The European precariat: the protection of precarious workers in the European Union

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Chapter 8: False & Precarious Self-Employed Persons

1 INTRODUCTION

The final case study that will be discussed is the situation of 'false' and 'precarious' self-employed persons. This describes the situation where the classification of the worker's status as self-employed, as opposed to paid employment, renders the employment precarious and is liable to affect the individual's protection. As with other forms of non-standard work, self-employment is not precarious *per se*. Self-employed workers have different rights and obligations, which are justified in light of the objective differences between the two kinds of worker. Those in self-employment sacrifice some of the securities associated with paid employment in order to gain more flexibility and the opportunity to receive profits from their business. However, in recent years the traditional dichotomy between paid and self-employment has blurred, meaning that workers who are objectively in an employer-employee relationship are treated as self-employed persons (known as 'false' or 'bogus' self-employment). Furthermore, some individuals may be 'genuinely' self-employed, however, denying them certain social rights is difficult to sustain in light of modern practices and the relative power imbalance between 'client' and 'contractor' (i.e., 'precarious' self-employment).

This chapter will examine the situation of precarious self-employed workers. First, it will define 'false' and 'precarious' self-employment, before looking at the distinction between genuine and false self-employment from the European and national perspective, identifying similarities and differences between the various approaches. Following this, it will assess the situation of genuinely self-employed persons who, due to the grey area between self- and paid-employment, may face many of the same risks as paid-employees. It will consider their rights under free moment and social law, including the right of self-employed persons to assembly and collectively agreed rates of pay, and ask how such rights may be protected within the space permitted by the EU legal framework.

2 PRECARIOUS FORMS OF SELF-EMPLOYMENT

Self-employment is not *per se* precarious or even undesirable. Being in charge of one's own employment is inherently associated with a degree of risk and uncertainty. This is most evident in context of social law as self-employed persons, both at the European and national level, are not entitled to a range of employment-based protections that are reserved for paid-workers. However, this lack of protection is offset by a greater degree of flexibility in setting one's working schedule and by receiving higher income through profits, rather than just a salary.

Generally speaking, self-employment is a popular form of employment. It is reported to have the "best working conditions, and satisfaction with career opportunities, job security and pay".[1] This means that using self-employment in itself as an indicator for insecurity or

[1] A. Broughton et al (DG Internal Policies, European Parliament), *Precarious Employment in Europe* (2016) DG for Internal Policies (European Parliament): Brussels, p. 84.

precariousness is unhelpful.[2] Instead, a distinction must be made between 'genuine' and 'precarious' forms of self-employment. Self-employment can be precarious where the worker is forced into a self-employed contract despite them being in a relationship of subordination with the employer. This is known as 'false' or 'bogus' self-employment. However, it should be noted that the increasingly grey area between paid- and self-employment means that even those genuinely classified as self-employed persons may be not entitled to certain social rights, such as the right to collectively agreed fees. Given their employment status and their position *vis-à-vis* the 'customer', it may be inappropriate to continue denying them this right. This is particularly the case for so-called 'dependent contractors' or platform workers that blur the boundaries between paid work and self-employment.

2.1 'False' or 'Bogus' Self-employment

'Bogus' or 'false' self-employment is the situation whereby an individual is engaged on a self-employed basis, meaning that the employer obtains the benefits of this relationship and pushes the risks onto the worker, even though their relationship with their employer is more akin to that of employer-employee.[3] These positions often have very similar characteristics to paid-employment: there is substantial continuity with a single employer over many contracts, a lack of control over working times or the ability to refuse jobs, a non-supplying of materials, constant supervision or the requirement to obey instructions on routine daily basis, etc.[4] Conversely, the activities normally associated with self-employment are missing: tendering for different contracts, negotiating the price for a service, or employing workers to perform specific jobs.[5] False self-employment is often associated with platform work, given that this involves a triangular relationship between platform, worker, and client, with the convoluted relationship between the three making it difficult to determine who is the employer.[6]

False self-employment is one of the most precarious forms of non-standard employment. The individual is placed onto a self-employed contract, normally involuntarily, taking on more risk and losing social protections as a result. This puts the individual in a weak, insecure position and places all of the power in the hands of the employer (or platform). The falsely self-employed have the longest hours and the most irregular patterns of all precarious workers.[7] It is suggested that the "vast majority" of bogus self-employed workers are labour migrants with little chance of finding other sources of income.[8] Due to their status as self-

[2] S. McKay et al, 'Study on Precarious work and social rights' (2012) Working Live Research Institute: London, p. 26.

[3] A. Broughton (n 1), p. 83; see also C. Thornquist, 'Welfare States and the Need for Social Protection of Self-Employed Migrant Workers in the European Union' (2015).

[4] F. Behling, F, and M. Harvey, 'The evolution of false self-employment in the British construction industry: a neo-Polanyian account of labour market formation' (2015) 29(6) *Work, employment and society* 970; A. Thornquist, 'False Self-employment and Other Precarious Forms of Employment in the 'Grey Area' of the Labour Market' (2015), p. 412.

[5] Ibid, p. 970.

[6] Z. Kilhoffer et al, 'Study to gather evidence on the working conditions of platform workers' (2020) *Directorate-General for Employment Social Affairs and Inclusion - Report VT/2018/03*, Luxembourg: Publications Office of the European Union, p. 41; A. Rosin, 'Platform Work and fixed-term employment regulation' 12(2) *European Labour Law Journal* 156-176, p.162.

[7] A. Broughton (n 1), p. 84.

[8] C. Thornquist (n 3).

employed workers they are not entitled to the rights and protections available to paid-employees,[9] and are often prohibited from collective bargaining or unionising.[10] The use of falsely self-employed persons is also damaging for society overall, as having self-employed persons and paid-employees performing near-identical roles in the labour market creates stark dualisations, allows employers to evade taxes and labour and insurance costs associated with paid-employment,[11] and results in a destabilisation of the labour market and a distortion of competition.[12]

2.2 Dependent Contractors & Platform Workers

Not all persons that are classified as self-employed but who are in the grey area between paid and self-employment are necessarily falsely self-employed. There is an increasing amount of work that is "somewhere between subordinate and independent work", where the worker is seen formally as independent, even though the relationship and conduct of the employer suggests the relationship is one of subordination.[13] The Court of Justice has explicitly recognised the difficulty in distinguishing between genuine and false forms of self-employment in modern labour markets.[14] Whilst national courts have generally held that platform workers such as *Uber* drivers and *Deliveroo* riders are paid-employees under national law, this is not always the case as some courts have recognised certain platform workers as being self-employed.[15] The fact that delivery riders for the same company can be classified as workers and self-employed depending on the state in question demonstrates how such persons can find themselves in the grey zone between paid- and self- employment. This grey zone includes many individuals working on platforms, who are often engaged falsely or otherwise on self-employed contracts.

These persons cannot be simply categorised into one group or another. Whilst some aspects of their employment may be similar to self-employment, they may also face similar challenges as the falsely self-employed: i.e., they are not entitled to employment rights related to holiday pay and leave, sick pay and leave, and unemployment benefits, as well as other entitlements and rights available to paid-employees.[16] They are often paid per-job, which can result in significant amounts of unremunerated work and even in real terms paid below the minimum wage. They are suggested to have "…the lowest incomes and the greatest household financial difficulty of any category of worker".[17] Furthermore, their self-employed status means that they are often barred from collective bargaining, have difficulties appealing disciplinary matters, and can even find it difficult to unionise and enforce their rights at all. The lack of

[9] F. Behling, and M. Harvey (n 4), p. 970.
[10] Ibid.
[11] A. Thornquist (n 4), p. 412. See also *Ibid*; C. Thornquist (n 3).
[12] J. Cremers, 'Non-standard employment relations or the erosion of workers' rights' (2010).
[13] S. McKay (n 2), p. 25.
[14] Case C-413/13 *FNV* ECLI:EU:C:2014:2411, para. 32-34; Opinion of Advocate General Wahl in Case C-413/13 *FNV* ECLI:EU:C:2014:2215, para. 51.
[15] See, for example, *The Independent Workers Union of Great Britain v Central Arbitration Committee and Roofoods Ltd t/a Deliveroo* [2021] EWCA Civ 952.
[16] F. Behling, and M. Harvey (n 4), p. 970.
[17] A. Broughton (n 1), p. 84.

rights can have serious implications for life, as the worker subsequently loses future benefits related to unemployment, illness, and retirement.[18]

3 THE DISTINCTION BETWEEN GENUINE AND FALSE SELF-EMPLOYMENT

The distinction between paid- and self-employment is important as it determines the basis of an individual's status and rights under EU law, either from Article 45 TFEU on the freedom of movement for workers or Article 49 TFEU on the freedom of establishment.[19] This categorisation affects their rights and protections. However, as has been recognised by the Court, this distinction is becoming increasingly difficult in the light of modern employment practices.[20] The following section will examine how the Court distinguishes between genuine and false self-employment through the subordination aspect of the *Lawrie-Blum* criteria. It will then compare the Court's reasoning with that used in national jurisdictions where there is case law, looking at any similarities, differences, and tensions that may exist.

3.1 The Court of Justice

The distinction between genuine and false self-employment is made through the subordination element within the *Lawrie-Blum* criteria. As was explained previously, there is a tension in European integration in terms of who has the competence to define who is a worker the purposes of both European free movement law and national labour law. In the context of the *Lawrie-Blum* criteria, the Court has asserted that this requires an EU-wide, uniform definition to ensure the uniformity of the law and its effectiveness.[21] The Court also applies this logic in the context of self-employment. It has held that any classification of the individual as being self-employed under national law will not prevent that individual from being classified as a worker under EU law, if their independence "is merely notional, disguising an employment relationship".[22] This means that the Court will not give a *carte blanche* to national administrations when determining who is a worker, which is important as this distinction has the potential to significantly affect the level of protection available.

When determining whether an individual's status as self-employed is "merely notional" or not, the Court has established the main factors that should be considered. In *Allonby*, it held that national courts should consider the "extent of any limitation on their freedom to choose their timetable, and the place and content of their work", with any obligation or lack thereof on the worker to accept assignments being irrelevant for this assessment.[23] This suggests that the choices and freedom of the individual to determine their working schedule, both in terms

[18] F. Behling, and M. Harvey (n 4).
[19] Case C-104/94 *Asscher* ECLI:EU:C:1996:251, para. 26; Case C-268/99 *Jany and Others* ECLI:EU:C:2001:616, para. 34; Joined Cases C-151/04 and C-152/04 *Durré* ECLI:EU:C:2005:775, para. 31.
[20] *FNV*, para. 32-34; Opinion of Advocate General Wahl *FNV*, para. 51.
[21] Case C-393/10 *O'Brien* EU:C:2012:110, paras. 34 – 35; Case C-216/15 *Betriebsrat der Ruhrlandklinik* ECLI:EU:C:2016:883, para. 36 – 37; Case C-658/18 *UX* ECLI:EU:C:2020:572, para. 118.
[22] Case C-256/01 *Allonby* ECLI:EU:C:2004:18, para. 71; *FNV*, para. 35; see also N. Kountouris, 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018), p. 202.
[23] *Allonby*, para. 72.

of their time and the tasks that they perform, are crucial when making this assessment. In subsequent cases the Court has continued to place emphasis on the freedom and discretion available to the individual when assessing their employment status. In *FNV*, it held that an individual may not obtain the status of independent trader if (s)he "does not determine independently (his/her) own conduct on the market, but is entirely dependent on the principal, because (s)he does not bear any financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking".[24] This means that if the individual acts under the direction of another, in particular in relation to his or her "freedom to choose the time, place and content of (his/her) work, (he/she) does not share the employer's commercial risks, and forms an integral part of that employer's undertaking", then the worker in question will be considered as being part of the same economic unit as the undertaking 'contracting' them, and thus not be classified as being self-employed.[25] In *Iraklis Haralambidis* the Court also emphasised the importance of features of self-employment that are "typically associated with the functions of an independent service provider", such as freedom in terms of the type of work performed, the manner in which they are completed, the choice of time and place of work, and the freedom to recruit staff or subcontract out work.[26]

The Court potentially expanded the idea of subordination in *Sindicatul Familia*, where it was asked whether foster parents could be in a relationship of subordination with the state for the purposes of the Working Time Directive (which explicitly uses the *Lawrie-Blum* criteria).[27] In this case, the Court emphasised the importance of the existence of a "hierarchical relationship", which must be considered on a case-by-case basis taking into account the "factors and characteristics characterising the relationship".[28] The Court considered that as the Member State in question monitored the foster parents' contract, could suspend it, and hired specialists to supervise their activity, the existence of this "hierarchical relationship" was evidenced by "permanent supervision and assessment of their activity by that service in relation to the requirements and criteria set out in the contract".[29] One could make an argument that the Court's reasoning in a case concerning the relationship between foster parents and the state has limited implications for the status of potentially falsely self-employed persons such as Uber drivers and Deliveroo riders. However, given the all-encompassing reach of the *Lawrie-Blum* criteria, as well as the fact that the application of the Working Time Directive is very important to platform workers and other falsely self-employed persons, this decision can be applied to situations concerning falsely self-employed persons. Interestingly, the UK Supreme Court applied the hierarchical relationship principle established in *Sindicatul Familia* explicitly when determining whether *Uber* drivers were self-employed or paid employees.[30]

The Court's case-law therefore suggests that, while it will notionally leave the classification of paid or self-employment to national courts, it is willing to step in when workers are falsely classified as self-employed. In doing so, it will look primarily at the independence of the

[24] *FNV*, para. 33.
[25] *FNV*, para. 36
[26] Case C-270/13 *Iraklis Haralambidis* ECLI:EU:C:2014:2185, para. 34.
[27] Case C-147/17 *Sindicatul Familia Constanţa* ECLI:EU:C:2018:926.
[28] Ibid, para 42; see also Case C-47/14 *Holterman & Others* ECLI:EU:C:2020:574, para. 46; Case C-692/19 *Yodel* ECLI:EU:C:202:288, para. 28.
[29] *Sindicatul Familia Constanţa*, para 45.
[30] *Uber BV and others v Aslam and others* [2021] UKSC 5, para. 73.

individual, particularly in terms of their working schedule and freedom to make their own business choices. The Court's recent *acquis* suggests an even broader test, simply looking at whether there is a "hierarchical relationship" between the employee and employer, and the level of control that the latter has over the former. Both approaches, but particularly the latter, would be likely to encompass most workers on the borderline between paid and self-employment, including platform workers such as Uber drivers, Deliveroo riders, etc. Their classification as paid-workers is welcome, as it clearly provides them with more protection than if classified as self-employed contractors. However, the Court's approach has been criticised for creating a binary situation whereby an individual's level of protection is determined through their classification as paid or self-employed, rather than through the creation of new statuses or the extension of certain rights and protections to both paid and self-employed persons. The binary approach means that those not meeting the subordination condition are left without vital social protections, which can be inappropriate given their position on the labour market.[31]

3.2 National Courts

The actual classification of workers as paid or self-employed is ultimately undertaken by national authorities and courts. Therefore, to understand how such workers are treated it is necessary to briefly look at their situation in the Member States. This will allow for a comparison between the systems, that assesses the similarities and differences between them and see if any tensions exist. In doing so, it will look at Member States where there is relevant case-law on this area. Specifically, this includes the United Kingdom, which whilst no longer a Member State has seen a significant rise in both the levels of platform work and false self-employment,[32] and where there is significant case-law on the topic. It will further look at the Netherlands, France, and Spain, where there have also been legal developments in this area.

The United Kingdom

The approach of UK courts is to assess the extent that the worker assumes certain responsibilities and risks related to the employment.[33] The freedom of the worker to make their own choices regarding the employment is key, as this demonstrates whether the individual "markets his services as an independent person to the world … or whether he is recruited by the principle as an integral part of (their) operations".[34] Much emphasis is also placed on the ability of an individual to subcontract out work to another person, or as it was put by the court to do a job "either by one's own hands or by another's".[35] In *Pimlico Plumbers,* workers were

[31] E. Groshiede & B. ter Haar, 'Employee-like worker: Competitive entrepreneur or submissive employee? Reflections on ECJ, C-413/13 KNV Kunsten Informatie', in M. Laga, S. Bellomo, N. Gundt, and J.M.M. Boto (eds) *Labour Law and Social Rights in Europe. The Jurisprudence of International Courts* (2018) Wydawnictwo Uniwersytetu Gdańskiego: Gdansk.

[32] Commission Working Document, '2020 European Semester: Country Report United Kingdom' SWD(2020) 527 final, p. 27.

[33] F. Behling, and M. Harvey (n 4), p. 977

[34] *Cotswold Development s Construction Ltd v Williams* [2006] IRLR 181, para. 44

[35] *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29, paras. 20-23; see also [2017] EWCA Civ 51; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

considered as paid employees as the entire performance of the contract could not be transferred without stretching the "natural meaning of the contract beyond breaking-point".[36]

The most important UK case relating to falsely self-employed workers is *Uber*.[37] After decisions of the Employment Tribunal, High Court, and Court of Appeal, in February 2021 the UK Supreme Court gave its final decision, confirming unanimously that *Uber* drivers are paid employees under UK law. It placed most focus on the control exercised by *Uber* and the power imbalance between platform and drivers, as it considered these factors the most important when determining the existence of an employment relationship. It reasoned that "the more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social, and psychological vulnerability in the workplace".[38] As such, it examined the "relative degree of control exercised by Uber and drivers over the service provided to them", in particular who determines the price to passengers and who is responsible for defining and delivering the service.[39] The Supreme Court considered that the remuneration paid by *Uber* to drivers was non-negotiable; the contractual terms applicable to divers were dictated by *Uber*; who also dictated the information that was provided to drivers; they monitored drivers' job acceptances and imposed *de facto* penalties for cancellations; the control *Uber* had over the route taken by the driver and financial risks for deviations; and the restriction of communication between drivers and passengers and ensuring that there is no relationship between them outside of the *Uber* service, all meant that they the service performed by the drivers was held to be "very tightly defined and controlled by *Uber*", and that drivers were "substantially interchangeable" and had no relationship with passengers, and they had little to no ability to improve their economic position through professional or entrepreneurial skill.[40] The *Uber* case had an EU law element insofar as part of the case concerned the applicability of the Working Time Directive. The Supreme Court applied the *Lawrie-Blum* criteria and specifically used the "hierarchical relationship" definition of paid employment as applied in *Sindicatul Familia*.[41] It considered that its own approach was in line with that of the Court in this case, as it looked for the existence of a hierarchical relationship and took into account and all the circumstances of their work.[42]

Uber can be compared to the case of *IWGB v CAC & Roofoods Ltd*, where platform food delivery riders were held *not* to be paid employees.[43] The ability of the worker to sub-contract their jobs out to third parties was again considered to be very important. However, in this case the possibility of subcontracting work was held to be "genuine" and actually operated in practice.[44] There was no punishment for a rider cancelling a job so long as the job was performed, which put them in a very different position than other platform workers such as *Uber* drivers.[45] Recently the Court of Appeal agreed with the CAC, finding that the riders are

[36] [2018] UKSC 29, paras. 24, 33
[37] *Uber BV and others v Aslam and others* [2021] UKSC 5; see also [2018] EWCA 2748; UKEAT/0056/17/DA.
[38] Ibid, para. 75; see also *McCormick v Fasken Martineau DuMoulin LLP* [2014] SCC 39; [2014] 2 SCR 108, para. 23.
[39] Ibid, para. 92.
[40] Ibid, paras. 94 -101; see also [2018] EWCA 2748, para. 96; UKEAT/0056/17/DA, para. 92.
[41] Ibid, para. 72.
[42] Ibid, para. 88.
[43] *R (on application of The Independent Workers Union of Great Britain v Central Arbitration Committee and Roofoods Litd t/a Deliveroo* [2018] EWHC 3342 (Admin). See also TUR1/985(2016)
[44] TUR1/985(2016), para. 100; [2018] EWHC 3342 (Admin), para. 19
[45] TUR1/985(2016), para. 102; [2018] EWHC 3342 (Admin), para. 19

"genuinely not under an obligation to provide their services personally and have a virtually unlimited right of substitution".[46] This was different to Uber drivers, who are required to perform the services themselves personally. Whilst riders rarely make use of this possibility, the "unfettered and genuine right of substitution that operates both in the written contract and in practice" meant that the riders were legitimately self-employed.[47] Other factors the court considered were the fact that Deliveroo riders did not have specific working hours of particular duration or continuity; did not need to be available for work; were responsible for their phone and bike (the most essential tools of the job), which is was claimed adhered to the approach of the Court of Justice.[48] The decision meant that the riders were not eligible to renegotiate a collective agreement under UK law. The Court of Appeal held that whilst it may seem counter-intuitive not to recognise that these workers have the right to protect their interests through trade unions and collective action, given that they are genuinely self-employed this means that they have more limited rights in this respect.[49]

The Netherlands

The Netherlands has also seen a significant increase in the amount of self-employment and platform work over the past 10 years, and is currently the Member State with the fastest growth in self-employment in the EU.[50] Recently, the Dutch courts found that Deliveroo riders are paid employees under national law.[51] It was held that whilst Deliveroo riders were granted a level of freedom that could indicate self-employed status, "all other elements, including the method of payment of wages, the authority exercised by Deliveroo, and other circumstances" suggest the presence of an employment contract, rather than its absence.[52] As such, the freedom provided to Deliveroo riders was not considered to be incompatible with the classification of such persons as paid-employees, given the level of the authority and control exercised by Deliveroo.

Spain

In Spain, food delivery riders have also been held to be paid employees. The Valencian Social Court found that Deliveroo riders were paid employees, given that Deliveroo owned the means of production, set the price of the service, and the riders had little to no information about the jobs they performed.[53] Furthermore, the Spanish Supreme Court recently held that *Glovo* riders (another food delivery service), should be considered as paid employees under Spanish law.[54] In doing so, it considered that the relationship between drivers and *Glovo* had

[46] *The Independent Workers Union of Great Britain v Central Arbitration Committee and Roofoods Ltd t/a Deliveroo* [2021] EWCA Civ 952, paras. 77 – 78.
[47] Ibid, para. 76.
[48] Ibid, para. 82; see Case C-692/19 *Yodel* ECLI:EU:C:202:288.
[49] Ibid, para. 86.
[50] Commission Working Document, '2020 European Semester: Country Report the Netherlands' SWD (2020) 518 final, p. 44; European Commission Staff Working Document, 'Country Report The Netherlands 2019 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances' (27th February 2019), p. 34.
[51] Case Number: 200.261.051 / 01; ECLI: NL: GHAMS: 2021: 392; Case 7044576 CV EXPL 18-14762 *FNV v Deliveroo* (15th January 2019) ECLI:NL:RBAMS:2019:210.
[52] Case Number: 200.261.051 / 01; ECLI: NL: GHAMS: 2021: 392, para. 3.12.1.
[53] Judgment No. 244/2018 of Labour Court No. 6 in Valencia; see A. Rosin (n 6), p.163.
[54] STS 2921/2020 *Juan Molins Garcia-Atance* ECLI:ES:TS:2020:2924.

a laboral nature, given the "defining features" of a contract of employment were fulfilled, in particular those of "dependency and alienation".[55] The court further held that, rather than the workers, it was in fact *Glovo* that controlled the businesses assets and organized the business.[56] The Supreme Court paid attention to the limited freedom of the riders, and the power that the platform had over them. In March 2021 the Spanish Parliament legislated to ensure that all food delivery drivers are treated as workers rather than self-employed persons, becoming the first parliament in Europe to do so.[57] This statutory classification is good for food delivery drivers, but risks excluding many other platform workers who are engaged through in similar relationships.

France

The French Supreme Court has also found delivery riders to be classified as workers rather than self-employed persons.[58] Whilst the French lower courts had considered that delivery riders were self-employed as they could decide on their own working hours or whether to refuse a job or not, the Supreme Court held that their relationship had aspects that suggested an employer-employee relationship, such as the ability of the platform to track the rider's position in real time, as well as the power to instruct, monitor, and sanction the rider meant that there existed a power of direction and a relationship of subordination.[59]

3.3 Comparing the National and European Approaches

There are clear similarities between the approaches of the Court of Justice and that used by many national courts. All focus on the freedom of the individual, in particular their ability to set their own work schedule and sub-contract work out, and the level of control and power of the undertaking or platform has over the worker. However, the concept of subordination as applied by the Court of Justice is arguably broader and more inclusive than that applied in some national jurisdictions. This can result in the situation whereby an individual is classified as self-employed under national labour law but would be a worker under EU law should any provisions of EU law be applicable to them. For example, the broader interpretation of subordination that exists at the European level indicates that *Deliveroo* riders would likely to considered as paid employees by the Court of Justice.[60] That said, it is also suggested that some Member States interpret the idea of subordination more broadly than the Court of Justice or

[55] Ibid, para. 8(2), p. 10.
[56] Ibid, para. 21(1), p. 18.
[57] L. Cater, 'Spain approved a law protecting delivery workers. Here's what you need to know' (11th May 2021) *Politico.eu*. Available at: https://www.politico.eu/article/spain-approved-a-law-protecting-delivery-workers-heres-what-you-need-to-know/
[58] Arret No. 1737 (28/11/2018) Cour de cassation (Chambre sociale) ECLI:FR:CCASS:2018:SO01737; A. Rosin (n 6), p.162.
[59] Ibid; See B. Fielder, N. Devernay, C. Ivey, 'Delivery Riders are Employees, not Self-employed workers, according to a French Supreme Court ruling' (November 2018). *Bird & Bird*. Available at https://www.twobirds.com/en/news/articles/2018/france/delivery-riders-are-employees-not-self-employed-workers-according-to-a-french-supreme-court-ruling.
[60] In light of the language used by the Court in *Allonby*, para. 72.

include other and newer criteria that depart from the Court's binary employee/self-employed dichotomy.[61]

There are also some stark differences between Member States and the Court of Justice, as well as across Member States. There is a difference between the UK and the EU regarding the weight given to the ability to subcontract out work for the purposes of the subordination criterion, as can be seen from the difference in status between delivery riders in the UK and elsewhere in Europe. This contrast can be seen from the case of *Dakneviciute*, which concerned the rights of self-employed persons under Directive 2004/38.[62] The UK placed much emphasis on the ability of the individual to sub-contract out work to a third party, whilst the Court of Justice said that this was not decisive in the case.

Divergent approaches between the European and national courts are logical given that the distinction between paid- and self- employment through the subordination criterion is a product of EU free movement law. This is different from national systems, that tend to be based on labour law, and therefore often do not have the same concept of subordination as EU law.[63] National systems also use fewer binary distinctions when determining the protections available to paid- and self-employed persons. For example, English law contains a "historical layering of different legal criteria for determining status", that symbolises the legal-economic evolution of employment.[64] Under this test, no individual factor (e.g. subordination) will be conclusive on its own, meaning courts may only approximate employment status on a case-by-case basis.[65] Within the British system there are not just paid-employees and self-employed persons, but also "an intermediate class of workers that are self-employed but provide their services as part of a professional undertaking carried out by someone else".[66] These individuals obtain certain rights associated with employment such as unfair dismissal, however, only paid-employees are entitled to most provision of UK labour law. This flexibility is a double-edged sword: whilst it is adaptable when confronted with changing employment norms, it also risks creating grey zones where employers have the space and incentive to exploit such legal ambiguities.[67] The Court of Justice's binary approach is also problematic, however, due to its inflexibility in providing an extension of some social rights to self-employed persons, as happens in the UK and elsewhere. It may be the case that a more effective system of social protection would be realised if the Union followed a more flexible approach, that extended certain social rights to some categories of self-employed persons. This will be kept in mind later in this Chapter when examining the situation of 'precarious' self-employed persons under EU social law.

[61] Z. Kilhoffer (n 6), p. 39.
[62] Case C-544/18 *Dakneviciute* ECLI:EU:C:2019:761.
[63] L. Nogler, 'Rethinking the Lawrie-Blum Doctrine of Subordination: A Critical Analysis Promoted by Recent Developments in Italian Employment Law' (2010), p.84
[64] S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialisation, Employment and Legal Evolution* (2005) REF.
[65] S. Deakin and G. Morris, *Labour Law* (2005) Butterworths; F. Behling, and M. Harvey (n 4), p. 978
[66] *Uber BV and others v Aslam and others* [2021] UKSC 5, para. 38.
[67] F. Behling, and M. Harvey (n 4), p. 978

4 THE PROTECTION OF THE SELF-EMPLOYED UNDER FREE MOVEMENT LAW

This chapter will now examine the rights and protections available to self-employed persons who are genuinely classified as self-employed but may still find themselves in a precarious working situation. It will initially look at their rights under free movement law, specifically under Article 49 TFEU and Directive 2004/38.

4.1 Protection under the Freedom of Establishment provisions

Failing to meet the subordination aspect of the *Lawrie-Blum* criteria does not result in the individual losing legal status under EU law. Instead, they derive their rights from the freedom of establishment provisions under Article 49 TFEU rather than workers under Article 45.[68] Historically, there has been little difference in terms of the level of protection available to workers and self-employed persons through free movement rights, for example relating to residence, equal treatment, and the derived rights of family members.[69] In fact, the Court has explicitly stated that, at least in the context of granting residence permits, [Articles 45 and 49 TFEU] "afford the same legal protection and that therefore the classification of an economic activity is without significance".[70] This suggests that there is a degree of equivalence between the free movement rights of self-employed and paid employed persons.

An example of this equivalence can be seen from *Meeusen,* which concerned a Belgian frontier worker who was the "the director and sole shareholder" of a company established in the Netherlands, and therefore could not fulfil the subordination condition required to be classified as a worker.[71] As such, his daughter could not derive a right to a university grant as the child of a worker under (then) Regulation 1612/68, which only applied to workers.[72] However, the fact that the child's mother worked for the father's company two days a week meant that she could derive this right from her mother's genuine employment.[73] The Court held that the relationship between the spouses was irrelevant: "the personal and property relations between spouses which result from marriage do not rule out the existence, in the context of the organisation of an undertaking, of a relationship of subordination".[74] Furthermore, regardless of the relationship between mother and father, the daughter would nevertheless obtain the same derived right to student grants through the father who was exercising his rights under the freedom of establishment.[75] This shows that both workers and

[68] Case C-104/94 *Asscher* ECLI:EU:C:1996:251, para. 26; Case C-268/99 *Jany and Others* ECLI:EU:C:2001:616, para. 34; Joined Cases C-151/04 and C-152/04 *Durré* ECLI:EU:C:2005:775, para. 31.
[69] The only difference between their treatment is that some EU secondary legislation (a notable wexaple being Regualtion 492/2011) only applies to workers under Article 45 TFEU.
[70] Case C-363/89 *Roux v Belgium* ECLI:EU:C:1991:41, para. 23.
[71] Case C-337/97 *Meeusen* ECLI:EU:C:1999:284, para. 15. This is different to *Danosa,* where the Director was held to effectively be in a relationship of subordination with the shareholders, suggesting that for Directors to be workers, they need to be different from shareholders.
[72] Article 12, (then) Regulation 1612/68 on freedom of movement for workers within the Community, now Regulation 492/2011.
[73] *Meeusen*, para. 7.
[74] Ibid, para. 15.
[75] Ibid, paras. 27 – 29.

self-employed persons are entitled to virtually the exact same rights and protections under Articles 45 and 49 TFEU.

4.2 Social Protection of Self-employed under Directive 2004/38

The free movement rights of self-employed persons are now mostly regulated through Directive 2004/38. Article 7(1)(a) grants a right of residence to "workers or self-employed persons in the host-Member State", whilst Article 7(3) on worker status retention states that a Union citizen "who is no longer a worker or self-employed person shall retain the status of worker or self-employed person". They are also included in the provisions on retaining a right of residence, the safeguards against expulsion, and equal treatment rights under Article 24. Their inclusion in Directive 2004/38 is logical, given the equivalence between the two categories in terms of their protection.

That said, following the adoption of the Directive, it was not clear to what extent the system of worker retention under Article 7(3) would apply to them, specifically the extent to which self-employed persons can become *involuntarily* unemployed, as is required to retain worker status. The Court clarified this point in *Gusa*,[76] which concerned a Romanian national who was living in Ireland since 2007, and between October 2008 and October 2012 worked as a self-employed plasterer. At that time, he ceased work due to adverse economic conditions (specifically the Eurozone crisis and the collapse of the 'Celtic Tiger') and claimed jobseeker's allowance. However, Ireland considered that once his plastering work had 'dried up', he would lose his right of residence under the Directive and could not retain it under Article 7(3). The Court first held that it could not be "inferred unequivocally" from the wording of Article 7(3), specifically the term "after having been employed", if this provision concerned just paid employees, or also included the self-employed.[77] It was also unclear from examining alternate language versions of the Directive, which used different terminology.[78] However, the Court went on to find that the term 'involuntary unemployment' should constitute any loss of occupational activity, including self-employment, "for reasons beyond the control of the person concerned, such as an economic recession".[79] Excluding self-employed persons from the system of worker retention under the Directive would undermine the objective of strengthening the right to move and reside, and the aim of converging the rights of persons in a "single legislative act" under Directive 2004/38.[80] Given that the Directive equates self-employment and paid employment for the purposes of residence and equal treatment, distinguishing between the two categories under Article 7(3) would create an "unjustified difference", given that the provision is aimed at providing continued protection for any worker whose occupational activity ceased due to circumstances beyond their control.[81]

[76] Case C-442/16 *Gusa* ECLI:EU:C:2017:1004.
[77] Ibid, paras. 29 – 30.
[78] Ibid, paras. 32 - 33; see Opinion of Advocate General Wathelet in Case C-442/16 *Gusa* ECLI:EU:C:2017:607, paras. 48 - 49.
[79] Ibid, para. 31.
[80] Ibid, paras. 40-41.
[81] Ibid, paras. 42.

Gusa continues the principle of equivalence between self-employed and paid employees under free movement law. Advocate General Wathelet made this point clear in his Opinion, repeating the long-standing principle that Articles 45 and 49 TFEU "afford the same legal protection" and therefore "the classification of the basis on which an economic activity is performed is thus without significance".[82] To exclude self-employed persons from protection would result in someone that has contributed to the Member State social security and tax system being treated the same as a first-time jobseeker that has "never carried on an economic activity in that State and has never contributed to that system".[83] What is noteworthy about the decision is that the Court so emphatically held that self-employed persons can be involuntarily unemployed. On the face of it, there is a reasonable argument that self-employed persons can never be "forced" to cease employment for economic reasons as this decision is never imposed on them: they must always actively make the final decision to close the business. However, in reality there is very little difference between the two situations, apart from the person actually making the decision to cease trading. A paid employee may find that economic conditions have led to them being let go by their employer, however, a self-employed person may well have to cease operations due to the exact same economic conditions. From this perspective, it would be unfair to exclude them from protection: it would undermine their employment security and place additional financial burdens upon them when compared to paid workers, thereby pushing them into social exclusion and creating dualisations in the labour market.

The equivalence between the protection available to paid employees and self-employed persons under the Directive can also be seen from *Dakneviciute*,[84] which concerned the retention of worker status for pregnant self-employed women. In this case, a Lithuanian national in the UK was working in paid employment for two years before becoming pregnant and subsequently deciding to work on a self-employed basis as a beauty therapist. Between July and October 2014 she did not work due to her pregnancy, and at the start of 2015 gave up her self-employed activity due to insufficient income and went back to paid employment. Her child benefit claim in August 2014 was rejected due to her having insufficient resources and therefore no right to reside. Whilst Ms Dakneviciute claimed that she should retain a right to reside for a reasonable period following her pregnancy under the *Saint-Prix* doctrine, the UK claimed that this was impossible as "a self-employed person is not required to carry out her work personally and it is open to her to continue her business by other means", meaning she would not need to take time out of the labour market.[85]

The Court confirmed that the principle laid down in *Saint Prix* that the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth may result in a woman needing to give up work temporarily, so long as she seeks to return to the labour market "within a reasonable period".[86] It then made a stronger statement of equivalence between paid employees and self-employed persons than *Gusa*, using the *Roux* terminology to state that "Articles 45 and 49 TFEU afford the same legal protection, the classification of the economic

[82] Opinion of Advocate General Wathelet in *Gusa,* paras. 73.
[83] *Gusa*, paras. 43 – 44.
[84] *Dakneviciute*.
[85] Ibid, para. 21, 40-41.
[86] Ibid, para. 28 – 29.

activity thus being without significance".[87] Denying self-employed women this right would deter them from exercising their free movement rights if they risked losing legal status due to pregnancy,[88] and furthermore treating pregnant self-employed persons and paid employees differently would create an unjustifiable difference, given that "pregnant women are in a comparable vulnerable situation, regardless of whether they are employed or self-employed".[89] The Court therefore extended the *Saint-Prix* principle to self-employed persons, finding that the physical constraints of pregnancy and childbirth "which require a woman to give up work temporarily, cannot, *a fortiori*, result in that woman losing her status as self-employed".[90]

The decision is a logical interpretation of the Directive. Moreover, the UK's approach of focusing on the ability to subcontract out work ignores the reality of self-employment and is arguably offensive towards those engaged in manual and service-based professions. If a freelance consultant ceases trading, their clients may be understandably cautious of switching to a new consultant. The same is true for beauty therapists, who are likely to have built up relationships with customers that cannot be easily replaced. As such, the Court's statement that "it cannot be assumed that such a replacement will always be possible, particularly when the activity in question involves a personal relationship or a relationship of trust with a customer" must be welcomed.[91]

5 Social Protection of Self-Employed: Social Rights

The blurred lines between paid- and self-employment means that there are also genuinely self-employed persons who find themselves in a precarious working situation as they face many of the risks and challenges that apply to paid-workers, particularly those engaged in platform and on-demand work. This is because there are persons who are classified as genuinely self-employed persons who face many of the insecurities and risks that are applicable to falsely self-employed persons yet are not entitled to the same rights and protections.[92] As Lord Justice Underhill stated in the *RooFoods (Deliveroo)* judgment, it can seem "counter-intuitive" for certain gig sector workers such as delivery riders not to have the same rights as paid-workers.[93] This is liable to affect their social rights more than free movement rights given that self-employed persons have very limited protections under EU and national social law. Whilst in principle this justified by the different situations these persons find themselves in, the following section will assert that the blurring between the two statuses, particularly in the context of platform work, means that it is no longer appropriate to deny these workers certain social rights. This section will examine specifically the right of self-employed persons to enforce collectively agreed rates of pay under EU competition law and the freedom to provide services.

[87] Ibid, para. 31.
[88] Ibid, para. 33.
[89] Ibid, para. 35 – 36.
[90] Ibid, para. 41.
[91] Ibid, para. 38.
[92] See W. Eichhorst *et al*, 'Social Protection of economically dependent self-employed workers' (2013) *European Parliamentary Committee on Employment and Social Affairs* IP/A/EMPL/ST/2012-02 PE 507.449.
[93] Lord Justice Underhill in [2021] EWCA Civ 952, para. 86.

5.1 (No Right to) Employment & Social Law

Those classified as self-employed have very limited rights under EU labour legislation.[94] They cannot invoke the *pro-rata* and equal treatment rights available under the Part-time Work, Fixed-term Work, and Employment Agency Directives.[95] They also cannot rely upon the Working Time Directive, which provides significant protections to platform workers and dependent contractors engaged on a paid-employee basis, in terms of registering working time and enforcing rights such as paid annual leave and compensation *in lieu*. This highlights the importance of gaining the status and rights of a worker, particularly for platform workers.

This difference in protection is in principle explained by the objectively different situations of each type of worker.[96] Whilst self-employed persons take on more risk, they also gain more reward, which should then be used to insure oneself against the risks of the market, much in the same way an employer covers the risks of employees working under their direction.[97] However, the traditional distinction between paid and self-employment, particularly in certain sectors such as the platform economy, is increasingly grey and arbitrary. For example, whilst Deliveroo riders are entitled to labour law rights in the Netherlands due to their classification as workers, across the English Channel in the UK they are not as they are treated as self-employed persons.

Despite the lack of applicability of EU social law to self-employed persons, the EU increasingly recognises the problems with the classic dichotomy between paid and self-employment. The Recommendation on Social Protection for Workers and the Self-employed emphasises the potentially insufficient access of self-employed persons to social protection branches that are more closely related to the participation in the labour market.[98] In this regard, it claims that the self-employed should have access to the listed social protection branches, at least on a voluntary basis, and where appropriate on a mandatory basis.[99] This suggests that the level of social protection available to self-employed persons is increasingly seen as inadequate in the context of modern employment trends. However, as a soft law coordinating instrument that does not confer concrete rights, the Recommendation is likely to only have indirect and limited relevance for self-employed persons and platform workers.[100] There have even been recent calls for the EU to adopt a Directive explicitly regulating the status of platform workers.[101] However, even this initiative seems to have little to say on improving the social rights of platform workers that are classified as self-employed persons. Most recently, the European

[94] N. Kountouris (n 22), p. 213.
[95] Z. Kilhoffer (n 6).
[96] C. Barnard, *EU Employment Law (4th Ed)* (2012) OUP: Oxford, p. 155; UK House of Lords European Union Committee, *Modernising European Union Labour Law: has the UK anything to gain?* (2007) Authority of the House of Lords: London, p. 80-81
[97] Ibid, p. 145; C.J. Cranford, J. Fudge, E. Tucker, and L.F. Vosko, *Self-Employed Workers Organize: Law, Policy, Unions* (2005) McGill-Queen's University Press: Montreal, p. 9.
[98] Recital (13), Council Recommendation on access to social protection for workers and the self-employed COM (2018) 132 final; see also Z. Kilhoffer (n 6), p. 162.
[99] Recital (18), Council Recommendation on access to social protection for workers and the self-employed COM (2018) 132 final
[100] Z. Kilhoffer (n 6), p. 162.
[101] L. Chaibi, 'Proposal for a Directive of the European Parliament and of the Council on Digital Platform Workers' (2019). Available at: https://www.guengl.eu/content/uploads/2020/11/Directive-travailleurs-des-plateformes-ENG-WEB.pdf

Commission has published a Proposal for a Directive on improving working conditions in platform work.[102] Whilst the final text of the Directive is yet to be published, from the Proposal it would seem that this instrument does little to expand the social rights of platform workers. Instead, the Directive is focused on their classification as paid workers (i.e., the distinction between paid and self-employment).

5.2 The Right to Assembly and Collectively Agreed Rates

In view of the increasingly blurred distinction between paid and self-employment, it becomes inappropriate to deny even genuinely self-employed persons certain social rights. This is not to say that it would be possible or desirable to extend all social rights that are available to workers to self-employed persons, who are in a different factual situation. As such, it is not claimed that self-employed persons should be entitled to the rights outlined in Chapter 6. However, it may be that one social right in particular is difficult to deny to precarious self-employed workers: namely, the right of collective bargaining and action, which stems from the freedom of assembly and of association, protected under Articles 28 and 12 of the Charter respectively. The right to collective action and enforcing collectively bargaining rates of pay is important as it is be highly beneficial for workers, particularly those in flexible and insecure working arrangements.[103] Collective bargaining can contribute to improvements in wages and working conditions, as well as building trust and respect between workers, employers, and other organisations, thereby fostering stable and productive labour relations.[104] They complement regulatory obligations, which can benefit all parties by ensuring that workers get a fair share of productivity gains while not impairing the capacity of employers to operate profitably.[105]

However, the blurred distinction between paid and self-employment means that certain persons who are genuinely classified as self-employed are in a very similar factual situation to paid workers in terms of their work freedom and autonomy, and yet are not permitted to improve their working conditions through collective action. In particular, 'genuinely' self-employed platform workers face problems as they often face restrictions on their working schedule, rates of pay, whether they can refuse jobs without consequences, etc., which are all set by the platform, and yet paid workers they cannot collectively organise to improve their situation As Lord Justice Underhill stated in *RooFoods*, it seems counter-intuitive that self-employed gig-economy workers cannot protect their interests through trade union action and associated rights.[106] Lord Justice Coulson went further, stating that gig economy workers have a "particular need" of the right to organise through trade union and enforce their rights.[107] The following section will examine the ability of precarious self-employed persons to enforce collectively agreed (minimum) rates of pay in the areas where such rules are prohibited: namely, within EU competition law and under the Services Directive 2006/123.

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[102] Proposal for a Directive on improving working conditions in platform work COM (2021) 762 final.
[103] S. Hayter, *The Role of Collective Bargaining in the Global Economy: Negotiating for Social Justice* (2011) Cheltenham: Edward Elgar, pp. 57-59.
[104] ILO, *Collective Bargainning: A Policy Guide* (2015) Geneva: ILO, p. 4-5.
[105] Ibid, p. 5.
[106] [2021] EWCA Civ 952, para. 86.
[107] Ibid, para. 96.

5.3 EU Competition Law

EU competition law applies to all entities engaged in economic activity "regardless of its legal status and the way in which it is financed".[108] As self-employed persons meet this definition, they are classified as undertakings and as such EU competition rules apply to them, which limits their ability to enforce collectively agreed rates of pay. The seminal case on the right of self-employed persons to collectively agreed conditions is *Albany*.[109] This case concerned a collective agreement, that was agreed between an employers' and employees' association, to set up a single sectoral pension fund responsible for managing a supplementary pension scheme and to make affiliation of that fund compulsory. The Court held that the agreement in question could fall under Article 101(1) TFEU as it had an appreciable effect on trade, and its compulsory nature meant it affected the entire textile sector.[110] However, it went on to emphasise that the Union seeks to establish "not only a system ensuring that competition in the internal market is not distorted, but also a policy in the social sphere".[111] This meant that the social policy objectives pursued through collective agreements between employers and workers and that inherently restrict competition would be "seriously undermined" if they were subject to Article 101(1) TFEU when management and labour jointly seek to improve conditions of employment for workers.[112] Consequently, it was held that "agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives" fall outside the scope of Article 101(1) TFEU. As such, agreements that are concluded through negotiations between management and labour and pursue valid social policy objectives will be excluded from the scope of this provision.[113] However, two cumulative criteria must be fulfilled: (i) the agreement must be concluded between management and labour (i.e. not between undertakings); and (ii) it must be aimed at improving work and employment conditions.[114] In *Albany*, the agreement fulfilled these two criteria as it was entered into by employers' and employees' organisations and pursued a social policy objective by guaranteeing a level of pension entitlement to all workers within a sector.[115] Therefore, *Albany* both restricted the scope of Article 101(1) by excluding it from certain agreements applying to workers, and confirmed that self-employed persons cannot conclude or enforce collective agreements.

In *FNV*, which concerned the compatibility of collectively agreed minimum fees for substitute orchestra musicians (applying to both paid employees and self-employed freelancers), the Court applied the *Albany* exception, finding that although self-employed substitute musicians performed "the same activities as employees, service providers such as the substitutes at issue in the main proceedings, are, in principle, 'undertakings' within the meaning of Article 101(1) TFEU … and perform their activities as independent economic operators in relation to their

[108] For a recent example, see Case C-74/16 *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe* ECLI:EU:C:2017:496, para. 41.
[109] Case C-67/96 *Albany* ECLI:EU:C:1999:430.
[110] Ibid, para. 49 – 50.
[111] Ibid, para. 54.
[112] Ibid, para. 59.
[113] Ibid, para. 59 – 60; See also *FNV*, para. 23; Opinion of Advocate General Wahl in *FNV*, para. 24; Case C-222/98 *Hendrik van der Woude* EU:C:2000:475, para. 22; Opinion of Advocate General Fennelly in Case C-222/98 *Hendrik van der Woude* ECLI:EU:C:2000:226, para. 21; Z. Kilhoffer (n 6), pp. 246 – 247; E. Groshiede & B. ter Haar (n 31).
[114] *Albany*, para. 60.
[115] Ibid, paras. 62 - 63.

principal".[116] As the musicians were self-employed, they were considered not to be acting collectively as a trade union, but rather an association of undertakings.[117] As such, the agreement failed the *Albany* exception, meaning that it could not be excluded from the scope of Article 101(1) TFEU, unless such workers were engaged as self-employed workers on a false basis, and that their situation was comparable to that of employees".[118]

The Court therefore considers that agreements between self-employed persons will always fail the first part of the *Albany* exception as they inherently restrict competition.[119] This means that the Court has not extended the *Albany* exception to improve the working conditions of self-employed persons.[120] The General Court has held that farmers were undertakings as there was "no employment relationship at all" between farmers and slaughterers as the former do not work for the latter or do not make part of their undertaking, which was not affected by the farmer's ability to joint trade unions under the French Labour Code.[121] Furthermore, the Court has continued to find that minimum fee arrangements unliterally set by organisations representing professionals will fall under the Article 101(1) TFEU, and can only be justified if necessary for the implementation of a legitimate objective.[122]

The application of Article 101(1) TFEU to collective agreements between self-employed persons is criticised for its lack of flexibility, and for failing to accommodate national labour systems and the business model of many platforms.[123] Collective bargaining is suggested to be more effective than legislation at protecting against risks associated with precarious employment, for example minimum wages, insurance against accidents at work, protection against unfair dismissal, working time and rest periods, etc., meaning that this rule excludes an avenue for them to improve their working conditions, and ultimately it is likely to result in their position becoming more precarious.[124] This also arguably undermines the rights contained in the Charter, such as Article 12 which states "that everyone has the right to … freedom of association … which implies the right of everyone to form and join trade unions for the protection of his or her interests". The Charter makes no distinction between paid employees and the self-employed. Furthermore, collective agreements are specifically recognised under Article 152 TFEU, which "recognises and promotes" the role of social partners, respects their autonomy, and takes into account the "diversity of national systems".

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[116] *FNV*, paras. 23, 27; See also *Albany*, para. 60; Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens'*, EU:C:1999:434, para. 57; Case C-219/97 *Drijvende Bokken* EU:C:1999:437, para. 47; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* EU:C:2000:428, para. 67; Case C-222/98 *van der Woude* EU:C:2000:475, para. 22; Case C-437/09 *AG2R Prévoyance* EU:C:2011:112, para. 29; Case C-1/12 *Ordem dos Técnicos Oficiais de Contas* EU:C:2013:127, paras. 36 – 37; C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* EU:C:2006:784, para. 45.

[117] *FNV*, para. 28.

[118] Ibid, paras. 30-31.

[119] Ibid, para. 27.

[120] Opinion of Advocate General Wahl in *FNV*, para. 27.

[121] Joined Cases T-217/03 and T-245/03 *FNCBV* ECLI:EU:T:2006:391, para. 58, 123; see D. Schiek and A. Gideon, 'Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier to smart cities' (2018) 32(2-3) *International Review of Law, Computers & Technology* 275-294, p. 281.

[122] Case C-136/12 *Consiglio nazionale dei geologi* ECLI:EU:C:2013:489, para. 57; Joined Cases C-427/16 and C-428/16 *CHEZ Elektro Bulgaria AD* ECLI:EU:C:2017:890, para. 55; see also N. Countouris and V. de Stefano, *New trade union strategies for new forms of employment* (2019) ETUI: Brussels, p. 46.

[123] C. Bergqvist, 'Collective Bargaining and Platforms' (11th December 2020) *Kluwer Competition Law Blog*.

[124] Z. Kilhoffer (n 6), p. 247.

It is possible for the Court to extend the protections available under the *Albany* exception to certain categories of self-employed persons. For example, if an agreement does not significantly affect competition it could potentially be excluded under a *de minimis* exception.[125] The Court has already held that agreements which do not have an appreciable effect on competition can be excluded from the scope of Article 101(1) TFEU.[126] However, the problem is that any agreement between self-employed workers is by its very nature going to restrict competition, and if it did not it would likely have very little benefit for workers in the first place.

Another possibility would be to assess whether collective agreements actually have pro-competitive effects, or at least protect workers whilst having a neutral effect on competition, for example because they counter the monopoly power of big platforms.[127] Currently, the pro-competitive effects of such agreements will not be considered if the agreement is held to be restrictive by object, i.e. it is considered to be a hardcore restriction that is so damaging to competition that any actual negative or positive effects arising from the agreement are not considered at all.[128] In these situations, the Court has held that "the form, official purpose, or subjective intent of the collective agreement are immaterial", and that such considerations are "irrelevant for the purposes of applying [Article 101(1) TFEU]".[129] It will be held to restrict competition even if it is not aimed at doing so and pursues other legitimate objectives, such as social protection.[130] A solution may be for the Court to change its approach towards agreements that are anti-competitive by object by considering the effect of these agreements. The restriction by object approach is designed for hardcore restrictions that serve "no legitimate purpose".[131] However, if the agreement does serve a legitimate social purpose, then an effects-based assessment would allow for a more balanced approach that includes possible benefits and efficiencies to be included within the assessment.[132] These agreements may well be in line with core EU values and can even produce pro-competitive effects, as well as ensuring a balance between fair competition and protecting workers, thereby helping realising the Union's goal under Article 3 TEU of establishing a social market economy.[133]

A final option could be to apply the ancillary restraints doctrine to find that any restrictive elements are merely ancillary to the main agreement. This could save agreements like that in *FNV* that apply to both paid-employees and self-employed persons. These agreements could be justified if they are (i) ancillary to a traditional collective agreement; (ii) are necessary for the protection provided under the agreements, (iii) do not limit the commercial freedom of third parties, and (iv) the original collective agreement falls under the *Albany* exception.[134] In conclusion, it would seem that, despite the Court's assertion that self-employed persons

[125] Ibid, p. 250.
[126] Joined Cases C-180/98 to C-184/98 *Pavlov & Others* ECLI:EU:C:2000:428, paras. 94 – 97.
[127] C. Bergqvist, 'Collective Bargaining and Platforms' (11th December 2020) *Kluwer Competition Law Blog*.
[128] Ibid.
[129] Case C-209/17 *Beef Industry* ECLI:EU:C:2008:643, para. 21.
[130] Case C-551/03 P *General Motors v Commission* ECLI:EU:C:2006:229, para. 64.
[131] C. Bergqvist (n 127). See Case C-228/18 *Budapest Bank* ECLI: ECLI:EU:C:2020:265, paras. 82 - 86; Case C-307/18 *Generics* ECLI:EU:C:2020:52, paras. 87 - 90.
[132] C. Bergqvist (n 127).
[133] Ibid.
[134] Ibid.

cannot rely on collective agreements *per se*, tools exist in EU competition law that would permit such agreements, if they had positive effects on trade, or if the restrictive effects are ancillary to the main agreement which is to the benefit of workers.

5.4 The Freedom of Establishment and Service Provision

The setting of minimum fees, which is crucial to collective agreements between self-employed persons, is also in principle prohibited under the internal market rules on service provision. This has conflicted with collective standards that are set by organised professions.[135] Prior to Directive 2006/123, the Court had held that setting fee rates could restrict [Article 56 TFEU]. In *Cipolla & Others*, it held that an Italian rule prohibiting any derogation from minimum fees applicable to lawyers was liable to "render access to the Italian legal services market more difficult for lawyers established in (another) Member State" as it deprives them of the opportunity to compete with lawyers that are established on a stable basis in the host-state and who therefore have greater opportunities.[136] That said, such measures could be justified if pursuing an overriding reason in the public interest and proportionate, which the Court considered that the Italian rule was, as it could prevent lawyers from competing against one another through price, thereby potentially leading to a deterioration in the quality of the services provided.[137] In *Commission v Italy*, the Court held that the setting of maximum tariffs on lawyer's services could also restrict the freedom of establishment, given that foreign service providers must adapt to the host-state's rules and thus may be "deprived of the opportunity of gaining access to the market of the host Member State under conditions of normal and effective competition".[138] However, in this case it had not been demonstrated that the system "adversely affected" conditions of normal and effective competition.[139] This suggests that rules which are not proven to adversely affect market access "under conditions of normal and effective competition" will fall outside the scope of Article 56 TFEU.[140]

The setting of minimum fees is now regulated under Article 15(2)(g) of Directive 123/2006, which states that "Member States shall examine whether their legal system makes access to a service activity or exercise of it subject to compliance" with requirements such as that contained in paragraph (g), namely "fixed minimum and/or maximum tariffs with which the provider must comply". Article 15(3) states that these measures can be justified if they are non-discriminatory, pursue an overriding reason in the public interest, and are proportionate in pursuing this aim. It should be noted that as Article 15 Directive 123/2006 is contained within Chapter III on establishment, it applies to all service providers operating in the Member State in question, regardless of where they are established.[141] As such, unlike Article 56 TFEU,

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[135] N. Countouris and V. de Stefano, *New trade union strategies for new forms of employment* (2019) ETUI: Brussels, p. 46.

[136] Joined Cases C-94/04 and C-202/04 *Cipolla and others* ECLI:EU:C:2006:758, para. 58 - 59.

[137] Ibid, para. 67.

[138] Case C-565/08 *Commission v Italy* ECLI:EU:C:2011:188, paras. 50 – 51.

[139] Ibid, para. 53.

[140] V. Vandendaele, 'Commission v Germany (c-377/17): Do exceptions in tariff regulation matter?' (29th July 2019), *European Law Blog*, Available at: https://europeanlawblog.eu/2019/07/29/commission-v-germany-c-377-17-do-exceptions-in-tariff-regulation-matter/.

[141] Joined Cases C-360/15 and C-31/16 *X & Visser* ECLI:EU:C:2018:44, paras. 105-107; Case C-377/17 *Commission v Germany* ECLI:EU:C:2019:562, para. 58.

this restriction applies to situations where all the relevant elements are confined to a single Member State, i.e., "wholly internal" situations where there is no cross-border element.

Some agreements and/or practices can be excluded from the scope of the Services Directive due to the nature of the activity being performed. Under Article 2, a range of activities are excluded from its scope, including importantly under paragraph (d) services in the field of transport falling within the scope of Title V of the Treaty. The Court has considered the applicability of the Directive to private car hire services and platforms performing this service. In *Uber Spain* it held that "any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport" falls under Article 2(d) and is therefore excluded from the scope of the Directive.[142] As *Uber* was considered to be a transport company, the Services Directive did not apply. This principle has been continued by the Court in subsequent case-law.[143] This suggests that, assuming the sector in which the self-employed worker is engaged can be excluded from the scope of the Services Directive, then its provisions are not applicable to the situation at hand. As such, the setting of minimum fees by, for example, private taxi drivers, would not be covered under the Directive. However, in all other areas not falling under a specific exception under Article 2, this restriction will apply.

For situations where Article 15(2)(g) does apply, the Court has held that under this provision, Member States are allowed to introduce minimum and maximum tariffs, provided that those requirements comply with the conditions laid down in Article 15(3).[144] This means that they must be (i) not directly or indirectly discriminatory, (ii) 'necessary', which means that there must be an overriding reason relating to the public interest to justify the measure, and (iii) 'proportionate', meaning that the requirements must be suitable for securing the attainment of the objective pursued and not go beyond what is necessary to attain it, and cannot replace them with other, less restrictive measures which attain the same result.[145] This does not mean that the Member State is required to prove that "no other conceivable measure" could attain the same result, which is particularly difficult when a measure has just been introduced and there is no empirical evidence to compare it to others.[146] In *Commission v Germany*, the Court again used the reasoning that the national measure may assist in ensuring that "service providers are not encouraged … to engage in competition that results in offering services at a discount, with the risk of deterioration in the quality of services provided".[147] However, as the German rule did not pursue this aim "in a consistent and systematic manner" it could not be justified.[148]

The Court's approach to Article 15(2)(g) is similar to its pre-Directive case-law, except that this provision now applies to all service providers in the territory, regardless of where they are established. Moreover, it is suggested that Article 15(2)(g) does not allow for the exclusion of measures which do not "adversely affect market access", as was applied by the Court's

[142] Case C-434/15 *Uber Systems Spain* ECLI:EU:C:2017:981, paras. 40 – 41.
[143] Case C-320/16 *Uber France SAS* ECLI:EU:C:2018:221, paras. 21 – 23.
[144] *Commission v Germany*, para. 61; Case C-593/13 *Rina Services and Others* EU:C:2015:399, para. 33.
[145] Ibid, para. 62.
[146] Ibid, para. 64 – 65.
[147] Ibid, para. 67 – 78.
[148] Ibid, para. 89; See also Case C-169/07 *Hartlauer*, EU:C:2009:141, para. 55; Case C-168/14 *Grupo Itevelesa and Others* EU:C:2015:685, para. 76; Case C-634/15 *Sokoll-Seebacher and Naderhirn* EU:C:2016:510, para. 27.

decision in *Commission v Italy*, thereby indicating less space for justifying such measures, although the limited effect of the national measure could be a relevant factor within the proportionality assessment under Article 15(3).[149] That said, similar to the *de minimis* exception under EU competition rules, measures which do not adversely affect market access may be of limited assistance in improving the wages of precarious self-employed workers. The Court has continued to use customer protection as a valid justification insofar as it may prevent self-employed persons from competing with one another resulting in reduced quality of service overall. This principle could be applied to platform workers and other self-employed persons in precarious situations. This means that, whilst agreements on minimum rates would therefore likely fall under Article 15(2)(g) of the Services Directive, this principle could be used to justify it, assuming it meets the requirements laid down in Article 15(3).

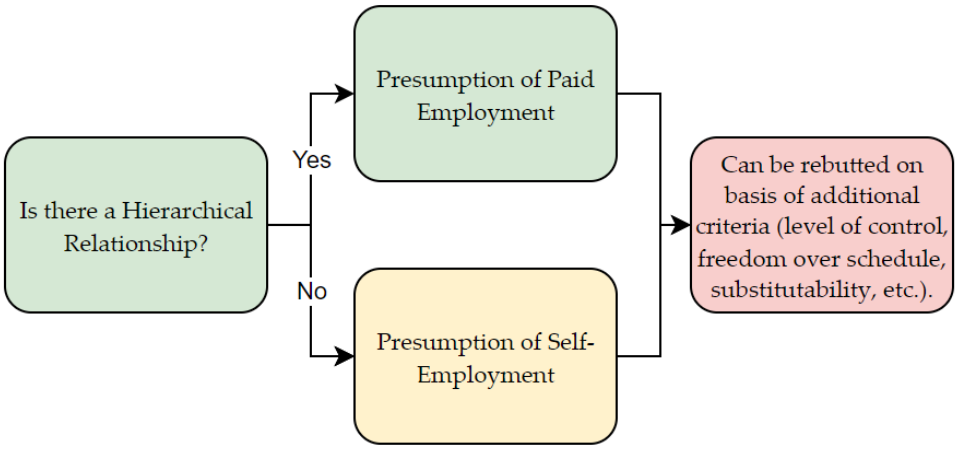
6 Suggestions: A Presumption of Paid Employment & Social Rights for Precarious Self-Employed Workers?

Falsely self-employed workers face a high level of precarity, as they are not entitled to many of the rights reserved for workers. This includes almost all worker protections under EU social law, as well as certain free movement rights like those available through Regulation 492/2011. That said, the Court has held that there is equivalence between the free movement rights under Articles 45 and 49 TFEU. This situation, whereby there is a class of workers that have no recourse to the rights available to them due to their classification as self-employed persons, is likely to lead to negative consequences for the worker, as well as creating dualisations in the labour market and placing downward pressures on social standards in a similar manner to part-time and intermittent workers.

These consequences demand that the law seeks to include those factually engaged in an employer-employee relationship, regardless of their status under national law. Whilst the Court has in principle held it is willing to do this, it could better clarify this test by adopting a presumption of paid employment. Under this system, assuming there is a 'hierarchical relationship' between the two parties, the worker is presumed to be employed by the undertaking or platform in question. A problem with this test is that it may encompass some self-employed persons (for example, those working on a sub-contracting basis) who are in a hierarchical relationship and yet are still genuinely self-employed. As such, this presumption of paid-employment based on a 'hierarchical relationship' could be rebutted based a case-by-case assessment looking at the level of freedom the individual has in terms of setting their own rates of pay, working schedule, etc.

[149] V. Vandendaele (n 140). The same reasoning has been applied in cases such as *X and Visser*, and more recently in the context of setting tariffs, Joined Cases C-473/17 and C-546/17 *Repsol Butano & DISA Gas* ECLI:EU:C:2019:308.

Figure 5: Falsely Self-employed Presumption of Employment



The European Commission recently published a Proposal for a Directive on improving working conditions in platform work, which seeks to establish a presumption of paid employment in the context of platform work.[150] Under Article 4, "the performance of work and a person performing platform work through that platform shall be legally presumed to be in an employment relationship", assuming they meet "at least two" of the criteria laid down in that provision, which includes control of the employer over the worker in terms of (a) upper limits for remuneration, (b) appearance, conduct, or performance of work, (c) supervising the work undertaken, (d) limiting freedom to accept of refuse jobs or use a subcontractor, or (e) restricting the possibility to build a client base. Whilst it remains to be seen whether this test will make the final text of the Directive, the broad terminology used in Article 4, and the fact that only two criteria need to be met, suggests that many, if not most, platform workers would be paid employees under it. That said, by using technical details relating to their employment, it may allow undertakings to change the nature of their employment relations to circumvent their obligation to classify them as workers. Furthermore, it will presumably only apply to platform workers. Whilst many of the falsely self-employed are engaged in platform work, there are many types of precarious worker that engaged in other areas; however, they will presumably not be able to rely on this presumption of paid employment. This makes this presumption different that the one suggested in this thesis, which would cover all forms of false self-employment, rather than just platform work.

This chapter also makes the case that, given the blurred lines between paid and self-employment, even genuinely self-employed persons have certain social rights, such as to conclude and enforce collective agreements, in particular the setting of minimum fees. Whilst the Court has repeatedly asserted that in the case of self-employed persons, collective agreements necessarily restrict competition (and service provision), EU law already seems to have the tools and legal space to allow these to be enforced, assuming that they meet certain conditions. In the context of EU competition law, the most appropriate and protective solution would be for the Court to examine the actual effects of the agreement, to see whether it could actually have a positive or at least a neutral effect on competition. In that case, agreements that set minimum fees that protect self-employed contractors and consumers alike by providing a high quality of service could be excluded from the scope of Article 101(1) on the basis of having

[150] Proposal for a Directive on improving working conditions in platform work COM (2021) 762 final.

positive effects. A link can be made with the Court's case-law on service provision under Article 56 TFEU, where the Court has found that the setting of minimum fees can actually be beneficial for consumers as it stops undertakings from reducing the quality of service provided through intense competition. This would also suggest that such agreements could also be justified under Article 15(3) Directive 123/2006, assuming that it complies with the other conditions of being non-discriminatory and proportionate.

7 CONCLUSION

This chapter has shown two situations where self-employed persons are in a precarious working situation. First, where the individual is falsely self-employed, i.e., where the employer hires them on a self-employed basis, despite them being in an employer-employee relationship. Second, the blurring of the lines between paid- and self-employment also means that there are situations in which an individual is 'genuinely' engaged as self-employed, and yet face many of the same risks and problems as paid-employees. An example of this can be seen from Deliveroo riders, who were classified in the UK as self-employed (whilst the UK was an EU Member State), and yet have been classified in Netherlands as workers, despite them performing the exact same role.

The Court distinguishes between genuine and false self-employment in its case-law through the subordination element of the *Lawrie-Blum* criteria. It has been willing to find that self-employed persons are workers if their classification as self-employed is merely "notional", which it has interpreted in a broad manner that would seem to encompass most falsely self-employed persons. This would also seem to be the case at the national level, given that in most dispute national courts have held that the workers are paid employees, however, there are some stark differences in approach, with national courts often being less generous than the Court of Justice, as well as differences over the idea of subordination, thereby making a uniform application of this test difficult. This chapter has proposed a presumption of paid employment based on whether there is a "hierarchical relationship" between the parties, which could be rebutted on the basis of the freedom provided to the worker in question. This is different to the presumption of paid employment included with the newly proposed Directive on Platform Work, which uses technical details and is focused solely on the situation of platform workers, rather than falsely self-employed workers in general.

For those who are genuinely classified as self-employed but who nonetheless face similar problems to self-employed persons, these persons gain sufficient protection under free movement law insofar as they have virtually the same rights and protections under Article 49 TFEU as they do under Article 45 TFEU. Under Directive 2004/38, the Court has continued to apply a principle of equivalence that ensures almost full parity between self-employed and workers. Importantly, this includes the ability to retain the status of self-employed worker, for example in situations where the individual has to cease occupational activity due to adverse economic conditions. However, self-employed persons are not entitled to rely on EU social legislation. Whilst this is in principle justified due to their different working situations, the blurring of the lines between paid and self-employment means that it is increasingly difficult to justify their exclusion from certain social rights, such as to collectively agreed rates of pay and the right to enforce such rates through collective action. This chapter concludes that such

rights could likely be enforced within the current confines of EU competition law, perhaps through application of a restriction by effect approach towards self-employed contractors, which may serve legitimate social purposes whilst having a marginal effect on competition.