'predominantly personal work' for defining who is a worker for the purposes of labour rights in Countouris, De Stefano and Lianos (n 3) 288-290 or the plea for the Gebhard Formula as a way of granting the right of collective bargaining the platform workers in Tamás Gyalavári, 'Collective rights of platform workers: the role of EU Law' (2020) 27 Maastricht Journal of European and Comparative Law.

[40] Willem de Groen, Zachary Kilhoffer, Leonie Westhoff, Doina Postica and Farzaneh Shamsfakhr, 'Digital labour platforms in the EU' (2021) CEPS 1, 8.

[41] Commission, 'Commission staff working - Impact Assessment report accompanying the proposal for a Directive on improving working conditions in platform work' SDW (2021) 396.

through court cases that the actual contractual description of their status is false. As research points out, in most cases, the rulings have confirmed that self-employed workers were misclassified and should actually be categorized as workers.[42] However, this can be considered as quite a struggle time and money wise, especially for workers in a weak position, such as low-wage earners, young workers or those with a migrant background. That is why the Commission proposes that the contractual relationship between a digital labour platform shall be legally presumed to be an employment relationship when the platform 'controls the performance of work'.[43] In relation to the employment status, the Directive puts forward the possibility to rebut the legal presumption.[44] If the digital labour platform intends to do so, the burden of proof is on the platform. The platform controls the performance of work if there is at least the fulfilment of two of the following criteria[45]:

i) Effectively determining, or setting upper limits for the level of remuneration;
ii) Requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
iii) Supervising the performance of work or verifying the quality of the results of the work including by electronic means;
iv) Effectively restricting the freedom, including through sanctions, to organize one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;
v) Effectively restricting the possibility to build a client base or to perform work for any third party.

The publication of the European Commission's directive proposal initiated a complex legislative process with an uncertain outcome. The European Parliament established its position on the proposal in February 2023 after intense negotiations.[46] Subsequently, EU ministers in the Council reached an agreement on the proposal in June 2023.[47] On July 11, 2023, the first interinstitutional meeting was convened to explore a consensus among the three European institutions. However, significant differences in their positions have made it unclear what the final directive will entail. The primary point of contention revolves around the legal presumption and the application of specific criteria.

The European Parliament aims to strengthen the position of platform workers as much as possible and has modified the proposed directive to legally presume, in principle, an employment relationship between a digital labour platform and a platform worker.[48] The presumption is a given and does not depend on meeting specific criteria, unlike the Commission's proposal. It allows

[42] Christina HieBl, 'Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions' (2022) Comparative Labour Law & Policy Journal. has written overview in 2021 containing all the different National judgements.
[43] Commission (n 36) article 4.
[44] Commission (n 36) article 5.
[45] Commission (n 36) article 4; Gabriël van Rosmalen, 'Naar een eenduidig Europees kader om platformwerkers in precaire werkomstandigheden te beschermen' (2023) 5-6 Nederlands Tijdschrift voor Europees Recht 102, 104-106.
[46] European Parliament, 'Draft European Parliament legislative resolution on the proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work' COM/2021/762 final.
[47] European Council, 'Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work' COD/2021/0414.
[48] Van Rosmalen (n 45) 106.

platforms the opportunity to challenge the presumption before any reclassification decision. To do so, platforms must demonstrate the genuine independence of platform workers by meeting two criteria: 1) platform workers operate without control or directives regarding task execution, and 2) platform workers primarily engage in a similar independent business activity. Conversely, the Council's proposal offers more flexibility for digital platforms to categorize workers as self-employed. While it employs similar criteria to the Commission, a key distinction is the requirement to satisfy *three* criteria (rather than two, as proposed by the Commission) for an employment relationship, granting digital labor platforms greater leeway to challenge the presumption.[49]

The Directive aligns with the direction set by the European Court of Justice in the FNV Kiem case (see also Figure 3) and aims to improve the working conditions of these platform workers by reclassifying them into employees. The main issue addressed in this article is the restriction on collective bargaining for self-employed (platform) workers imposed by the cartel prohibition, which is no longer relevant for this group since they fall under labour law rights. The implementation of the Directive will lead to an expansion of the group of employees. The proposed Directive will ensure that false self-employed workers have the right to collectively negotiate through the reclassification of a traditional employment relationship. The exact number of platform workers affected will depend on the final directive, which is currently under negotiation. The European Commission's proposal would extend labour law regulations to cover over 5 million workers.

This approach, however, still aligns with the binary framework discussed in sections 2.2 and 2.3. After all, it does not influence the status of a genuine self-employed worker. This raises the question whether it is possible for both conditions of Article 101 TFEU to be met and yet no sanction or enforcement follows. This addresses the second question posed in section 2.1, which revolves around the nature of collective agreements between undertakings: do these always fall within the scope of Article 101 TFEU?

3.2 Anti-competitive agreements between undertakings falling outside the scope of Article 101 TFEU

In the *Albany* case, The European Court of Justice, has formulated an important viewpoint to the question raised in the previous section. In this case, a collective agreement was made between organizations representing employers and organizations representing workers, the former being undertakings. In *Albany*, the Court clearly took the view that it was 'beyond question that certain restrictions of competition are inherent in collective agreements between organizations representing employers and workers'.[50] However, it was also willing to concede that 'the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to [EU competition rules] when seeking jointly to adopt measures to improve conditions of work and employment'. This approach was partly based on the understanding that the 'nature and purpose'[51] of

[49] Ibid; In the Council's proposal, subpoints d and c from the original Commission proposal have been divided into four different options (d, da, db, and e).

[50] C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751, para 59.

[51] The nature criterion requires that collective bargaining agreements derive from social dialogue, that is, that they are the outcome of collective negotiations between organizations representing employers and workers. The purpose criterion requires that the agreement is meant to contribute directly to improving the workers' working conditions (Ibid para 63).

the agreement was that of 'improving (…) working conditions, namely (…) remuneration'.[52] Consequently, the agreement at issue does not 'by reason of its nature and purpose', fall within the scope of EU competition rules.[53] The *Albany* case shows that some agreements between undertakings can in fact fall outside the scope of competition rules if they are derived from social dialogue and have the purpose of directly improving the working conditions. This raises the question: what about horizontal agreements between self-employed workers? [54]

Most cases have shown that, prior to the publication of the draft Guidelines, such agreements were indeed in conflict with competition law provisions. In the *Pavlov* case for example, the European Court explicitly held that an exception cannot be applied to an agreement which is not concluded between employers and employees.[55] Therefore, the self-employed Dutch medical doctors in this case could not rely on the Albany exception, so their agreement does not 'by reason of its nature or purpose' fall outside the scope of Article 101. The ECJ emphasized that 'the Treaty contains no provisions, encouraging the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment and working conditions...'[56]

However, there are some examples in which self-employed persons constitute as undertakings and competition law allows those persons to come up with a horizontal agreement. In the *Wouters* case, for example, the Court had to consider the legitimacy of a decision by the Dutch Bar Association to disallow the creation of joint ventures between lawyers and accountants. The Court agreed that this ban could be justified having regard to domestic policy considerations relating to the provision of legal services even if other Member States did not prevent the operation of such joint ventures. Here the effective provision of legal services justified a restriction of competition. As held by the Court in *Wouters*, not all agreements that distort competition necessarily violate Article 101(1) TFEU.[57]

The cases *Albany* and *Wouters* demonstrate that it is possible for agreements between undertakings to fall outside the scope of Article 101 TFEU if distorting competition is an inherent result of pursuing relevant objectives, such as social or policy goals.

3.3 Identifying a second group of precarious self-employed persons comparable to workers

The draft Guidelines address the permissibility of self-employed individuals to engage in collective bargaining. In contrast to the Directive, the Guidelines focus on the challenges faced by self-employed individuals in the broader context of employment, rather than exclusively addressing digital labour platforms. They aim to address the vulnerable position of self-employed persons in the overall labour market. If a genuine self-employed worker is 'comparable' to a worker, this undertaking is free to engage in collective bargaining. In such cases, a collective agreement falls *outside* the scope of Article 101 TFEU.[58] Here, the Commission indicates that anticompetitive negotiations between self-

[52] Ibid para 63.
[53] Ibid para 64.
[54] Daskalova (n 8) 28.
[55] C-189/98 *Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-06451.
[56] Ibid para 69.
[57] C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-01577, para 97.
[58] Commission (n 37) 16: if the agreement aims to improve the working conditions of the workers including matters such as remuneration, working time and working patterns, holiday, leave, physical spaces where work takes place, health and

employed individuals in a situation comparable to workers do not, in fact, meet the two conditions of Article 101 TFEU.

This could have two reasons. Firstly, because the nature of the negotiations does not aim to distort competition. In that case, the Commission would follow the line of *Albany* and *Wouters*, as described above. The Guidelines clarify that agreements between certain self-employed workers can distort competition but also serve the social policy objectives of the European Union.[59] Another reason could be related to the undertaking criterion. This group consists of genuine self-employed individuals that are comparable to a worker. The Commission points out that a service provider can lose their status as an independent trader (undertaking). If he does not independently determine his conduct in the market, but is entirely dependent on his principal because he does not bear financial or commercial risks and works as if they were an employee integrated into the client's company.[60] This would mean that the genuine self-employed, from a competition law perspective, would no longer be considered an undertaking because they form one economic entity with the client.[61] This does not mean that there is an immediate employment relationship. This was also evident in the *Uber Spain* case of the European Court of Justice (2017).[62] This case dealt with the legal classification of Uber's service. Uber argued that it merely offered a technical platform, while the ECJ ruled that Uber provided transportation services. The central issue was not whether the drivers were self-employed or should be classified as employees. In Advocate General Szpunar's opinion, he noted that, in his view, Uber and its drivers qualify as an economic entity (from a competition law perspective).[63] However, he pointed out that forming an economic entity does not automatically mean that the drivers are employees.

In any case, this represents a cautious departure by the Commission from the binary distinction between workers and undertakings that determines whether an entity is eligible for collective bargaining (see the second category in Figure 4). What is crucial to fall outside the scope of Article 101 TFEU (competition law) is not only the (reclassified) employment status (labour law). The Commission considers that the following categories of solo self-employed persons are in a situation comparable to that of workers and that collective agreements concluded by them therefore fall outside the scope of article 101 TFEU:

1) Economically dependent solo self-employed persons who provide their services exclusively or predominantly to one counterparty or who is likely to be in a situation of economic dependence on that counterparty. The Guidelines consider that a self-employed worker is in a situation of economic dependence where the person earns at least 50% of her or his total annual work-related income from a single counterparty.
2) Solo self-employed persons working side-by-side with workers who perform the same or similar tasks side-by-side with workers for the same counterparty and do not bear the

safety, insurance and social security, and conditions under which the solo self-employed person is entitled to cease providing his/her services, for example, in response to breaches of the agreement relating to working conditions.

[59] Commission (n 37) 4.

[60] The European Commission refers to C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] EU:C:2006:784, paras 43-44.

[61] Kloostra (31) 16.

[62] Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain* [2017] ECLI:EU:C:2017:981.

[63] Ibid, Opinion of AG Szpunar, para 62.

commercial risks of the counterparty's activity or enjoy any independence regarding the performance of the economic activity concerned.

3) Solo self-employed persons working through digital labour platforms. This final category is most relevant to the central research question of this article. The Guidelines ensure that even if a platform worker is not false self-employed (see the Directive), he will fall outside the scope of Article 101 TFEU.

3.4 Identifying a third group of precarious workers in a weak bargaining position

The category 'comparable to a worker' ensures that some genuine self-employed workers can collectively bargain. As mentioned, this represents a slight shift in the dichotomy of worker versus undertaking that determined collective bargaining rights. It is a minor change because the second category still mostly reflects the paradigm of the employment or subordinate relationship.[64] While there is room for genuine self-employed workers to negotiate, it is only for those who are comparable to a worker.

That is why the third category (see also Figure 4), identified by the Commission, is interesting. For this category, the Commission decided 'not to enforce' competition law.[65] In some situations, solo self-employed persons who are not in a situation comparable to that of workers may nevertheless be in a weak bargaining position vis-à-vis their counterparts and therefore may be unable to significantly influence their working conditions.[66] Solo self-employed persons who deal with counterparties that have a certain level of economic strength, and hence buyer power, may have insufficient bargaining power to influence their working conditions. In that case, collective agreements can be a legitimate means to correct the imbalance in bargaining power between the two sides. Therefore, the Commission proposes that to the extent that collective agreements aim to correct a clear imbalance in the bargaining power of solo self-employed persons relative to their counterparties and are intended to improve working conditions, the Commission will not intervene. Such an agreement does fall *within* the scope of Article 101 (1) TFUE. An imbalance in bargaining power will be considered to exist 'at least' where self-employed workers negotiate with a counterparty which represent the whole sector or industry or where self-employed persons negotiate with a counterparty whose annual aggregate turnover exceeds EUR 2 million or whose staff headcount is equal or more than 10 persons.[67]

This means that the European Commission goes further than the approach previously developed by the ECJ.[68] Even if both conditions of Article 101 TFEU are met, there is room for a genuine self-employed worker to negotiate. With this category and the second category of self-employed workers in a situation comparable to workers, the European Commission creates opportunities alongside the worker (employee) and undertaking dichotomy.

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[64] Silvia Rainone, 'Labour Rights Beyond Employment Status: Insights from the Competition Law Guidelines on Collective Bargaining' (2022) Defining and Protecting Autonomous Work 167, 181.
[65] Commission (n 37) 32-36.
[66] Ibid.
[67] Ibid 35.
[68] Kloostra (31).

3.5 Decoupling the right to collective bargaining from a worker's labour law status

The Platform Work Package introduced by the European Commission reshapes the relationship between labour law and competition law. Section 2.2 showed how the traditional binary distinction between an employee and an undertaking determined the potential for collective bargaining. A worker either fell under labour law, avoiding competition law concerns, or a self-employed worker was treated as an undertaking under competition law, making them ineligible for collective bargaining. Labour law status was the gateway to bargaining rights. Despite the European Court of Justice's attempts to protect new self-employed individuals, it still clung to the worker-undertaking dichotomy. That raised the question how genuine self-employed were protected by collective bargaining rights. The previous sections indicate that the European Commission is breaking away from this binary approach. The position of genuine self-employed workers is decisive, not the presence of an employment relationship. Consequently, labour law and competition law are no longer in opposition, as illustrated in Figure 2. The classification of a self-employed individual as an undertaking no longer affects their right to engage in collective bargaining.

Figure 4 illustrates the protection of the bargaining position of the various groups discussed above within the Package. On the far left is the traditional worker in an employment relationship. Next to the traditional worker is the first category of precarious workers (discussed in 3.1). The Directive reclassifies these false self-employed as employees, placing them outside the scope of Article 101 TFEU. The second category (discussed in 3.3) does not encompass workers as defined in Article 45 TFEU, but it includes genuine self-employed workers who are considered undertakings under competition law. Before the Package, these individuals would have been subject to the cartel prohibition, preventing them from engaging in collective bargaining. However, the Commission acknowledges that in today's labour market, the distinction between certain self-employed workers and employees has become blurred, necessitating the protection of the former. Self-employed workers who are 'comparable to workers' fall outside the scope of Article 101 TFEU, indicated by the colour green. This may be because agreements of this group are not considered anticompetitive behaviour because they are inherent to meeting social objectives. This rationale would be in line with the rulings of the European Court in the *Albany* and *Wouters* cases. Alternatively, the Commission may have decided not to classify this group of workers as undertakings, because they form one economic entity with the client. Despite the fact that these workers are not employed or reclassified as employed, they are granted the labour law right to engage in collective bargaining. The third category (discussed in 3.4) is not comparable to an employee but still experiences a clear imbalance in bargaining power with its counterparties. Agreements between these self-employed workers do fall within the scope of Article 101 TFEU but the Commission will not intervene, indicated by a mixture of both the red and green colour. Thus, the competition law dichotomy between undertaking and worker is redefined.

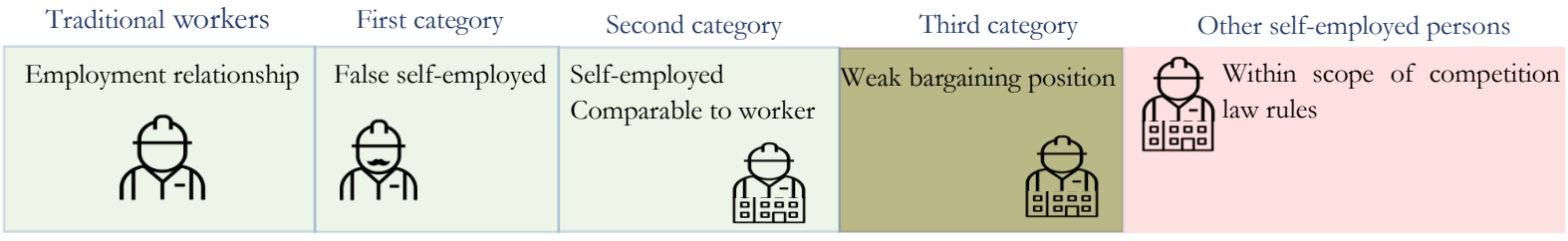

Figure 4: decoupling the right to collective bargaining from a worker's labour law status

4. Reservations regarding future success

The Platform Work Package of the European Commission is a significant step toward granting collective bargaining rights to self-employed workers in general and platform workers in particular. However, three reservations can be made about whether this course will prove successful in the future.

The first concern relates to the legal nature of these Guidelines. With these Guidelines, the Commission aims to develop policy in which it outlines how EU law (regarding supervision and enforcement of competition rules) should be interpreted. These Guidelines represent a form of soft law issued by the Commission.[69] The reason for the Commission's choice might have a political motive. It saves time, as there is no need for a lengthy legislative process (as described in the proposal for a directive in section 3.1). As a result, this form of soft law enables the Commission to quickly and explicitly explain how it will act in certain situations. The Commission 'clarifies' what various workers can expect, aiming to enhance legal certainty.[70] A drawback of the guidelines is that they are non-binding, which means that member states can choose to deviate from the course set by the European Commission. Member states are free to pursue their own path, and the effectiveness of the guidelines largely depends on the persuasive force of the arguments put forward.[71] There is no way to enforce these guidelines with national competition authorities. Furthermore, it is important to note that the European Court of Justice is not bound by this form of soft law.[72] What if a case involving self-employed platform workers' negotiations reaches the European Court of Justice? These cases could reach the Court through various routes: direct appeals against Commission decisions, preliminary references, or legal actions brought by private entities challenging such agreements on competition law grounds. When such cases come before the Court, it is tasked with interpreting EU competition law as laid out in the TFEU. The soft law guidelines of the Commission are explicitly not part of this. Furthermore, as described in this article, the European Court of Justice has followed an approach to granting collective bargaining rights based on the binary relationship between a worker and an undertaking. The Court could choose an approach in line with the Commission and create an exception for certain self-employed workers, but there is currently no certainty for self-employed workers in this regard. This uncertainty, stemming from the soft law instrument, may lead stakeholders to be hesitant about actually entering into collective agreements.[73]

A second caveat relates to the definition of a digital labour platform, which is relevant both to the directive proposal and to the workers in situations comparable to workers (see section 3.4). It is essential to ensure that all types of digital labour platforms are included within the Directive's scope. According to the Commission, a digital labour platform is any natural person which meets the following requirements: a) it is provided, at least in part, at a distance through electronic means, b) it

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[69] Ibid 11.

[70] Commission (n 33) 10.

[71] Corina Andone, Sara Greco, 'Evading the Burden of Proof in European Union Soft Law Instruments: The Case of Commission Recommendations' 2018 31 International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique 79, 80.

[72] Kloostra (31)19-20.

[73] Ibid 21; See also Frans Pennings, Sonja Bekker, 'The Increasing Room for Collective Bargaining on Behalf of Self-Employed Persons' (2023) 19 Utrecht Law Review 8, in which the authors state that the guidelines have only a limited meaning, and cannot take away legal uncertainty completely. At the same time, they do observe a positive development, which is also being monitored and implemented, for instance, by the Dutch competition authority.

is provided at the request of a recipient of the service, c) it involves, as a necessary and essential component, the organization of work performed by individuals, irrespective of whether that work is performed online or in a certain location. Criterion b for example seems to exclude content marketplace such as Youtube. This criterion implies a specific workflow with customer requests, worker responses, job completion, and payment. However, content creators on these platforms often generate content without explicit requests, and any requests are informal, such as viewer suggestions in comments.[74] The third criterion can also raise some questions. A mere digital bulletin board function, like listing available workers for third-party contact, does not meet the criteria for a digital labour platform under the Guidelines. But what if a platform provides a digital bulletin board and an extra service for payment processing.[75] The Guidelines lack a precise definition of what qualifies as a 'essential component' and the legal interpretation in the future will likely provide further clarity on when a platform fulfills such a role in work organization.

A final question, beyond the scope of this article, is whether the right to collective bargaining is sufficient to improve the working conditions of platform workers. This article has demonstrated how the European Commission is trying to address the issue of competition law. The described injustice in the introduction stems from the weak bargaining position of platform workers.[76] The imbalance of power leaves workers vulnerable to precarious working conditions. The Commission's proposals aim to shift the balance of power away from platforms by enabling platform workers to organize counterpower. However, will this reform sufficiently change the balance of power? The digital labour platforms remain in private ownership which creates a misalignment of interests between workers and the platform itself. As suggested in recent literature, a more fundamental approach to addressing the power imbalance in the platform economy could lie in reforming the governance structure of platforms.[77] For instance, the platforms could be run as cooperatives, so that the interests of the platform align with the interests of the workers. This is a subject for further research.

[74] Michael Silberman, 'The concept of the 'digital labour platform'' 2023 1 London College of Political Technology Working Paper M. Six Silberman 1, 4.
[75] Kloostra (31) 14.
[76] See for example Friedemann Bieber, 'Labour Justice in the Platform Economy' (2022) Journal of Applied Philosophy 7 in which Bieber argues that 'as different as the various threats to labour justice might be, their root cause is identical: (…) an imbalance of power that renders workers vulnerable to domination and exploitation'.
[77] See for example James Muldoon, *Platform Socialism: How to Reclaim Our Digital Future from Big Tech* (Pluto Press 2022); Tim Christiaens, *Digital Working Lives: Worker Autonomy and the Gig Economy* (Rowman & Littlefield Publishers, Incorporated 2022) or the work of Trebor Scholz and Juliette Schor.

5. Conclusion

Circling back to the introduction, we can conclude that the initiative by the European Commission represents a departure in the treatment of solo self-employed individuals in general, and platform workers in particular. Prior to the introduction of the Platform Work Package, labour law and competition law were considered opposing forces. The binary relationship between workers and undertakings was the determining factor for granting the right to collective bargaining. The first category consisted of individuals in an employment relationship, while self-employed workers fell under the category of undertakings. The underlying rationale was that employees were in a weaker position compared to employers and thus required protection, including the right to collective bargaining. However, the emergence of so-called new self-employed individuals complicated this dynamic. Did they not deserve protection? The European Court of Justice attempted to protect this group in the FNV Kiem case but chose to expand the category of workers by introducing the concept of false self-employment. This approach maintained the dichotomy, leaving genuine self-employed individuals without access to collective bargaining.

The Platform Work Package breaks this pattern and ensures that certain genuine self-employed individuals, despite their classification as undertakings, can still engage in collective bargaining. The European Commission demonstrates that it can place not only individual employees in a weak position vis-à-vis their employers but also individual undertakings in a similar position vis-à-vis their clients. This applies to self-employed workers in a situation 'comparable to workers', such as working for a digital labour platform. Although this category falls outside the scope of Article 101 TFEU, as discussed, genuine self-employed individuals in a 'weak bargaining position' fall within the scope of Article 101 TFEU. Interestingly, the Commission has decided not to enforce it. This article highlights how the Commission's approach signifies a departure from previous practices and the direction developed by the European Court of Justice. The Commission decouples the right to collective bargaining from a worker's labour law status, thus departing from the binary distinction between workers and undertakings.

The European Commission has taken a significant first step towards creating counterbalance against digital labour platforms. However, there are reservations about the practical success of this package, particularly concerning the non-binding nature of the guidelines, the definition of digital labour platforms, and whether collective bargaining alone will adequately address the power imbalances within the platform economy. As the EU Platform Work Package unfolds, it will be important to keep a close eye on its implementation and assess its effectiveness in improving the working conditions of solo self-employed persons in general and platform workers in general.