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Gleiss Lutz

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COMPETITION / ANTITRUST

THE GIG ECONOMY: ANTITRUST LAW AND SELF-EMPLOYED INDIVIDUALS

In the gig economy, self-employed individuals earn their living by taking on one paid "gig" after another. This economy is becoming increasingly important in antitrust law. Both the European Commission and the antitrust authority of the Netherlands have recently addressed this issue, situated at the interface of antitrust and labour law.

Among antitrust authorities, there is a consensus that antitrust law should not interfere with the work forces' justified interests without due cause to do so. This applies all the more in the current Corona pandemic, which has hit self-employed individuals particularly hard, and makes it all the more imperative to clear up some core issues. Do self-employed individuals in the gig economy need to be treated as undertakings within the meaning of antitrust law? If self-employed individuals come to agreements among themselves with regard to payment, does this then constitute price-fixing or a justifiable bundling of their interests? Are principals in the gig economy permitted to stipulate to their contractors what prices the latter may ask from their customers? The business models of major platforms depend on the answers to these questions.

The issue: Are self-employed individuals undertakings or employees? A turning point for antitrust law

In antitrust law, there is general agreement that employees are not to be treated as undertakings within the meaning of antitrust law. As a general principle, therefore, collective bargaining agreements do not fall within the ban on cartels (cf. ECJ, Albany; Van der Woude; FNV Kunsten Informatie en Media, cf. also Article 28 European Charter of Fundamental Rights). For Germany, this requirement arises from the principle of free association set forth in Article 9(3) of the country's constitution. So employees may bundle their interests through trade unions and demand higher wages or better working conditions, for example. Such action is exempted from the prohibition on concerted practices. This is largely undisputed.

The situation is quite different with regard to self-employed individuals. Under ECJ case law, they need to be treated as undertakings within the meaning of antitrust law (cf. ECJ, Pavlov). A group of web designers might be made up of self-employed individuals who receive contracts via platforms, for example. If they act together and demand better payment from their customers, they are running a risk of breaching competition law. The same applies to drivers on mobility platforms or restaurant delivery services.

This interface between labour law and antitrust law has long been a subject of discussion (cf. for example ZAAR (Centre for Employment Relations and Labour Law): Kartellrecht und Arbeitsmarkt, 2009; cf. Prof. Frank Bayreuther's research report for Germany's Federal Ministry of Labour and Social Affairs (text in German)). But the details have not yet been fully clarified. There is a particular need, it is felt, to improve protection of self-employed individuals in the gig economy.

Also for the question of vertical restraints the question of how individuals in the work force are designated is of utmost interest. As employees, these persons belong to the undertaking, which means that antitrust law does not apply to them within the company internally. But if they are to be viewed as undertakings, then any stipulation of prices to the contractor by the principal may constitute prohibited vertical price-fixing or a hub-and-spoke scenario.

1. Categorising self-employed individuals in the platform economy: current developments

a. European Commission's proposal

Increasingly, the European Commission believes that a legally sound categorisation of "gig worker" under antitrust law is required. The underlying thinking is that antitrust law should not prevent those who obtain contracts via platforms from combining to negotiate better terms and conditions. Commissioner Vestager's aim is to improve protection of such individuals and treat them as employees under antitrust law. This would mean that antitrust legislation would not apply to them if they cooperate to fight for better pay (cf. here). But to rule out antitrust risks to these self-employed individuals as far as possible, the European Commission wanted first to determine exactly how self-employed individuals' working relationships actually function in practice when these individuals offer their services via online platforms. To this end, an investigation into these relationships was incorporated into the consultation on the EU's Digital Services Act). A particular focus of this investigation was how payment of services is regulated, what latitude exists in this respect, and whether it is possible to collectively negotiate with the platforms. Relevant industries and services include vehicles for hire, food delivery, online translations, and services in design, software development, DIY, the creative industries and housework. The European Commission is expected to initiate regulatory proposals soon after the results of the consultation have been evaluated, perhaps as early as in Q4 2020. By then, it should have become clear which self-employed individuals in the platform economy antitrust law must apply to or not. Commission President von der Leyen recently announced an initiative to improve the working conditions of platform workers, making this one of her key projects for 2021.

Protecting workers in the platform economy has long been on the European Parliament's agenda. Most recently, Directive (EU) 2019/1153 was passed on 20 June 2019. It is intended to improve protection for casual or short-term workers in the gig economy (cf. here and here). Domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive. The aim is to improve protection of their employment relationships. By contrast, persons who are indeed self-employed do not fall within the scope of this Directive.

But this does not resolve the issue of whether self-employed individuals in the gig economy need to be treated as undertakings within the meaning of antitrust law. Nor did the ECJ have to go into this matter in its judgment in the preliminary ruling procedure from Spain on Elite Taxi/Uber (C-434/15). That case only concerned the question of whether Uber's performance must be classified as a transport service within the meaning of EU law. The Advocate General deliberately did not comment either on the question of whether Uber drivers must be treated as employees or self-employed individuals. He did, however, address the drivers' dependency on Uber and the latter's control over them, also mentioning a potential hub-and-spoke scenario under antitrust law (cf. also here). In the United Kingdom, the Supreme Court must take a final decision on whether Uber drivers are to be treated as self-employed individuals. A judgment is expected before the end of the year. The previous three instances had each ruled in favour of the drivers, namely that they are workers within the meaning of employment and labour law regulations (see here). But there as well, the issue is decided from the perspective of employment and labour law rather than antitrust law. In the case of deliveroo riders, however, the English High Court refused to view them as workers (cf. here). This is in contrast to France, where the Court de Cassation recently found that Uber drivers must be treated as employees under employment and labour law standards (cf. Court de Cassation, No. 19-13.316 of 4 March, cited in Flash Reports on Labour Law, March 2020).

b. Guidelines of the antitrust authority of the Netherlands

The antitrust authority of the Netherlands, the ACM, has gone further in categorising self-employed individuals. In 2019, it issued very detailed guidelines, updated in July 2020 (cf. here). In at least two groups of cases, according to these guidelines, workers may agree on their pay with other workers without running the risk of committing an antitrust violation.

- The first group that falls outside of antitrust law consists in workers engaged in bogus self-employment ("working side-by-side with employees") If these workers cannot de facto be distinguished from employees because they undertake the same tasks as employees, then they should be treated as employees rather than undertakings under antitrust law. In particular, antitrust law should not apply where these workers wish to negotiate their pay together, irrespective of whether they do so as part of collective bargaining or not. Nor should this depend on whether these workers wish merely to secure their minimum subsistence level or in fact generate substantial earnings.
- The second group of cases relevant here concerns joint negotiations by self-employed individuals to secure their means of existence. According to the antitrust authority of the Netherlands, no fines will be imposed where self-employed individuals act together to secure their means of existence. The original expectation had been that statutory minimum wages would be fixed for self-employed individuals in the Netherlands. In this case, an "exemption" under antitrust law would not have been required. Contrary to that expectation, however, legislators in the Netherlands were unable to agree on this. For this reason, the permanent rule is now that antitrust law should not prevent self-employed inidviduals from offering their services at prices that secure their means of existence. Agreements in this regard will not be prosecuted as agreements with antitrust

› implications. This is to enable self-employed individuals to obtain sufficient means of existence through their work.

c. Interim conclusion

In the view of the European Commission and the antitrust authority of the Netherlands, antitrust law can impose restrictions on self-employed individuals in today's platform economy which the public authorities do not consider to be desirable. Antitrust law should not apply where workers are referred to as self-employed but must be categorised as dependent workers given the circumstances of the individual case.

2. Vertical price-fixing?

The question of whether self-employed individuals must be categorised as employees or undertakings within the meaning of antitrust law has consequences for antitrust law that go still further. One issue, as we have seen, is whether self-employed individuals are permitted to come to agreements among themselves regarding working conditions and pay without violating antitrust law. But their classification as employees or undertakings in the antitrust law sense is also crucial for potential vertical price-fixing. The only way that principals may readily stipulate what prices self-employed individuals should demand from their customers is if the self-employed individuals are deemed employees. If they are in fact genuinely self-employed and therefore undertakings within the meaning of antitrust law, then any stipulation of prices may constitute a violation of the ban on vertical price-fixing. Using a joint algorithm can also be judged to be a prohibited hub-and-spoke scenario in which the platform is made responsible for the contractors demanding uniform prices from customers.

This issue has become relevant in cases in the U.S. where suit has been filed against Uber in civil courts for an antitrust violation (cf. here). In particular, a hub-and-spoke antitrust violation was asserted. In February 2020, however, an arbitral tribunal ruled on this matter but did not publish the grounds of its decision. An appeal to ordinary courts of law on the grounds of prejudice on the arbitrator's part failed (cf. here). Luxembourg's antitrust authority was faced with a similar scenario in the case of Webtaxi, a taxi ride platform. Setting prices through an algorithm, the authority ruled, constituted a horizontal agreement under Article 101 TFEU. But because this promoted efficiency, it was exempted on a one-off basis (cf. here).

Overall, therefore, there has been no decision in Europe as to whether scenarios in which a platform sets prices for those offering services via that platform constitute vertical price-fixing or a hub-and-spoke scenario. Nor does the ECJ's decision in the matter of Eturas (cf. here) cover such scenarios directly. All the same, the ECJ does make it clear that an antitrust violation through the platform is a possibility. In the light of this, and from a purely antitrust perspective (but not an employment and labour law or social insurance law perspective), it may be advantageous to platforms if those offering their services via the platform are deemed employees within the meaning of antitrust law. Platform operators would then no longer face follow-up issues under antitrust law in this relationship.

Conclusion

Antitrust authorities are well advised not to take unnecessary action against the interests of self-employed individuals. This applies especially in the crisis, in which the employment market has shifted in favour of employers. We therefore welcome the fact that antitrust authorities wish to give both self-employed individuals and principals certainty. Legally sound classification under antitrust law is also important for follow-up issues under antitrust law. How these self-employed individuals are categorised under employment, labour and social insurance law continues to be independent of this.

Authors: Petra Linsmeier, Rut Steinhauser

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EXPERTS

Dr. Wolfgang Bosch

Dr. Ingo Brinker

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Dr. Alexander Fritzsche

Dr. Johannes Hertfelder

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Dr. Matthias Karl

Dr. Christian von Köckritz

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