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Are national collective bargaining systems ready for solo self-employed persons?

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The example of Belgium

In the 1960s, employees were by far the most important category of persons active in the private labour market, who traditionally fell within the scope of protective labour law. However, the world of work has changed dramatically in recent decades, with more and more persons taking on other statuses and a significant portion of the population working as freelancers or self-employed, without staff (henceforth: 'solo self-employed persons'). These individuals do not perform tasks within the framework of an employment contract, but operate on a self-employed basis.

Nevertheless, they often find themselves in a similar predicament to that of employees, whereby their weak negotiating position in relation to their client makes for a precarious situation. Therefore, certain authorities, social partners and other stakeholders are seeking to improve the social status of solo self-employed persons by allowing them to collectively negotiate their working conditions, including their remuneration, which can result in a collective bargaining agreement (CBA) in which minimum labour conditions for self-employed persons can be established. In this way, the perilous negotiating position of the self-employed is considerably strengthened.

In December 2021, the EU Commission published draft guidelines for collective agreements on working conditions for solo self-employed workers. In this document, the Commission clearly recognises that, in the light of the EU's obligations to promote social dialogue and collective bargaining (laid down in the EU's Charter of Fundamental Rights, the TFEU and the European Pillar of Social Rights), and given the changes in the composition and circumstances of the labour market, where more and more people are active under classifications other than that of the traditional employee, it is no longer tenable to maintain a strict view of competition law. With these guidelines, the Commission therefore makes it clear that it will no longer intervene to safeguard free competition in the case of collective agreements for certain self-employed workers, without hired personnel. There has been a longstanding discussion in EU law as to whether Article 101 TFEU (which prohibits agreements between undertakings that limit free competition) can allow CBAs for self-employed persons in an economically dependent position. The Court of Justice of the European Union (CJEU) has thus far failed to deliver a clear-cut answer to this enduring controversy (cfr. the FNV Kunsten Case, CJEU 4 December 2014, nr. C-413/13, ECLI:EU:C:2014:2411), even as it has left an opening for CBAs for employee-like individuals.

In particular, the Commission mentions the three categories of self-employed workers which can fall out of the scope of EU competition law, namely: i) Economically dependent self-employed workers; ii) Self-employed workers 'side by side' with employees; and iii) Self-employed workers working via digital labour platforms. According to the Commission, these self-employed workers are clearly in a similar situation as employees and, in line with the case law of the Court of Justice, collective bargaining agreements aimed at improving their working conditions should fall outside the scope of Article 101 TFEU.

An interesting side note here is that this document is merely a draft recommendation and so, to date, it is not yet final, neither are they intended to become EU legislation. Moreover, the Commission has literally proclaimed that these guidelines do not prevent national regulations or case law, or new case law of the Court of Justice, from otherwise being changed. The guidelines only relate to the Commission's own enforcement of competition law. This nuance does not alter the fact that, like the Commission, Member States also have a positive obligation to enable and support social dialogue and collective bargaining for self-employed workers. The creation of a strong national legal framework for self-employed collective bargaining would be an ideal outcome, especially for those countries and Member States of the European Social Charter that have ratified the fundamental ILO Conventions no. 87 and 98, which, consequently, also have an unequivocal obligation to create a supportive legal framework for collective bargaining for solo self-employed persons. This follows from the views of the ILO Committee of Experts and the ILO Committee of Freedom of Association, which have extended the right to collective bargaining to self-employed persons, but also from the view of the European Committee of Social Rights, which has condemned Ireland for prohibiting CBAs for certain freelancers due to EU competition rules (cfr. Collective complaint no. 123/2016). This prohibition was seen as a violation of the right to

collective bargaining under art. 6.2 European Social Charter.

Following the view that CBAs for solo self-employed persons do not violate competition, the next question is whether the national legal frameworks for collective bargaining are equipped to actually allow collective bargaining for solo self-employed persons.

Let us have a look at the Belgian system, laid down in the Collective Bargaining Act of 5 December 1968 (henceforth "CBA Act"). It is primarily aimed at the traditional employee, which is logical given the social context of the 1960s. Without this specific legal framework of the CBA Act, a CBA is little more than a civil law agreement between the negotiating parties. The importance of the CBA Act is that it increases the legal value and extends the binding force of a CBA. Any CBA that is not governed by the CBA Act is therefore only a second-rate CBA, which may well be a source of rights and obligations, but would actually fall short of laying down provisions that should bind large groups of people or offer collective protection.

The main problem with the CBA Act is its personal scope of application, laid down in Article 2. In the first paragraph, this article states that the law applies to employees and employers, as well as to the organisations. The very concept of 'employee' is in itself, not defined by the law; it refers to the person who is bound by an employment contract to the employer and therefore performs work in exchange for remuneration under the authority of an employer. These are the four constitutive elements of an employment contract (contract, work, remuneration and authority). It should be clear that, in principle, self-employed persons cannot be qualified as employees, unless they are bogus self-employed persons. The aim, however, is not to obtain the requalification of self-employed persons, but rather to make it possible for solo self-employed persons to conclude CBAs in their own right. This is therefore a dead end.

However, the Act also equates other persons with actual employees, namely "persons who, other than by virtue of an employment contract, work under the authority of another person". It is not clear how widely this assimilation to employees can be interpreted. The only condition the law sets is that a relationship of authority (subordination) exists between the "worker" and the person for whom he/she performs the work. What exactly this relationship of authority entails and how it should be determined is not mentioned. The equivalence is traditionally used to target the following categories: trainees, home workers, volunteers, persons with a professional induction contract or those who are pursuing a professional training course, and students following an internship. Self-employed persons are not mentioned in the doctrine or in case law.

At first sight, one could think of the requirement of a relationship of authority for the existence of an employment contract according to the Employment Contracts Act of 3 July 1978. The Belgian Court of Cassation defines the exercise of authority as "an essential element of the employment contract which includes the power for the employer to direct the employee and to supervise the employee's work" (Cass. 18 May 1981, Arr. Cass. 1980-81, 1080). In other words, 'authority' means the power of the employer to direct the employee (right to command) and to supervise the execution of the orders (right to control and discipline). The authority need not be permanent or uninterrupted, but the person exercising the authority (in the sense of an employment contract) must have the legal possibility to do so effectively, at any time. As it is usually very difficult to determine whether there is actual authority, is it necessary to use the criteria laid down in the Labour Relations Act 2006; the four general criteria are considered to be the most important: i) the will of the parties; ii) the freedom of organisation of working time; iii) the freedom of organisation of work; and iv) the possibility of exercising hierarchical control.

The question is whether this equivalence with employment can be used for self-employed persons. Vincent Franquet and Jean-Benoît Maisin see this as an opening for the application of the CBA Act to self-employed persons. They admit that the legislator did not have the self-employed in mind when drafting the CBA Act, but they do point to the broad concept of a situation in which someone provides work under the authority of another person. In particular, they argue that the requirement of authority here cannot simply be equated with the requirement of a relationship of authority as a condition for the existence of an employment contract, as defined by the Court of Cassation in the context of the Employment Contracts Act of 3 July 1978. In their view, the requirement of authority in the assimilation of employees by the CBA Act is a much more flexible concept. Also, Franquet and Maisin do not seem entirely (100%) convinced that this flexible concept of authority, under which it is not altogether evident as to what exactly it entails, is sufficient to allow (solo) self-employed workers to fall within the scope of the CBA Act. They argue that an interpretation in that sense would be in line with the views of the supervisory bodies of the International Labour Organisation. They also point out that there is already a national CBA that grants rights to persons who are not yet employees, namely CBA No. 38 concerning the rules on recruitment and selection of employees. After all, at the time of the application procedure, the candidates are not yet employees and could therefore, in principle, not fall within the scope of the CBA Act.

Even if this vision of Franquet and Maisin can be followed, and thus we have to interpret the employer-employee relationship in the context of the CBA Act in a broad sense, this still does not seem to be a universal solution. By requiring the establishment of a relationship of authority, however expansive, we are, in actuality, reverting back to within the scope of the qualification of the self-employed person as an employee and therefore, as a bogus-employed worker. After all, where is the line drawn between a relationship of authority within the framework of the CBA Act and within the framework of the law on employment contracts? This is far from clear. Moreover, it will certainly not always be easy to establish a relationship of authority for all self-employed persons, even when the concept is flexibly defined. The assimilation would only help a part of the self-employed. Furthermore, the use of this assimilation could cause legal problems for principals, as it would provide the necessary ammunition for the self-employed to claim their reclassification as employees. Even if one were to interpret the equivalence broadly and only require a weak form of the employer-employee relationship, we run the very real risk of opening a Pandora’s box, which would likely lead to a legal pragmatism that is neither law-abiding nor desirable.

There are other arguments against the broad interpretation of assimilation to employees. The first can be found in the Labour Act of 16 March 1971, which includes the rules on working time. Article 1, 1° of the Labour Act contains precisely the same equation with employees as the CBA Act. A broad interpretation could therefore, mean that the rules on working hours, night work, etc. are equally applicable to certain self-employed persons for whom a certain relationship of authority has been established. Hence, this would lead to a far-reaching extension of the application of working time law to certain self-employed persons. Second, there is also the problem that many other Belgian labour laws refer to the concept of employees in the CBA Act, in order to delimit their own scope of application. In particular, the CBA Act is often referred to in order to delimit the employees (and employers) of the private sector. Applying the assimilation to self-employed persons could, as a consequence, suddenly and immediately stipulate that all this other legislation would also be applicable to self-employed persons, which was presumably not the legislator’s intention.

The fact that it will be very difficult for solo self-employed persons to fall under the existing assimilation possibility with employees also means that the clients of solo self-employed persons

cannot be viewed as “employers” under the CBA Act, which defines employers as “the person who at least employs one employee”, save for the fact that the client is already employing real employees.

Next, the CBA Act grants a negotiation monopoly for CBAs to “the organisations” – for the employee-side this refers to the three main trade unions of Belgium, the ACV/CSC (Christian trade union), the ABVV/FGTB (Socialist trade union) and the ACLVB/CGSLB (Liberal trade union). According to the CBA Act, there is an option to recognise organisations acting/speaking on behalf of self-employed persons as representative, but this only concerns employers’ organisations. Another option, the recognition of associations that the National Labour Council (the national collective bargaining platform of Belgium) recognises as representative in a certain industry is also reserved for employers’ organisations. Therefore, in theory, it is not possible to recognise other organisations that are specifically aimed at defending the interests of the self-employed persons by analogy to an employee-organisation and which would have the same authority to conclude CBAs. This shortcoming can possibly be solved by admitting such organisations that represent the interests of self-employed workers in practice, even though they are not employers. After all, this is also the case for Unizo which, in addition to SMEs, also defends the interests of self-employed workers in the national social dialogue in the National Labour Council.

In conclusion, the CBA Act, cannot currently apply to collective agreements that would be concluded for solo self-employed persons in Belgium. The consequences of this is that such CBAs cannot, in theory, be registered with the Federal Public Service of Work (the federal administration) and, as a result, they cannot be subject to a supplementary binding force in accordance with art. 19 and art. 26 of the CBA Act. According to article 19, registered CBAs are binding for the organisations which have entered into it, and the employers who are members of those organisations or have entered into the agreement themselves, the organisations which accede to the agreement and the employers who are members of those organisations, from the date of accession; the employers who become members of a tied organisation, from the date of their membership; and all employees of a tied employer. In accordance with article 26, which concerns a collective labour agreement concluded within a joint committee of a sector, the stipulations relating to the individual relationship between employer and employee are binding on all employers and employees, other than those referred to in article 19 who belong to the material scope of the joint committee and, in so far as they fall within the scope as defined by the agreement, unless a stipulation contrary to the agreement has been included in writing in the individual employment contract. This means that Articles 19 and 26 extend the binding force of a CBA beyond the negotiating parties, which is currently not possible with CBAs for solo self-employed persons.

In addition, these CBAs cannot be considered for the declaration of universal applicability either (which would make it impossible to derogate from its provisions by individual employment contract). This means that such CAOs only have the contract value according to Belgian contractual obligation law. In other words, it will not be possible to make such collective agreements generally binding for all self-employed persons (e.g. in a sector). This CBA will only bind the parties who are validly represented when the collective agreement is concluded. This is extremely unfortunate, because it will often be less obvious for self-employed persons to join organisations that can conclude collective agreements, particularly the trade unions. These CBAs for solo self-employed persons are, of course, not without legal value. For example, through the CBAs, clients could unilaterally commit themselves to respecting certain employment conditions, which self-employed persons could then invoke under contract law. However, these remain a kind of second-class collective bargaining agreement that offers much less protection for self-employed

people who find themselves in a similar situation to that of employees.

The federal administration and the Minister of Employment could pursue a policy of tolerance, whereby they would allow for self-employed CBAs to be filed and declared universally binding, even though they do not fall under the CBA Act. In theory, the check by the administration of the content of the CBA should, in principle, prevent this. In any case, such a strategy of tolerance does not offer any legal certainty or a strong legal framework, and it will therefore greatly depend on the administration and the executive as to what is possible. Moreover, such a strategy of tolerance opens the way to legal proceedings by clients who do not like the content of the CBAs. A policy of tolerance may offer a temporary solution, but it is not the way to go in the long run.

We can find an existing strategy of tolerance in The Netherlands, where the court of appeal of The Hague has accepted CBA's for freelancer musicians in 2015, as the result of already mentioned FNV Kunsten case of the CJEU. In the aftermath of this case, the Dutch parliament (Second Chamber) approved a motion in 2017 to request the Dutch government and social partners to make it possible for solo self-employed persons in the cultural sector to be able to bargain collectively. In practice this led to the active conclusion of CBAs regarding the remuneration of solo self-employed workers in this industry. However, there is still no legal framework and this practice is restricted to the cultural sector (while other sectors could use a similar possibility) and until now the material scope of collective bargaining has been very narrow, focusing exclusively on pay. This certainly is an interesting example for Belgium, but it does not seem like a stable and well-defined legal framework to function as the basis of a real collective bargaining system.

Therefore, Belgium will have to adjust the scope of the CBA Act or create a new (similar but separate) system for collective bargaining system for solo self-employed persons. This is not an easy task, as the CBA Act is an important pillar of Belgian labour law and any alteration is politically sensitive, but also should require the consent of the social partners. There are certainly sectors in which employers and trade unions are willing to negotiate and conclude CBAs on behalf of solo self-employed persons, e.g. the arts and entertainment sector. These social partners are currently facing the shortcomings of the traditional collective bargaining system and can only conclude second-rate CBAs on behalf of solo self-employed artists and freelancers. It is clear that legislative action needs to be undertaken, but it is less apparent how far the legislator and the national social partners would be willing to go. Would the existing system for employee simply be extended? Or should it only be extended in certain sectors (e.g. the sectors with a lot of freelancers) and do we want to start collective bargaining on all possible levels (central, sector and company) or restrict it to e.g. sector level collective bargaining; these and other difficult issues will have to be solved by parliament, ideally with the meaningful input of the social partners. Until this happens, collective bargaining for solo self-employed employees will take place under legally uncertain procedures and will not receive the same protection as that afforded to employees under a collective bargaining agreement.

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